Manliness and the Constitution

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INTRODUCTION

Men as a group are saddled with at least three broad, and 
not necessarily baseless, caricatures: the hypermasculine brute, 
the dutiful gentleman, and the independent thinker who is his

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This Article is for Peter H. Kang, Esq., tireless Public Defender and, in the best sense, a gentleman of the Constitution.
“own man.” These portraits do more than populate our culture; they inform the Supreme Court’s constitutional jurisprudence.

First, let us consider the image of men as hypermasculine brutes who are consumed by a propensity for atavism, violence, and domination.¹ A characteristic of hypermasculine men is the desire to avenge violently perceived wrongs done to them, including wrongs in the form of public slights.² This description may call to mind the rabid Miami Dolphins fan who feels compelled to punch the loudmouth at the other end of the sports bar who has dishonored the reputation of Dan Marino. We may also think of the enraged husband who beats his wife for publicly humiliating him. Mindful of insult’s role in hypermasculinity, the Supreme Court has sought to preempt conditions where it can provoke violence. A stark example is

¹. See Mary Ellen Gale, Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct, 34 LOY. L.A. L. REV. 691, 746 (2001) (explaining that “the hypermasculine gendering of police work has led to corruption, excessive force, and extreme violence”); Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 785 (2000) (describing hypermasculinity as “the exaggerated exhibition of physical strength and personal aggression”); James E. Robertson, A Punk’s Song about Prison Reform, 24 PACE L. REV. 527, 534 (2004) (defining hypermasculinity as “the magnification of masculinity as expressed through radical individualism, violence, and the will to dominate”). My use of the term “hypermasculinity” means essentially the same thing as “machismo” as used by Donald Mosher and Silvan Tomkins. Mosher and Tomkins defined the “ideology of machismo” as “a system of ideas forming a worldview that chauvinistically exalts male dominance by assuming masculinity, virility, and physicality to be the ideal essence of real men who are adversarial warriors competing for scarce resources (including women as chattel) in a dangerous world.” Donald L. Mosher & Silvan S. Tomkins, Scripting the Macho Man: Hypermasculine Socialization and Enculturation, 25 J. SEX RES. 60, 64 (1988) (emphasis removed).

². According to Mosher and Sirkin, a “macho” man “must defend his masculine identity from any assault on his masculine status or sexual potency. Interpersonally . . . with men, he must display a cool and aloof self-confidence as he is ever ready to respond to veiled insults during verbal dueling with verbal or physical aggressive action.” Donald L. Mosher & Mark Sirkin, Measuring a Macho Personality Constellation, 18 J. RES. PERSONALITY 150, 150 (1984); see also Cynthia Lee, The Gay Panic Defense, 42 U.C. DAVIS L. REV. 471, 479 (2008) (discussing how some men who self-identify as heterosexual violently attack gay men who make unwanted sexual advances toward them); James E. Robertson, Closing the Circle: When Prior Imprisonment Ought to Mitigate Capital Murder, 11 KAN. J.L. & PUB. POL’Y 415, 421 (2002) (“Many male inmates respond by exaggerated displays of manhood, in which even minor slights by others become direct challenges to their masculine status.”); Frank Rudy Cooper, “Who’s the Man?”: Masculinities and Police Stops (Suffolk University Law School, Research Paper No. 08-23, 2008), available at http://ssrn.com/abstract=1257183 (arguing that police frisks may be prompted by a desire by police officers to assert their hypermasculine identities); infra Part I.
the fighting words doctrine, created by the Court in *Chaplinsky v. New Hampshire.*, The Court allowed a prohibition on fighting words when construed as those that “men of common intelligence would understand would be words likely to cause an average addressee to fight.”*4* Fighting words can be “threatening, profane or obscene revilings,” especially when uttered “face-to-face.”*5* Fighting words, the Court declared, should not receive constitutional protection because “by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace.”*6* The Court elaborated:

It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*7*

Notice that the fighting words doctrine targets men and draws from a gendered worldview. “[M]en of common intelligence” and “ordinary men”*8* are the touchstone and, although women theoretically can also retaliate with violence against men or women, the *Chaplinsky* Court never refers to the female perspective. For the Court, only men threaten the public peace with their anger and, thus, only men must not be needlessly aggravated.

Against this image of hypermasculinity stands the ideal of the gentleman: civil, dutiful, gracious, and protective of the weak.*9* Here is the man who unfailingly absorbs the casual parade of daily slights with stoic politeness and, in his old-fashioned and perhaps vaguely chauvinistic way, always opens doors for women. The gentleman also differs from the hyper-

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4. Id. at 573.
5. Id.; see also Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940) (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”).
7. Id.
8. Id. at 573 (emphasis added).
masculine brute by being mindful of his civic responsibilities. In 1996, the Virginia Military Institute (VMI) case afforded the Supreme Court an opportunity to ponder the meaning of being a gentleman. The Court rejected VMI’s policy of denying admission to women applicants, because the policy violated the Equal Protection Clause and, more specifically, VMI’s policy stood as an obstacle to the Court’s advancement of gender neutrality. For Justice Scalia, who dissented, the Court’s vindication of gender neutrality defeated a public sanctuary where young men could develop virtues as gentlemen. Justice Scalia found “powerfully impressive” the school’s requirement that its students abide by a list of rules for good behavior known as the “Code of Honor.” The Code insisted, among other things, that a gentleman:

- Does not go to a lady’s house if he is affected by alcohol. He is temperate in the use of alcohol.
- Does not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public.
- Never discusses the merits or demerits of a lady.
- Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.
- Does not “lick the boots of those above” nor “kick the face of those below him on the social ladder.”

These responsibilities are surely arduous for many men, especially of college age, but VMI formally expected its recruits to embrace opportunities to fulfill the Code’s tenets. To be a gentleman at VMI was to attain a lustrous nobility, a premise that finds expression in the Code’s preface:

10. See id. There is perhaps no better exemplar of these traits in fiction than the lawyer Atticus Finch. See HARPER LEE, TO KILL A MOCKINGBIRD (1960). See also SHAFFER WITH SHAFFER, supra note 9, at 43, 45–46 (discussing Atticus Finch as a quintessential gentleman).
12. See id. at 534, 557.
13. Id. at 602–03 (Scalia, J., dissenting).
14. Id.
Without a strict observance of the fundamental Code of Honor, no man, no matter how “polished,” can be considered a gentleman. The honor of a gentleman demands the inviolability of his word, and the incorruptibility of his principles. He is the descendant of the knight, the crusader; he is the defender of the defenseless and the champion of justice . . . or he is not a Gentleman.15

Somewhat complementary to the image of the gentleman is the ideal of men as independent and, especially in the political realm, as independent thinkers.16 No judge articulated the latter view with more poignancy than Justice Brandeis in his famous concurrence in Whitney v. California.17 Conventionally lauded for its bracing support of free speech, Justice Brandeis’s opinion is partly a discourse about male identity. He argued that men must possess a stout courage to exercise their constitutional rights. The Framers, Justice Brandeis asserted, “believed liberty to be the secret of happiness and courage to be the secret of liberty.”18 Unfortunately, Justice Brandeis provided little direct explanation for the statement’s meaning. He simply announced that courage must counteract the pathology of fear because “fear breeds repression . . . repression breeds hate . . . hate menaces stable government” and “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”19 Courage is not exclusive to men, but its etymology in Greek, Latin, and Hebrew derives from the word for “man,” as if to be courageous is necessarily to be manly and vice versa.20 This correlation was not lost on Justice Brandeis. Although the Whitney case concerned Charlotte Anita Whitney, a woman, and probably a courageous

15. Id. at 602.
20. See infra notes 356–57 and accompanying text.
one. Justice Brandeis’s only reference to women as a gender in Whitney hardly rendered them courageous: “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.” Justice Brandeis depicted women as passive objects of men’s superstition or enlightenment; for him, men were the sole political actors, and that is why he urged men, and not women, to be courageous.

The American constitutional enterprise, according to Justice Brandeis, invested its hopes in men, but, on the other hand, the fighting words doctrine and the Supreme Court’s decision in the VMI case imply that men can present threats to it. The tension may cause us to wonder how to make sense of male identity in the American constitutional order. This Article examines the tension by delving into the historical origins of male identity and its relation to the American Constitution.

This examination begins in the sixteenth and seventeenth centuries of early modern England, for the American colonists would eventually have to grapple with ideas that arose from this period. Two of the most prominent conceptions of male identity in early modern England made constitutional democracy, as the Americans understood it, philosophically unrealistic. Thomas Hobbes represents one conception, and Robert Filmer the other.

Part I presents a picture of early modern England where the spectacle of men engaged in public brawls over issues of honor was common. Reacting to this public violence, the seventeenth-century philosopher Hobbes bemoaned that men’s hypermasculinity made them ineligible for the disciplined and mature enterprise of self-government. Only an absolute monarch, Hobbes insisted, could control men for purposes of collective peace.

Part II shows that Filmer, another prominent seventeenth-century English philosopher, also believed that men were generally incompetent for self-government. Unlike Hobbes, Filmer argued that men were psychologically infantile and thus lacked the manly independence for self-government. Only the king, wrote Filmer, had the requisite manliness of a powerful father, and men required the father’s love and guidance while owing him

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complete obedience. By the late seventeenth century, however, philosophers like John Locke began to challenge absolute monarchy in a manner that would influence how the American colonists thought about male identity and its relationship with political authority. Part III outlines this shift.

Although the American colonists were not the first to challenge absolute monarchy, they were the first to create a government that completely did away with a king. This radically democratic move, in turn, required the colonists to imagine conceptions of male identity that would help to underwrite their change in governance. The colonists first had to parry Hobbes’s and Filmer’s arguments for the king’s authority. Instead of bestowing upon the king the mantle of indispensable referee or loving patriarch, the Americans, as illustrated in Part IV, ridiculed him as a hypermasculine brute. By delegitimizing the king, the colonists cleared a philosophical path for a new government where all authority formally resided with the people themselves. That move in turn prompted the colonists to develop an account of public virtue that expected men to behave in a manner that would demonstrate their competence for self-government. Against Hobbes, the colonists pressed American men to embrace civility, including civility toward social inferiors, rather than allowing American men to be driven by a violent hypermasculinity. Against Filmer, the colonists urged American men to evince their manly independence by deliberating political truths instead of deferring to social betters. For these reasons, the political imperatives of the Constitution helped to create a model of an independent-minded American gentleman. The ideal of manliness as conceived by the Founders, however, presently occupies an ambivalent place in our constitutional culture. Part V reflects on this condition.

This Article seeks to offer a unique contribution to the existing legal scholarship on male identity. Much of that scholarship is written by feminist professors who are principally concerned with the study of female identity, and male identity only figures in the analysis to the extent it can illuminate the former.\[^{23}\]

\[^{23}\text{See Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1038 (1996) ("[I]n several important respects, apart from the crucial role of culprit, men have been largely omitted from feminism.")\]
Such a focus is understandable given that feminist scholarship seeks to empower women by exposing gender bias. This Article focuses squarely on male identity as deserving its own analysis. Furthermore, the articles that do focus on male identity tend to dwell on issues pertaining to statutory interpretation or the Equal Protection Clause, such as employment discrimination, single-sex education, and prisons. This Article explores male identity as it relates to general notions of political authority, the arrangement of institutional power, and civic ethos—in short, some of the fundamental aspects of constitutional enterprise.

I. THOMAS HOBBES: HOW HYPERMasculinity NECESSITATES ABSOLUTE MONARCHY

The most quoted line from Thomas Hobbes’s lengthy book Leviathan declares that the “life of man,” when “there is no common power to keep them all in awe,” is “poor, nasty, brutish, and short.” With this weirdly bleak introduction, Hobbes prepared the reader for perhaps the most famous argument against a limited government such as that created by the U.S.

24. Professor Weisberg explained: “Feminist legal theorists, despite differences in schools of thought, are united in their basic belief that society is patriarchal—shaped by and dominated by men. Feminist jurisprudence, then, provides an analysis and critique of women’s position in patriarchal society and examines the nature and extent of women’s subordination.” D. Kelly Weisberg, Introduction to Feminist Legal Theory: Foundations, supra note 16, at xv, xvi.

25. See, e.g., McGinley, Harassing, supra note 23; McGinley, Masculinities, supra note 23.


27. See, e.g., Levit, Male Prisoners, supra note 23; Robertson, supra note 1.

Constitution. Hobbes asserted in seventeenth-century England that men were consumed by a violent hypermasculinity that was problematic to even basic efforts at societal peace.  

Note that Hobbes was indicting men as a sex, not “men” in the universalist sense that subsumes women. Men, on his account, obsessively devoted themselves to the protection of their honor, and even the mildest social slights would set them off.  

Worse, Hobbes believed that for men violence was not simply a means to an end, but that men actually relished opportunities to inflict it and did not flinch from those moments when they had to endure it. Belligerent and touchy, men lacked the dispassion necessary for the pacific and disciplined business of constitutional democracy. For Hobbes, the only type of government suitable for men was an absolute monarchy that was strong enough to clamp down on their hypermasculine passions.

What led Hobbes to make such grim assessments about men as hypermasculine? He was thinking about man’s life in early modern England, an astonishingly violent society even by our contemporary American standards. It is telling, for example, that Lawrence Stone, a revered historian of the period, announced that early modern England was at least “five times more violence-prone” than England in the late twentieth century. Much of the violence was propelled by a desire to preempt or avenge assaults on one’s honor, and a glimmer of disrespect could provoke a fight. As Cambridge historian Mervyn James commented, “[s]illy quarrels escalated into battles in the streets.” Further, “[c]onflicts were rapidly translated into the language of...

29. See infra notes 80–89 and accompanying text.

30. Hobbes made fleeting references to women, but these references highlight his ascribed gender differences. He declared that “men are naturally fitter than women for actions of labour and danger,” and that “there is allowance to be made for natural timorousness, not only to women (of whom no such dangerous duty is expected), but also to men of feminine courage.” Hobbes, supra note 28, at 126, 142.

31. See infra notes 82–89 and accompanying text.

32. See infra notes 80–89 and accompanying text.

33. See infra notes 90–92 and accompanying text.


35. See Mervyn James, Society, Politics and Culture: Studies in Early Modern England 308 (1986); Lawrence Stone, The Crisis of the Aristocracy: 1588–1641, at 223 (1965) (arguing that in the fifteenth and sixteenth century, men “fought over prestige and propery, in that order”).

36. James, supra note 35, at 308.
the sword,” and this was especially so when they concerned politics or religion, topics that aroused pride, and hence involved issues of honor. Often, the only method of expression for dissidence appeared to be violent threats, as if the social demands of tolerating another’s competing opinion weighed unbearably on one’s honor. In this atmosphere, the gentry fought to get the best pew in the church, nobility dueled over who would get the most honored seats in court, squires clashed over election as knights and for membership on commissions, and nobility fought for the prestige of the monarch’s attention. According to Professor Stone, “[i]n a society that was even more obsessed with status than with money, intangibles of this sort aroused passions which often could only be appeased in blood.”

To exacerbate matters, the local government had little success in maintaining peace. Witness the following catalogue of lawlessness, made all the more appalling by having been perpetrated, usually in the open, by the most prominent members

37. Id.
39. See id. at 223.
41. See STONE, supra note 35, at 223.
42. See id. Historian A.J. Fletcher also remarked that there were “numerous opportunities for battles over precedence.” Fletcher, supra note 40, at 97. He offered this catalogue:

In Elizabethan Norfolk factional politics became so fraught that several gentlemen intrigued at court to have their name placed above a local rival at the next renewal of the commission of the peace. . . . Deeply entrenched quarrels could splutter into violence when the tensions of appearance in the public arena focused men’s minds on questions of pre-eminence. At the Norwich sessions in 1582, Sir Arthur Heveningham, faced with charges of misconduct by Edward Flowerdew, ‘burst out into a great and vehement kind of railing speech’ against him. A brawl with their fists between Sir Thomas Reresby and William Wentworth at the Rotherham quarter sessions in the 1590s turned into a scuffle with swords involving the two men’s followers. Arguments over seating arrangements on the bench were not uncommon. When the Tory Lord Cheyne and the Whig Lord Wharton appeared together on the Buckinghamshire bench in 1699, Cheyne objected to his rival sitting on the chairman’s right hand and after the business they retired to duel.

Id. at 97–98.
43. STONE, supra note 35, at 223.
44. See id. at 230 (“Attempts by the local administration to deal with feuds between nobles and squires usually ended in failure.”).
of the community. Thomas Hutchinson, also known as Lord Radcliffe, had assaulted Sir Germaine Poole, and “getting him downe he bit a goode part of his nose and carried yt away in his pocket.”45 The 14th Lord Grey of Wilton snuck up to Sir John Fortescue and repeatedly struck him with a crab-tree truncheon “as he lay senseless on the ground, until the latter’s servants came to the rescue.”46 The nobility also employed the services of retainers who were often no better than thugs.47 For example, “Henry, Earl of Lincoln always attacked with fifteen or sixteen bullies.”48 A group from the Talbot and Cavendish clans ambushed and attacked with swords Sir John Stanhope and four men.49 The feud between two noble families, the Markhams and the Holles, reached a climax as both engaged their respective retainers in battle. Gervase Markham was wounded and, on the excuse that he was unfairly attacked while on the ground, planned to shoot John Holles while Holles was not looking.50 The 2nd Lord Rich sent twenty-five retainers to attack Edward Windham in broad daylight on Fleet Street, and accompanied the attack with cries of “Drawe villains, drawe,” “Cutt off his legges,” and “Kyll him.”51 A group of men pummeled a servant of the Earl of Leicester, “presumably under orders of some noble enemy of the Earl.”52 Thomas, Lord Burgh, tried to murder a man in his bed.53 Ralph, Lord

45. Id. at 225.
46. Id. at 226. Less spontaneously, scheduled duels were also a common practice. Historian Philip Jenkins has remarked on their prevalence even in the late seventeenth century:

The defence of honour or self-interest often implied a resort to violence, and if the offending party was of too high birth to be merely beaten or mobbed, then a duel could result. Gentlemen wore swords, were portrayed with them in paintings, and were expected to use them in affairs of honour. . . . Duels were frequent when the code of honour was so sensitive, and the situation was exacerbated by the political bitterness of the later seventeenth century, when partisan rivalries caused many fights involving some of the greatest families of Wales.

47. See STONE, supra note 35, at 227.
48. Id. at 225.
49. See id. at 225–26.
50. See id. at 226.
51. Id.
52. Id.
53. See id.
Eure, first hired assassins to kill the Recorder of Berwick and, when unsuccessful, hired an expert to try to poison him.54 Professor Stone concluded that “[s]tories of this kind, which could be indefinitely repeated, prove beyond possibility of doubt that up to the end of the sixteenth century men saw nothing dishonourable in attacking by surprise with superior forces, and nothing in hitting a man when he was down.”55

Even in a court of law, hypermasculine men foreboded violence. There was the common habit of nobles bringing armed retainers to quarter sessions and assizes, the equivalent of court proceedings, to threaten judges and opposing parties.56 The seventeenth-century writer John Aubrey recounted that “[i]n those days . . . noblemen (and also great knights as the Longs) when they went to the assizes or [quarter] sessions at Salisbury, etc. had a great number of retainers following them; and there were (you have heard) feudes (i.e. quarrells and animosities) between great neighbours.”57 The feuding noble families of the Russells and the Berkeleys arrived collectively with five hundred armed men to the Worcester quarter sessions; fortunately, peace was brokered at the court.58 A bloodier outcome involved Lord Morley’s and Lord Strange’s entourages, who were brought to the Lancaster assizes.59 Wonderfully telling is an incident involving Sir Edward Dymock. When the judge accused him of bringing armed men to the court, Dymock sneered that his men were not “otherwise armed but with such ordinary weapons as men usually carry.”60 The Earl of Sussex tried to obey the rules to leave his retainers behind, but his rival, the Earl of Leicester, did not reciprocate.61 The former complained to the Queen.62 He also worried a few years later that another enemy, Lord North, would bring armed men to court, in which case, he warned, “I will come in suche sort as I wyll not fere pertakers ageynst me.”63

54. See id.
55. Id.
56. See id. at 231.
57. Id.
58. See id.
59. See id.
60. Id.
61. See id. at 232.
62. Id. at 232–33.
63. Id. at 233.
Hypermansculine violence was hardly the exclusive domain of nobles. In 1594, John Durant, a tanner, and Henry Elwood, a waterman, became involved in a quarrel at Cambridge. Elwood, in his additional capacity as a constable, had tried to arrest Durant’s friend, provoking Durant to call Elwood a “flapte mouthe boye.” Elwood retorted that he was “as good a man as” Durant and “yf thy knyfe were awaye thoue shouldest see what I would do by & bye.” A fight ensued and witnesses reported that all of Durant’s “face was beblodied.” Also consider an episode from 1604 between a group of Cambridge “gentlemen students.” Charles Garth and George Ward protested that Samuel Woodley, while deputy proctor at the university, had no right to confiscate their rapiers and daggers. Feeling slighted, Garth and Ward told the townspeople that Woodley “was but some cowardly fellow & not the mann that he was reported or taken to be,” and also called Woodley’s brother a coward. A fight ensued, and Garth greeted Samuel with a dagger, warning, “Gods wounds keepe backe or I will let out yor gutts.” In another instance, a group of “gentlemen scholars” were indignant that a stable boy had carelessly blocked their path with his horse. The scholars, in an act that would bid defiance to the modern stereotype of the shy and gentle academic, “box[ed]” the boy’s ears and beat the horse. The boy resented his ill-treatment and threw a bone at the gentlemen scholars as he scurried away. One of the scholars repaid the boy’s insolence by stabbing the horse. In another example, a Cambridge innkeeper complained that some scholars, feeling that the innkeeper had insulted their honor, had “mis-

64. See Alexandra Shepard, Meanings of Manhood in Early Modern England 127 (2003).
65. Id.
66. Id.
67. Id.
68. Id. at 141.
69. See id.
70. Id. at 142.
71. Id.
72. Id.
73. Id.
74. See id.
used & injured [the innkeeper] by pulling him by the beard & kicking & offering to strike upp [his] heles."

Hypermasculine violence was not limited to nobles or scholars. William Maphew and John Trott, two Cambridge cordwainers, came to blows after the former showed off his boots to his friend at an alehouse. Trott found the act impudent and threw one of the boots to the ground, thereby causing Maphew to say that the boot was “as good worke as you make,” and then a fight ensued. After the cordwainer John Dod called him a liar, the gentleman Henry Beston reminded the former that “he Beston did come of a better stock & kynn, then [Dod] or any of his kynn did,” and, for punctuation, slapped him on the face. These were hardly isolated incidents as “[n]early one-third of the assault cases heard by the Cambridge university courts cited insults as provocation, and defendants frequently justified violent responses as understandable if not appropriate reactions.” Men in early modern England, then, did not shun unlawful public violence as dishonorable; they saw it as the enactment of an exalted code of hypermasculinity.

Such was life in early modern England, and it certainly provided ample justification for Hobbes’s curious comment that the life of man is poor, nasty, brutish, and short. Hobbes had worried that the men of early modern England were beset by a hypermasculinity that made constitutional democracy, let alone societal peace, impossible. He set out his arguments by positing a hypothetical “natural condition of mankind” prior to government, whose unsettling details were intended to exaggerate the public violence in early modern England. In this natural condition, one of the chief causes of quarrel among men is “glory.” Quarrels over glory occur “for trifles, as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons, or by reflection in their kindred,

75. Id. at 146.
76. See id. at 143.
77. Id.
78. Id.
79. Id.
80. HOBBS, supra note 28, at 74.
81. See id. at 76–77.
82. Id. at 76.
their friends, their nation, their profession, or their name.”

Hobbes did not believe that intolerance for difference necessarily leads to strife. What leads to it is the apparent contemnor’s intolerant “sign of undervalue”—his show of disrespect—that stirs the contemned’s intolerant resentment and sometimes rage. Pride, Hobbes declared, provokes “a man to anger, the excess whereof is the madness called RAGE and FURY.” To Hobbes, pride seemed the most hypersensitive passion of all, for it cannot tolerate others’ contradictory opinions or social slights. Unable to tolerate others’ slights, it succumbs to “excessive desire of revenge.” Pride can become “excessive love” which, when confronted with one recognized as more honorable, can become jealous rage. Men also fight each other, according to Hobbes, “for reputation.” That is, they “use violence to make themselves masters of other men’s persons, wives, children, and cattle.” The natural condition of man thus provides additional argument, if more was necessary during the seventeenth century, that the hypermasculinity of men preempts possibilities for collective peace.

Hobbes accordingly asserted that to establish societal peace, men must obey a king wielding absolute power over his subjects. He warned that “justice, equity, modesty, mercy, and (in sum) doing to others as we would be done to[,] of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like.” Hobbes proposed that men au-

83. Id.
84. Id. at 75–76.
85. Id. at 41.
86. Id.
87. Id. Hobbes stated that “[honourable is whatsoever possession, action, or quality is an argument and sign of power.” Id. at 53.
88. Id. at 76.
89. Id.
90. Id. at 106 (emphasis removed). Professor Harvey Mansfield wrote:

Hobbes pointedly omits courage, the virtue of manliness in premodern thought, from a list of the virtues. What is manliness, essentially, for Hobbes? It is not a virtue but a passion, a passion for preeminence that he calls vain-glory, or vanity. It is appetite but not for any particular thing, thus a generalized appetite that compels men to aggression.

HARVEY C. MANSFIELD, MANLINESS 166 (2006) (footnote omitted). The view summarized here conflates hypermasculinity with manliness. By contrast, the American colonists took pains to differentiate them. See infra Part IV.
thorize a single man as a sovereign monarch to act on their behalf for their collective peace and safety.91 Under this procedure, men cannot withdraw their consent should they become dissatisfied with the sovereign.92 That Hobbes would require all men to give up their rights to govern themselves forever reflects Hobbes’s dour cynicism regarding the capacity of hypermasculine men to reform their antisocial tendencies.

Hobbes’s support for absolute monarchy was traditional, but his reliance on authorization was not. In a world of rigid social hierarchy, he was unusual for his time in positing an account of authorization whereby men individually elected to establish a political society, and thus were treated as free and equal. More traditional justifications for monarchical authority appealed to tropes of social deference in the contexts of affect and religion.93 But like Hobbes’s argument from authorization, these arguments, as Part II will show, also relied indispensably on conceptions of male identity.

II. ROBERT FILMER: THE AUTHORITY OF THE FATHER AND THE MANLY MONARCH

Hobbes argued that the king’s authority was consciously crafted by men who had collectively consented to authorize a single man as the sovereign to represent them all. But Hobbes’s authorization theory was not the only—or, in its time, even the prevalent—means to justify the king’s absolute power. The fa-

91. Hobbes wrote:
   The only way to erect such a common power as may be able to defend them from the invasion of foreigners and the injuries of one another . . . is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will, which is as much as to say, to appoint one man or assembly of men to bear their person, and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety, and therein to submit their wills, every one to his will, and their judgments, to his judgment.
HOBBES, supra note 28, at 109.
92. Id. (“This is more than consent, or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man I authorise and give up my right of governing myself to this man . . . on this condition, that thou give up thy right to him, and authorize all his actions in like manner.”).
93. See infra Part II.
vored alternative was patriarchalism, and its heralded text was Sir Robert Filmer’s *Patriarcha.* The king, Filmer urged, was and should be treated as a powerful and divine father entitled to absolute obedience from his subjects. The subjects, in turn, were politically helpless children who required the guidance of a patriarchal king.

Patriarchalism’s conception of male identity differed from that in Hobbes’s authorization theory. Hobbes’s arguments always derived from a no-nonsense desire to establish societal peace. An omnipotent king might be irresponsible, but Hobbes insisted that even an irresponsible king was better than the “dissolute condition of masterless men, without subjection to laws and a coercive power to tie their hands from rapine and revenge.” Filmer’s thesis is not so spare in its expectations. Men, on Filmer’s account, need and crave the love of a powerful patriarch, and, like reverential sons, they desire to submit themselves to his commands without question. According to this logic, the kind of constitutional democracy the colonists advocated would prove unwise for at least two reasons: One, men would lack the mature competence to reason for themselves as autonomous citizens, and two, they would lack a king who would furnish fatherly guidance and upon whom they would want to bestow loving obedience.

Filmer’s normative perspective was not eccentric for its time. Patriarchalism came to institutional realization in England under King James I in the late sixteenth century. Contra Hobbes’s impersonal diction of authorization, King James gave us the idiom of familial affect:

95. Id. at 12 (“If we compare the natural duties of a father with those of a king, we find them to be all one, without any difference at all but only in the latitude or extent of them. As the father over one family, so the king, as father over many families, extends his care to preserve, feed, clothe, instruct and defend the whole commonwealth. His wars, his peace, his courts of justice and all his acts of sovereignty tend only to preserve and distribute to every subordinate and inferior father, and to their children, their rights and privileges, so that all the duties of a king are summed up in an universal fatherly care of his people.”).
96. See id.
97. HOBES, supra note 28, at 117.
A good King, thinking his highest honour to consist in the due discharge of his calling, emploieth all his studie and paines, to procure and maintaine, by the making and execution of good Lawes, the well-fare and peace of his people; and as their naturall father and kindly Master, thinketh his greatest contentment standeth in their prosperitie, and his greatest suretie in hauing their hearts, subjecting his owne priuate affections and appetites to the weale and standing of his Subjects.99

King James echoed these views elsewhere: “[A]s the Father by his fatherly duty is bound to care for the nourishing, education, and vertuous government of his children; even so is the king bound to care for all his subjects.”100

Yet if the king was morally expected to care for his subjects, the subjects owed him unconditional obedience:

[1]If the children may upon any pretext that can be imagined, lawfully rise up against their Father, cut him off, & choose any other whom they please in his roome; and if the body for the weale of it, may for any infirmite that can be in the head, strike it off, then I cannot deny that the people may rebell, controll, and displace, or cut off their king at their owne pleasure, and upon respects moving them.101

Overthrowing a king, a justifiable act from our present perspective, is made unthinkable by equating it with the taboo of patricide. Filmer also wrote that “[t]he father of a family governs by no other law than by his own will, not by the laws or wills of his sons or servants,” and that “[t]here is no nation that allows children any action or remedy for being unjustly governed.”102 According to patriarchalism, if any legal limits were to be set on the king, they were to be, like the social limits on the father, entirely self-imposed.103 “Patriarchalism, at its base, treated status as natural and supported authority and duty without reciprocity.”104 Patriarchalism thus denies masculin-

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100. SCHOCHEMT, supra note 98, at 87.
101. Id.
102. Filmer, supra note 94, at 35.
103. See id. (“For as kingly power is by the law of God, so it hath no inferior law to limit it.”).
104. SCHOCHEMT, supra note 98, at 83. This was all the more so because, on Filmer’s account, the king’s authority as the father of his people derived from God. Although Hobbes had identified ordinary men as the source by which the sover-
ity’s constituent properties in power, strength, and independence to everyone save the king; as figurative children, male subjects are infantilized and their manhood preempted.

The endorsements of absolute monarchy will seem odd to democratic minds, but just as Hobbes’s condemnation of hypermasculinity resonated with those who bore the violent disruptions of an honor culture, Filmer’s political position found adherents under King James in Stuart England. In contemporary America the critique of patriarchy has converged on its disempowerment of women; patriarchy in the seventeenth century was also the chief justification for subordinating socially inferior men.

eign could derive his authority, Filmer located the same in God. See FILMER, supra note 94, at 7–8. Kings in seventeenth-century England, Filmer argued, could trace their lineage to Adam, to whom God had first bestowed the right of complete authority. See id. at 7. “It may seem absurd,” he conceded, “to maintain that kings now are the fathers of their people, since experience shows the contrary.” Id. at 10. But Filmer continued to insist on the analogy:

It is true, all kings be not the natural parents of their subjects, yet they all either are, or are to be reputed as the next heirs to those progenitors who were at first the natural parents of the whole people, and in their right succeed to the exercise of supreme jurisdiction. And such heirs are not only lords of their own children, but also of their brethren, and all others that were subject to their fathers.

Id. at 10. In any case, on Filmer’s terms people could not choose their leaders because divine sanction underwrites the authority of male leaders. See id. at 10–11. This was manly authority that was divinely sanctioned. Accordingly, there was no room for constitutional limits under patriarchal government.


106. Professor Schochet explained:

Before a man achieved social status—if he ever did—he would have spent a great many years in various positions of patriarchal subordination, passing successively from the rule of his father to that of a master, an employer, a landlord, and perhaps a magistrate. If he were high enough in the social scale to receive a formal education, he was also subject to the control of his teacher. The authority of ministers, which touched everyone in the population, was a further part of this same larger pattern. There is nothing particularly striking about these various forms of subordination in themselves. What is significant is that the relationships they comprised—master and servant, teacher and student, employer and worker, landlord and tenant, clergyman and congregant, and magistrate and subject—were all understood as identical to the relationship of father and children.

SCHOCHET, supra note 98, at 66.
A number of factors contributed to the widespread acceptance of this social arrangement. For example, it was one that ordered a man’s life from his birth.\textsuperscript{107} Most important, though, patriarchy was propped up by religious leaders. The article of faith, as it were, derived from the Old Testament—specifically, the Fifth Commandment injunction to obey one’s parents. The Anglican Church formulated a theory of patriarchy based on the Fifth Commandment’s injunction to “Honour thy father and thy mother.”\textsuperscript{108} As political theorist Gordon Schochet wrote, “There should be no question that Englishmen of all backgrounds were taught very early in their lives that they had to obey the king because God ordered it when He gave the Fifth Commandment to Moses.”\textsuperscript{109} It is safe to assume that nearly everyone had learned the Church’s catechism and was required to recite during services the religious duty “to honour and obey the King and all that are put in authority under him: to submit myself to all my governors, teachers, spiritual pastors and masters: to order myself lowly and reverently to all my betters.”\textsuperscript{110} Consider also the \textit{Shorter Catechism} of the Westminster Assembly:

Q[uestion] 64. What is required in the fifth Commandment?

A[nswer]. The fifth Commandment requireth the preserving the honour, and performing the duties, belonging to every one in their several places and relations, as Superiors, Infe-

Q. 65. What is forbidden in the fifth Commandment?

A. The fifth Commandment forbiddeth the neglecting of, or doing anything against, the honour and duty which belon-

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\textsuperscript{107} Id. at 73 (“[The] individual was confronted with a patriarchally ruled family and society from birth; until a man became the head of his own household, he was successively in the status of a filial inferior to his father, his master, and his employer. . . . These familial experiences must have played a central role in the political socialization process in Stuart England . . .”).

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 81.

\textsuperscript{110} Id. at 78 (quoting \textit{CATECHISM OF THE CHURCH OF ENGLAND} (1549), \textit{reprinted in PHILIP SCHAFF, 3 A HISTORY OF THE CREEDS OF CHRISTENDOM} 519–20 (London 1878)).

\textsuperscript{111} Id. at 79 (alteration in original) (emphasis removed) (quoting \textit{WESTMINSTER ASSEMBLY OF DIVINES, THE SHORTER CATECHISM} (1644), \textit{reprinted in CATECHISMS OF THE SECOND REFORMATION} 22–23 (London 1886)).
Similarly, John Poynet’s Catechismus Brevis, a book prescribed by the king to be used in all schools, interpreted the Fifth Commandment as ordering students to “love, feare, and reverence” their natural parents and stated that the Commandment “byndeth us also most humbly, and with most natural affection to obei the magistrate: to reverence the Minyesters of the church,oure Scholemasters, with aloure elders, and betters.”\textsuperscript{112} An anonymous catechism from 1614 referred to the father and mother of the Fifth Commandment as “[o]ur naturall Parentes, the fathers of our Countrie, or of our houses, the aged, and our fathers in Christ.”\textsuperscript{113} Robert Ram observed in 1655 that obedience was due to “[1] Our naturall Parentes, Fathers and Mothers in the flesh. 2. Our Civil Parents, Magistrates, Governours, and all in Authority. [and] 3. Our spiritual Parents, Pastors, Ministers, and Teachers.”\textsuperscript{114} In interpreting the Fifth Commandment, clergyman Richard Allestree clarified that there were three Parents to whom obedience was due: the civil, the spiritual, and the natural.\textsuperscript{115} Allestree continued: “[t]he Civil Parent is he whom God hath established the Supreme Magistrate, who by a just right possesses the Throne of a nation,” and he is a “common father of all those that are under his authority.”\textsuperscript{116}

Likewise, clergyman Humphrey Brailsford expounded the rights of inferiors in a manner more revealing about the depth of dependency on superiors. His interpretation of the Fifth Commandment’s exhortation to honor one’s parents demonstrates his view:

These words, Father and Mother, include all superiors, as well as a Civil Parent (the King and His Magistrates, a Master, a Mistress, or an Husband) and an Ecclesiastical Parent (the Bishop and Ministers) as the natural Parent that begat and bore thee: to all these I owe Reverence and Obediance, Service and Maintenance, Love and Honour.

\textsuperscript{112} Id. at 79–80 (quoting John Poynet, A Short Catechism, or Playne Instruction fol. vi. (London 1553) (a translation of Catechismus Brevis)).
\textsuperscript{113} Id. at 80 (quoting Short Questions and Answers, Contayning the Summe of Christian Religion signs B2–B3 (London 1614)).
\textsuperscript{114} Id. (alteration in original) (quoting Robert Ram, The Countrymens Catechisme: Or, A Helpe for Householders 39 (London 1655)).
\textsuperscript{115} See id.
\textsuperscript{116} Id. (quoting Richard Allestree, The Whole Duty of Man Laid Down in a Plain and Familiar Way, at xxvii (London 1842) (1658)).
... And I must have from my Natural Father, Maintenance, Education, Instruction, Correcting and Blessing: From my King, Justice, Reforming Abuses in Religions, Encouragement to the Good, Punishment to the Bad . . . From my Master (or Mistress) Instruction, Food, Correction, Wages: From my Minister, a Good Example and wholesome Administration of Spiritual Things.\textsuperscript{117}

Obedience to the king was simply the highest rung in a pervasive hierarchy that was seen as natural and divinely ordered. On this view, men required a strict social and political hierarchy so that they could find persons to whom they could owe obedience, and from whom they could receive love and direction.

In light of Filmer’s statements, one may wonder how to make sense of Hobbes’s depiction of the life of man as poor, nasty, brutish, and short. This Article’s discussion of Filmer suggests that a structure of patriarchal relationships effectively regulated men and preserved the semblance of peace, but Hobbes had conjured a scene of unruly masculinity and societal disorder. Given that Filmer and Hobbes were describing roughly the same period of early modern England, what should one make of these seemingly incongruous narratives? One reading is that the fights over manly honor coexisted uneasily with patriarchy’s story of social cohesion.\textsuperscript{118} Another reading is that the fights, instead of undermining the hierarchical order presupposed by patriarchy, were evidence of its appeal, as men jockeyed violently for a higher social position. Violence in early modern England was “a vital tool in men’s maintenance of hierarchy and reputation, routinely used to articulate subtle status distinctions between men.”\textsuperscript{119} Still another explanation is that what Hobbes solemnly delivered as sociological truth was deliberately exaggerated to strengthen the appeal of his political propositions.\textsuperscript{120}

\textsuperscript{117} Id. at 80–81 (alteration in original) (quoting HUMPRHEY BRAILSFORD, THE POOR MAN’S HELP 40 (London 1692)).

\textsuperscript{118} See SHEPARD, supra note 64, at 151 (“Patriarchal expectations of orderly comportment in men were therefore directly contravened by codes of conduct which seem to have governed men’s interaction in the streets and fields of early modern England.”).

\textsuperscript{119} Id. at 140.

\textsuperscript{120} Consider how Hobbes misrepresented Aristotle’s thoughts about the inherently social nature of human beings. See DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 77 (1989).
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What is clear is that the accounts of men as infantile and dependent, in Filmer’s terms, or as hypermasculine and violent, in Hobbes’s, were critical in bolstering the case for absolute monarchy. Yet critics of absolute monarchy existed as well. Even before Thomas Paine compared the king to an “ass,”121 English advocates for limited government made themselves heard. Writing nearly one hundred years before Paine, none was more prominent than John Locke.

III.  LOCKE’S ATTACK ON PATRIARCHALISM AND
ABSOLUTE MONARCHY

A contemporary of Sir Robert Filmer, John Locke used his Two Treatises of Government to skewer Filmer’s ideas, which Locke referred to as “glib Nonsense put together in well sounding English.”122 Filmer had argued that the king properly exercised absolute right over his subjects as a father did over his children.123 The normative force of Filmer’s argument hung on a particular—if by our lights peculiar—reading of the account of Adam in the Old Testament. It was a reading that Locke would not suffer.

First, Filmer argued there was never a time when men enjoyed natural freedom, because Adam was the first patriarchal king, in a long line of kings, to be granted a right by God to rule over others.124 Locke incredulously retorted, “Whatever God gave by the words of this Grant [in the Book of Genesis], it was not to Adam in particular, exclusive of all other Men: whatever Dominion he had thereby, it was not a Private Dominion, but a Dominion in common with the rest of Mankind.”125 The Bible, Locke explained, declared that God had given all men, not just Adam, a right of dominion.126 Mischievously, Locke also pointed out that God had given the power of domain to them only after He had created Eve, thus suggest-

121.  THOMAS PAINE, COMMON SENSE, reprinted in THOMAS PAINE, COLLECTED WRITINGS 5, 16 (Eric Foner ed., 1995) (1776) [hereinafter PAINE COLLECTION].
123.  See FILMER, supra note 94, at 10–12.
124.  See id. at 7.
125.  JOHN LOCKE, The First Treatise on Government, in LOCKE, supra note 122, at 141, 161 (emphasis removed).
126.  See id.
ing in a mood of proto-feminism that God had given Eve an equal right to rule.\textsuperscript{127} Besides, he jeered, why would God want to reward with kingship a fool as insolent as Adam, who disobeyed His orders and fell to sin?\textsuperscript{128} “This was not a time, when \textit{Adam} could expect any Favours, any grant of Priviledges, from his offended Maker.”\textsuperscript{129}

Next, Locke tackled Filmer’s argument that Adam embodied and introduced the inviolable principle that fathers may rule their children, and that, by extension, kings may rule their subjects. “For as Adam was lord of his children,” Filmer had declared, “so his children under him had a command and power over their own children, but still with subordination to the first parent, who is lord paramount over his children’s children to all generations, as being the grandfather of his people.”\textsuperscript{130} Putting aside the curious absence of any recognition by Filmer that Adam is conventionally accepted as the father of all peoples after him, what is Locke’s response? Locke suggested that Filmer believed fathers have “Power over the Lives of their Children, because they give them Life and Being.”\textsuperscript{131} This argument presupposes that “exposing or selling their Children” is a “Proof of their Power over them.”\textsuperscript{132} But Locke snapped back that the “Dens of Lions and Nurseries of Wolves know no such Cruelty as this.”\textsuperscript{133} “[D]oes [God] permit us,” Locke asked, “to destroy those he has given us the Charge and Care of, and by the dictates of Nature and Reason, as well as his Reveald Command, requires us to preserve?”\textsuperscript{134}

After criticizing Filmer, Locke offered his own account of the origins of society. Whereas Filmer began with God’s appointment of Adam as the first king on earth, Locke began his narrative with a state of nature preceding government where all men possessed the same rights and obligations.\textsuperscript{135} A state of nature

\textsuperscript{127.} \textit{See id.}
\textsuperscript{128.} \textit{See id.} at 172.
\textsuperscript{129.} \textit{Id.}
\textsuperscript{130.} FILMER, \textit{supra} note 94, at 6–7.
\textsuperscript{131.} LOCKE, \textit{supra} note 125, at 178 (emphasis removed).
\textsuperscript{132.} \textit{Id.} at 180.
\textsuperscript{133.} \textit{Id.} at 181.
\textsuperscript{134.} \textit{Id.}
\textsuperscript{135.} JOHN LOCKE, \textit{The Second Treatise of Government}, in LOCKE, \textit{supra} note 122, at 265, 269.
is a “State of perfect Freedom” in which men may “order their Actions, and dispose of their Possessions, and Persons as they think fit . . . without asking leave, or depending upon the Will of any other Man.”\(^{136}\) The only moral limit is the “Law of Nature.”\(^{137}\) Locke explained that “Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”\(^{138}\) The description offered here may be more mysterious than we would wish, but its political uses were palpable. Locke’s pronouncement that men possess reason and that, theoretically, anyone could use reason to comprehend the law of nature refuted the guardians of absolute monarchy like Hobbes, who argued that men were too hypermasculine for self-government, and Filmer, who believed that men were too infantile. Furthermore, Locke’s conception of the state of nature, by acknowledging the equal freedom of all to do “as they think fit,” rejected the notion that any one man, including Adam, had unlimited power over another by virtue of divine right or good birth. Locke tried to fortify his account of the law of nature by dubbing it a “measure God has set to the actions of Men,”\(^{139}\) a characterization that also functioned as an indirect jab against Filmer’s relentless invocation of divine authority.

Alas, problems arise in Locke’s state of nature. Some men willfully violate the law of nature\(^{140}\) while others disagree violently over its ambiguous meaning as applied to their cases.\(^{141}\) Locke lamented that “nothing but Confusion and Disorder will follow” in the state of nature.\(^{142}\) “Self-love will make Men partial to themselves and their Friends”\(^{143}\) while “Ill Nature, Passion and Revenge will carry them too far in punishing others.”\(^{144}\) This

\(^{136}\) Id. (emphasis removed).
\(^{137}\) Id.
\(^{138}\) Id. at 271.
\(^{139}\) Id. at 272.
\(^{140}\) See id. at 275–76, 280, 351.
\(^{141}\) See id. at 351.
\(^{142}\) Id. at 275.
\(^{143}\) Id.
\(^{144}\) Id.
situation imperils person and property. What began as a placid state of nature degenerates into a state of war where men seek to subdue each other. To leave this state of war, Locke argued, men must consent with each other to enter civil society, for it is only in civil society that men can establish indifferent judges with powers of enforcement. According to Locke, civil society is formed when men come together and agree to abstain from exercising their individual natural rights to enforce the law of nature. After such an agreement, men may create a government that will seek to protect their safety and property.

But this government is not without legal limits. Locke announced that “whenever the Legislators endeavour to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience.” Locke qualified, “happen not upon every little mismanagement in publick affairs.” For him, “[g]reat mistakes in the ruling part, many wrong and inconvenient Laws, and all the slips of humane frailty will be born by the People, without mutiny or murmur.” Revolution is justified, however, if people have some “manifest evidence” regarding the “evil intention of their Governors.” In these statements, Locke distinguished himself from Hobbes. Hobbes had argued that in the absence of a state, there is violent anarchy. Locke, by contrast, believed that civil society can survive the dismantling of a tyrannical state. By thus dis-

145. See id. at 350–51. Locke folded a person’s right to his bodily safety into the right of property. He wrote that “every Man has a Property in his own Person. This no Body has any Right to but himself.” Id. at 287.
146. See id. at 278–79.
147. See id. at 276, 352.
149. See id. at 331–32.
150. Id. at 412 (emphasis removed). Professor Mansfield remarked that Locke “encourages a manly vigilance in politics . . . that has endured to our time.” MANSFIELD, supra note 90, at 176.
151. LOCKE, supra note 135, at 415 (emphasis removed).
152. Id. at 415 (emphasis removed).
153. Id. at 418.
154. See MANSFIELD, supra note 90, at 177 (“For the sake of freedom [Locke] allowed more to manliness than did Hobbes: free and manly go together like soul and body, mutually supportive and fit for each other.”)
155. See HOBBES, supra note 30, at 76.
tistinguishing civil society from the state, Locke added another conceptual prop against unlimited monarchy.

Notwithstanding these positions, Locke never advocated the abolishment of the monarchy; he only wanted restrictions on its rule. The general sentiments behind Locke’s arguments, however, began to intensify in America and to manifest themselves through more democratic arrangements in government that relied on conceptions of male identity different from those of Filmer and Hobbes.

IV. THE AUTHORITY OF THE PEOPLE

As Locke demonstrated, the Americans were not the first to criticize the king’s absolute authority. What set them apart was that their political vision entirely rejected the need for any king. Partly for this reason, the historian Gordon S. Wood has called the American Revolution “as radical and social as any revolution in history.”

With their rejection of patriarchy, the colonists prepared for the formal empowerment of the common people. The greatest expression of this democratic ethos was the Declaration of Independence. Here are the oft-quoted words:

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,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Though familiar, the words are startling when juxtaposed against the arguments of Hobbes and Filmer. Hobbes had ar-

156. LOCKE, supra note 135, at 402–03. Note here that Locke’s justification for writing his most famous work, The Second Treatise of Government, is “to establish the Throne of our Great Restorer, Our present King William; to make good his Title, in the Consent of the People.” LOCKE, supra note 122, at 137.
158. The Declaration of Independence para. 2 (U.S. 1776).
gued that men, being violently hypermasculine, could secure collective peace only by consenting with each other to obey almost any command by the sovereign. According to the Declaration, men consent not with each other but with their political leaders such that whenever government becomes “destructive” of the ends of “Life, Liberty, and the pursuit of Happiness,” men may “alter or … abolish” it. And whereas Hobbes would permit resistance only when the sovereign threatened death, the Declaration states that such resistance is warranted when the government threatens a man’s right to liberty or even happiness. The Declaration also challenges Filmer’s account of political authority. Although Filmer had invoked God as a source of the king’s absolute authority, the Declaration invokes God as the source for the people’s right to depose such authority. So too, Filmer had posited that the privileged few were selected by God to rule over others; the Declaration proclaims that “all men are created equal” insofar as all possess rights to revolution. The closest English analogue to the Declaration of Independence is Parliament’s Declaration of Rights in 1689. Yet the latter did not refer to those things that defined the American Declaration of Independence: the universal equality of men and the people’s right of revolution.

The Federal Constitution also locates its authority in the People. Its Preamble reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

There is no mention of kings. The Constitution is created by the “People of the United States” and for “ourselves and our Posterity.” Likewise, the Ninth Amendment states that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the peo-

160. See id. at 6–14.
162. See id.
ple.\footnote{163} The Tenth Amendment similarly identifies certain rights owned by the people that theoretically can be used against the government: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\footnote{164}

Animating these institutional commitments is the philosophy of republicanism.\footnote{165} Although ambiguous, the term does find reference in the Constitution: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion.”\footnote{166} James Madison insisted that the new American government must be “strictly republican” and that “no other form would be reconcilable with the genius of the people of America.”\footnote{167} “What then are the distinctive characters of the republican form?” asked Madison.\footnote{168} He answered:

[We] may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is essential to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their

\footnotesize{163. U.S. CONST. amend. IX.}
\footnotesize{164. U.S. CONST. amend. X. Note also that “Article V’s mechanisms for constitutional amending may be understood as endorsing participation by ‘the people’ and their immediate representatives in constitutional revision.” WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 5 (1996). Chief Justice John Marshall echoed this view: “The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 199 (1819).}
\footnotesize{166. U.S. CONST. art. IV, § 4.}
\footnotesize{167. THE FEDERALIST NO. 39, at 194 (James Madison) (George W. Carey & James McClellan eds., 2001).}
\footnotesize{168. Id.}
powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic.\textsuperscript{169}

Madison explained that America alone had a truly republican government. Even England, with its constitution and its separation of powers, was not republican in his view because its government was partly controlled by “a hereditary aristocracy and monarchy.”\textsuperscript{170} No wonder the generally low-key Madison declared that the colonists “accomplished a revolution which has no parallel in the annals of human society.”\textsuperscript{171}

Yet, because the republicanism articulated by the Constitution lacked precedent, anxiety about its success abounded. Alexander Hamilton at once acknowledged the authority of the people and the dangers of giving them untrammled discretion. For him, the project of republican government could be interpreted as a test to determine “the important question” of “whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.”\textsuperscript{172} It is entirely possible for Americans to make “a wrong election,”\textsuperscript{173} as history shows that even small republics floundered. “It is impossible,” Hamilton wrote, “to read the history of the petty republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept perpetually vibrating between the extremes of tyranny and anarchy.”\textsuperscript{174}

Even if the references to “tyranny” and “anarchy” do not exactly map onto what Hobbes had called, respectively, absolute

\textsuperscript{169} \textit{Id. See also id.} No. 49, at 261 (James Madison) (“\textit{The people are the only legitimate fountain of power.}”). On the other hand, the Federalist Papers were not in favor of direct democracy. See id. No. 10, at 46 (James Madison) (“\textit{A} pure democracy, by which I mean, a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction.”).

\textsuperscript{170} Id. No. 39, at 194 (James Madison).

\textsuperscript{171} Id. No. 14, at 67 (James Madison).

\textsuperscript{172} Id. No. 1, at 1 (Alexander Hamilton). John Jay offered a related invitation: “When the people of America reflect, that the question now submitted to their determination, is one of the most important that has engaged, or can well engage, their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it, must be evident.” Id. No. 2, at 5 (John Jay).

\textsuperscript{173} Id. No. 1, at 1 (Alexander Hamilton).

\textsuperscript{174} Id. No. 9, at 37 (Alexander Hamilton).
monarchy and the state of nature, Hamilton, like Hobbes, appeared to recognize that man’s inherent flaws can sabotage self-government. “Happy will it be,” Hamilton mused, “if our choice should be directed by a judicious estimate of our true interests, uninfluenced by considerations foreign to the public good.”

“But,” he lamented, “this is more ardently to be wished for, than seriously to be expected.” For the plan of the Federal Constitution “affects too many particular interests [and] innovates upon too many local institutions, not to involve in its discussion a variety of objects extraneous to its merits, and of views, passions and prejudices little favourable to the discovery of truth.”

Madison also voiced these worries, especially with regard to factions. He defined a faction as “a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” To extinguish the causes of factions would be impossible, for the “latent causes of faction” are “sown in the nature of man.” First, there is man’s reason, which remains “fallible” and which will engender “different opinions” that will organize themselves into conflicting group interests. Second, “[a]s long as the connection subsists between his reason and his 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.” Indeed, Madison lamented that “[i]n all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason.” So inevitable is passion’s force that “[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”

These observations suggest that, because of defects in man’s nature, republics were not guaranteed to remain stable. Paradoxically, the Framers had no choice but to put much of their faith in

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175. Id. No. 1, at 1 (Alexander Hamilton).
176. Id.
177. Id.
178. Id. No. 10, at 43 (James Madison).
179. Id.
180. Id.
181. Id.
182. Id. No. 55, at 288 (James Madison).
183. Id.
the people, for the Constitution derived solely from their authority. Hobbes’s sovereign also derived his whole authority from the people, but once authorized his sovereign could never be lawfully deposed or shackled with legal restrictions. The Constitution, on the other hand, empowered the people to change, limit, and even dissolve their government.

Given the significance of these powers, the Framers implored men to embark on the difficult but necessary task of vigilantly exercising the correct sort of public virtue. Baron de Montesquieu partly anticipated the colonists’ new understanding of virtue forty years before the American Revolution. Montesquieu had surmised that, although a monarchy can subsist without public virtue by its subjects, a republic would perish. “There need not be much integrity for a monarchical or despotic government to maintain or sustain itself,” he declared. Rather, the “force of the laws in the one and the prince’s ever-raised arm in the other can rule or contain the whole.” On the other hand, Montesquieu explained, “in a popular state [there] must be an additional spring which is called virtue.” This hypothesis from France was also aired in America. John Adams wrote that “[u]nder a well regulated Commonwealth, the People must be wise [and] virtuous and cannot be otherwise.” By contrast, “[u]nder a Monarchy [men] may be as vicious and foolish as they please, nay, they cannot but be vicious and foolish,” a sure reference to the mindless scuffles among the nobility over matters of honor. Pastor Samuel McClintock recited

184. See supra notes 91–92 and accompanying text.
187. Id.
188. Id.
190. Id.; see also Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 70 (1985) (“The vital—that is life-giving—principle of republics was public virtut.”); Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 68 (1969) (“Every state in which the people participated needed a degree of virtue; but a republic which rested solely on the people absolutely required it.”).
similar views in a sermon delivered before the New Hampshire legislature on the commencement of the state’s new constitution.

In a word, the history of all nations and ages, shews that public virtue makes a people great and happy, vice contemptible and miserable. . . . In absolute governments, the principle of honor may in some measure supply the place of virtue, and there may be the shew of public happiness and grandeur, while the people are really in a state of slavery; but as virtue is the basis of republics, their existence depends upon it, and the moment that the people in general lose their virtue, and become venal and corrupt, they cease to be free. This shews of what importance it is to preserve public virtue under such a constitution as our’s, and how much it becomes all who have any regard to the good of their country . . . .

Here, McClintock explicitly segregated “honor” from “virtue” by charging virtue to do work for the “good of their country,” while rebuffing honor as obsessed with “venality.”

What do these calls for public virtue have to do with male identity and the Constitution? Public virtue made demands on men to fashion their identities in a way that would evince their competence for self-government. This meant that American men also had to refute the competing descriptions of male identity ascribed to them by those, like Filmer and Hobbes, who would have denounced the Constitution as unviable or dangerous. Americans sought to show that their men were neither hypermasculine nor infantilized, both traits that made men ineligible for constitutional democracy in the eyes of Hobbes and Filmer. The Americans thus produced an ideal of a gentleman who not only was abidingly civil in the face of insults and injuries, but also always insisted on thinking for himself with calm deliberation. Civility and deliberation, then, became two of the foremost public virtues for American men.

A. Civility

Beyond its affiliation with a dainty etiquette, civility can be an indispensable social adhesive for a community. As hinted by its etymological presence in “civilization” and “civil society,” civility is at base an ethic of cooperation, or as Stephen

Carter wrote, “the sum of the many sacrifices we are called to make for the sake of living together.”\textsuperscript{192} And living together implies the existence of a community, a connection made lucid in the now forgotten but once tangled semantic origins of “civility” and “citizenship.”\textsuperscript{193} Using “civility” to refer to the latter, Coverdale in 1568 wrote in \textit{Christ’s Cross} that “[y]our joy is in heaven, where your conservation and civility is.”\textsuperscript{194} Referring again to citizenship, Wycliffe’s \textit{Acts} from 1382 reads, “I with moche summe gat this ciuylite.”\textsuperscript{195} Similarly, civility once served as a stand-in for “[p]olity, civil organization and government.”\textsuperscript{196} To wit: In 1537, Starkey announced in \textit{To Pole} that “[i]n the joyning of these two lives together . . . stondeth the chief point of true christian civility.”\textsuperscript{197} More generally, civility was “[c]onformity to the principles of social order” and “behaviour befitting a citizen.”\textsuperscript{198} So Spenser declared in 1596 that “[t]hey should have beene reduced to perpetuall civilitie,” and Milton wrote in 1641 that it was important “[t]o inbreed and cherish in a great people the seeds of vertu, and publick civility.”\textsuperscript{199}

Of course, the contemporary understanding of civility does not conflate it with citizenship. Even by the 1600s, people used civility to mean an “act or expression of politeness”\textsuperscript{200} and “[d]ecency” and “seemliness.”\textsuperscript{201} As the Chicago sociologist Edward Shils explained, civility as we presently understand it “is a broader phenomenon than citizenship in the state.”\textsuperscript{202} He posited that citizenship is a phenomenon of the state, in that it is “the complex of actions of submission to, criticism and active guidance of the government.”\textsuperscript{203} Be that as it may, Shils made a

\begin{itemize}
  \item \textsuperscript{193} See \textsc{3 Oxford English Dictionary} 256 (2d ed. 1989).
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{Id.}
  \item \textsuperscript{196} \textit{Id.} at 257.
  \item \textsuperscript{197} \textit{Id.}
  \item \textsuperscript{198} \textit{Id.}
  \item \textsuperscript{199} \textit{Id.}
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} \textit{Id.}
  \item \textsuperscript{202} \textsc{Edward Shils}, \textit{The Virtue of Civility: Selected Essays on Liberalism, Tradition, and Civil Society} 73 (Steven Grosby ed., 1997).
  \item \textsuperscript{203} \textit{Id.} The political theorist Judith Shklar elaborated:
\end{itemize}
suggestive comment about civility’s relation to political membership:

Civility is nevertheless a function of a sense of membership in a national society coterminous with the boundaries of the state. The society which is the object of civility is a national society; the state within which it operates is a national state. Nationality and civility seemed at one time to grow apace; they were not identical but they were intimately intertwined because civility was focused on the national society.204

These remarks at first seem somewhat implausible. Are we not civil to those who are non-Americans, and, when traveling abroad, have we not been treated with civility, even by people who hate our government? Still, although not the same as citizenship or nationalism, civility can serve as a means toward a nation’s collective identity and social cohesion. Recall Locke’s account of civil society as separate from the state. For Locke, the absence of the latter need not, as Hobbes threatened, return people to the state of nature; civil society could endure. Shils, like Locke, declared that “[t]he idea of civil society is the idea of society which has a life of its own, and which is separate from the state, and largely in autonomy from it, which lies beyond the boundaries of the family and the clan, and beyond the locality.”205 One index of a properly functioning civil society is, for Shils, a widespread practice of civility.206 For civility, in political terms, “is an attitude of concern for the good of the entire society... It is solicitous of the wellbeing of the whole of the

Good citizenship should not be confused with what is usually meant by goodness... Good citizens fulfill the demands of their polity, and they are no better and no worse as citizens than the laws that they frame and obey. They support the public good as it is defined by their constitution and its fundamental ethos. The good person and the good citizen could only be identical in a perfect state, and even then only if we accept the notion that civic virtue, manly rectitude as the term implies, is the best human character. With that exception the possibility of tension between personal morality and citizenship is always possible and even likely, and there are, of course, regimes so terrible that good people are bound to be bad citizens there, but America has never been quite that bad.


204. SHILS, supra note 202, at 17 (differentiating nationality from civility and noting that “[w]hen nationality becomes nationalistic, it usually has become uncivil as well; the demand for complete national solidarity has often involved uncivil suppression”).

205. Id. at 320–21.

206. See id. at 320–21, 335.
larger interest.”207 But unlike nationalism, which places national pride above individual well-being, civility is “respect for the dignity and the desire for dignity of other persons.”208 “Civility is,” Shils stated, “conduct which accords, however superficially and however conventionally, esteem to others, either for particular properties or in general.”209 A civility worth its name “treats others as, at least, equal in dignity, never as inferior in dignity.”210 And consider Professor Carter’s injunction that “[r]ules of civility are . . . also rules of morality: it is morally proper to treat our fellow citizens with respect, and morally improper not to.”211 So, too, Shils declared, “civility as a feature of civil society considers others as fellow-citizens of equal dignity in their rights and obligations as members of civil society.”212 Even when civility is insincere,213 these remarks suggest that, at its heart, civility as a political practice involves a commitment, albeit sometimes only an outward one, to treat those in one’s community with equal respect. Here it might be useful to compare the civility on offer to the honor sought by men in Hobbes’s England. Civility, by its very meaning as equal respect or dignity, is something that all can possess. Indeed, the logic of civility requires that one bestow it on others instead of hoarding it for oneself. Honor is precisely the opposite of civility insofar as it does not acquire its value unless it is denied others.

Consonant with this rendering of honor, Hobbes announced that “the acknowledgement of power is called HONOR” and that “HONOURABLE are those signs for which one man acknowledgeth power or excess above his concurrent in another.”214 So runs the litany of things that Hobbes deemed honorable: “Beauty of person, consisting in a lively aspect of the counte-

207. Id. at 335.
208. Id. at 338.
209. Id.
210. Id.
211. CARTER, supra note 192, at 11.
212. SHILS, supra note 202, at 338. One cannot be completely civil for “[s]elfishness and parochiality are inexpungible from human life.” Id. at 350. Plus, we may not want consummate civility; civility can stifle diversity, dissent, and innovation, the sorts of things that a liberal democracy desires and nourishes. See id. at 97.
213. See Kang, supra note 192.
nance”,215 “general reputation amongst those of the other sex”;216 “to teach or persuade . . . because they be signs of knowledge”;217 “riches”;218 “nobility . . . as signs of power in the ancestors”;219 “authority” as “a sign of strength, wisdom, favour or riches by which it is attained.”220 All of these qualities are honorable because they are possessed by a few. This is why nobles dueled over church seats, cordwainers fought over whose boot was better, and squires pummeled each other for the attention of the king. The regard for honor obviously does not have to take such violent forms, but in early modern England, it did. Civility, on the other hand, seeks to make itself available to everyone in the relevant community; it is by nature a democratic resource of which all are presumptively deserving.

We should not be surprised, then, that the American colonists adopted civility as a cornerstone of their republican virtue.221 After all, under republican government, the people sought to govern themselves without a king. Civility, with its emphasis on equal respect, would seem patently serviceable. An exploration of the particulars follows.

1. Criticism of the King

Let us begin with the colonists’ criticism of monarchy, for this also furnishes us with a commentary about how men in a republican democracy should embrace civility and abjure hypermasculinity. Thomas Paine delivered the most incisive criticisms against monarchic rule. Paine denied that kings began from “an honorable origin,”222 for theirs is founded on an arrogant and dangerous masculinity:

It is more than probable, that could we take off the dark covering of antiquity, and trace them to their first rise, that we

215. Id. at 48–49.
216. Id. at 49.
217. Id.
218. Id.
219. Id.
220. Id.
221. Note here Shils’s rough equation of civility with Montesquieu’s account of republican virtue. See SHILS, supra note 202, at 335. John Rawls’s account of civility is roughly complementary to those of Shils and Montesquieu. See JOHN RAWLS, POLITICAL LIBERALISM 236 (1993).
222. PAINE, supra note 121, at 16.
should find the first of them nothing better than the principal ruffian of some restless gang, whose savage manners of pre-eminence in subtlety obtained him the title of chief among plunderers; and who by increasing in power, and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions.223

A jarring rhetorical shift was astir. Filmer had represented the king as the mature and manly father, and Hobbes had stigmatized ordinary men as hypermasculine and requiring control. By the late eighteenth century, Paine reversed these roles. The king is a “ruffian of some restless gang, whose savage manners . . . obtained him the title of chief among plunderers.”224 No longer the benevolent patriarch, he “overawed the quiet and defenseless to purchase their safety by frequent contributions.”225 Paine did not argue that the sovereign threatens civility just because he wields violence. Hobbes’s sovereign, for example, held a monopoly on violence but meant to subdue hypermasculine men for purposes of civil society. By contrast, the violence on display by Paine’s monarch symbolically connects him to the atavistic brute in Hobbes’s state of nature; unlike Hobbes’s sovereign, Paine’s king signals the absence of civil society.

The difference lies in the latter king’s attack on civility. Paine’s king uses violence to assault the dignity of others, and he treats them as means to his singularly personal ends. Whereas Carter and Shils suggested that civility presupposes a community of equals, the king’s violence initiates a gunman’s tyranny that places him outside the limits of law. By laying siege to the norms of civility, Paine’s king feels no compunction in trampling on the principle of the consent of the governed. Hence Paine worried:

When William the Conqueror subdued England, he gave them law at the point of the sword; and until we consent, that the seat of government, in America, be legally and authoritatively occupied, we shall be in danger of having it

223. Id. Note also Filmer’s concession that many kings “at first do most unjustly obtain the exercise of [the natural right of a supreme father].” FILMER, supra note 94, at 11. But Filmer, unlike Paine, was quick to add that such acts are “by the secret will of God.” Id.
225. Id.
filled by some fortunate ruffian, who may treat us in the same manner, and then, where will be our freedom?\textsuperscript{226}

The assault on civility can thus also present a threat to a republican government where the people formally retained the freedom of collective self-direction.

Partly for these reasons, the Constitution sought preemptive measures to limit political leaders from indulging the sort of politically destructive hypermasculinity exhibited by the king. Although a monarch claims the throne by inheritance, Article II, Section 1 of the Constitution requires election of the President to a four-year term.\textsuperscript{227} Hamilton stressed in the Federalist Papers that the term limit demonstrates a “total dissimilitude between him and a king of Great Britain, who is an hereditary monarch, possessing the crown as a patrimony descendible to his heirs for ever.”\textsuperscript{228} Article II, Section 4 created another limit by stating that the President could be removed upon impeachment and conviction for treason, bribery, or “other high Crimes and Misdemeanors.”\textsuperscript{229} The king’s position is “sacred and inviolable: there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected, without involving the crisis of a national revolution.”\textsuperscript{230} And whereas the king “has an absolute negative upon the acts of the two houses of parliament,”\textsuperscript{231} two thirds of the House and Senate can override the President’s veto on a bill.\textsuperscript{232}

The Constitution provides other limits, too. The President may assume the role of commander-in-chief of the state mili-

\textsuperscript{226} Id. at 43.
\textsuperscript{227} U.S. CONST. art. II, § 1. Later, the Constitution limited the President to two terms. U.S. CONST. amend. XXII. Hamilton wrote:

In a monarchy, [a standard of good behavior for continuance in office] is an excellent barrier to the despotism of the prince: in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

\textsuperscript{228} The Federalist No. 69 (Alexander Hamilton), supra note 167, at 302.


\textsuperscript{230} Id. at 356.

\textsuperscript{231} Id.

\textsuperscript{232} U.S. CONST. art. I, § 7, cl. 2.
tias, but only when the militia is “called into the actual Service of the United States.” Hamilton reminded his readers that the British king has “at all times the entire command of all the militia,” extending to “the declaring of war, and to the raising and regulating of fleets and armies,” whereas the Constitution gives such powers to Congress. In foreign affairs, the “king of Great Britain is the sole and absolute representative of the nation.” But the President must earn two-thirds approval from the Senate to make treaties. Lastly, in a sharp rejoinder to Filmer’s promiscuous mixture of church and state that had endowed the king with heaven’s mandate, Hamilton announced that the President has “no particle of spiritual jurisdiction.”

Such criticisms of the king were an extension of the dissatisfaction that was common around the time of the Revolution with patriarchalism’s general claims of manly authority. As Wood observed, “Certainly by 1750 ancient patriarchal absolutism no longer had the same ideological significance it had once possessed,” and “few fathers, or at least few gentry fathers, now dared to justify controlling their household dependents in the arbitrary manner advocated a century earlier by Sir Robert Filmer.” More children left the home and asserted a greater right against their parents to choose their marital partners. Sons were more likely to challenge and fight their fathers, and “American youngsters had a reputation for being more unruly than children elsewhere.” Also suggestive here is the condition of divorce in the colonies. Divorce was not permitted in England except through “rare private bills in Parliament.” But some colonies defiantly drafted legal means for divorce. Much more so than their English counterparts, American women used these means to abandon the patriarchal figures of

234. THE FEDERALIST NO. 69 (Alexander Hamilton), supra note 167, at 357.
236. THE FEDERALIST NO. 69 (Alexander Hamilton), supra note 167, at 359.
238. THE FEDERALIST NO. 69 (Alexander Hamilton), supra note 167, at 361.
239. WOOD, supra note 157, at 147.
240. Id.
241. See id.
242. Id. at 155.
their husbands. This challenge to patriarchy in the home was analogous to other contexts, as servants were more likely to challenge their masters and inferiors became more suspicious of their superiors. "Everywhere," observed Wood, "ordinary people were no longer willing to play their accustomed roles in the hierarchy, no longer willing to follow their callings, no longer willing to restrict their consumption of goods." In Wood’s account, "[t]hey were less dependent, less willing to walk while gentlemen rode, less willing to doff their caps, less deferential, less passive, less respectful of those above them." Just as patriarchy in the English family had propped up patriarchy during Filmer’s time, its weakening in the American family tended to diminish it in other areas of colonial America.

There were two main causes for this dissolution of patriarchal authority. First, the traditional bonds that made patriarchy thrive were harder to sustain against the sudden and powerful changes in the movement of people across America. The population had doubled from 1750 to 1770 and doubled again from 1770 to 1790, "multiplying more rapidly than any other people in the Western world." This growing number aggressively moved into new towns and the unsettled frontier as opportunities arose. Such movement "strained and broke apart households, churches, and neighborhoods," and young men "became more autonomous and more independent of paternal and patronage relationships."

Second, in addition to these social forces, patriarchalism came under attack from a new Enlightenment philosophy that urged the merits of civility and affection in people’s private lives and public dealings. By expecting everyone to work cooperatively, civility would help to bolster the colonists’ efforts at self-government.

244. See id. at 160–64.
245. See WOOD, supra note 157, at 145.
246. Id. at 145–46.
247. Id. at 146.
248. See Brandon, supra note 185, at 1216–18, 1222–27.
249. WOOD, supra note 157, at 125.
250. See id. at 126–28.
251. See id. at 129.
252. See infra Part IV.A.2.
2. Enlightenment Embrace of Civility

The Americans sought to create a public virtue that would help to undergird their new project of constitutional self-government, but the accounts of male identity from Hobbes and Filmer scarcely lent themselves to this endeavor. Hobbes depicted hypermasculine men who were so overwhelmed with belligerent passions that only the fear of violent death had any chance of scaring them into peaceable conduct. Filmer, on the other hand, believed that men could be regulated by social bonds of affect, but these bonds were hierarchically structured and ultimately required meek deference by infantile men toward a patriarchal king. American men had to fashion an alternative male identity.

They developed it to include the democratic attitude of treating each other with civility and even affection. By doing so, they adopted an ethos that tended to evince those social habits conducive to political cooperation among men of differing views and unequal stations. Part of this ethos derived from the Enlightenment philosophy that was spreading over Western Europe at this time. As its name implies, the Enlightenment sought to “enlighten” men’s minds by ridding them of superstitions and stifling traditions. Yet the Enlightenment

253. See WOOD, supra note 157, at 189 (“Destroying the ligaments of patronage and kinship that had held the old monarchical society together was only half the radicalism of the republican revolution.”)


255. See infra notes 271–81 and accompanying text.

256. See WOOD, supra note 157, at 194.

257. See id. at 191. Justice Brandeis alluded to these twin aims when he wrote that “[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.” Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). For historian Peter Gay, the Enlightenment was a break from entrenched conventions. It “was a century of decline in mysticism, of growing hope for life and trust in effort, of commitment to inquiry and criticism, of interest in social reform, of increasing secularism, and a growing willingness to take risks.” PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM 6 (1969). The Enlightenment was an age, “perhaps best of all, of attacks on superstition.” Id. at 23. Men were more willing to question conventions and find truth for themselves. Professor Gay offered examples:

Locke noted in his journal that there was a “large field of knowledge proper for the use and advantage of men,” namely to “finde out new inventions of dispatch to shorten or ease our labours, or applying sagaciously togethe
was not limited to the cultivation of men’s reason; it also sought to help men become civil and kind by eliminating the barbarism and cruelty of monarchical culture.258

A chief illustration was available in the new outlook toward childrearing. Locke described the family as a place for parents to show affection toward their children and to teach them about independence:

*Paternal* or *Parental* power is nothing but that, which Parents have over their Children, to govern them for the Children's good, till they come to the use of Reason, or a state of Knowledge, wherein they may be supposed capable to un-

several agents and patients to procure new and beneficial productions whereby our stock of riches (i.e., things useful for the conveniency of our life) may be increased or better preserv’d.” And, Locke added significantly, “for such discoveries as these the mind of man is well fitted.” Lord Shaftesbury, Locke’s disciple, more inward than his master, applied the ancient saying to man’s self-mastery: the “wise and able man,” he wrote, “by laying within himself the lasting and sure foundations of order, peace, and concord” thus becomes “the architect of his own life and fortune.” Not surprisingly, both the proverb and the attitude spread to the English colonies in America: in 1770 Thomas Jefferson included “*fiber suae quisque fortunae*” among his favorite maxims, while some years before Benjamin Franklin developed a plan for scientific cooperation among the colonies that would solve the mysteries of nature and enhance man’s power, “over matter, and multiply the conveniences or pleasures of life.”

*Id.* at 6–7 (footnotes omitted); *see also id.* at 6–12.

258. *See* WOOD, *supra* note 157, at 192 (“For the Enlightenment represented not just the spread of science, or liberty, or republican government—important as these were—but also the spread of what came to be called civilization.”); *see also id.* at 189, 192–98. Locke had started down that path by treating the relationships among men in the state of nature as generally sociable and by arguing that men would not resort to Hobbes’s demonic state of nature in the absence of government. *See supra* notes 138–39 and accompanying text. Notwithstanding his own investments in the South Carolina slave trade, Locke also wrote that “Slavery is so vile and miserable an Estate of Man, and so directly opposite to the generous Temper and Courage of our Nation; that ‘tis hardly to be conceived, that an Englishman, much less a Gentleman, should plead for’t.” LOCKE, *supra* note 125, at 141.

Professor Gay noted that for Enlightenment thinkers, “[r]eason and humanity were easily confounded, and an instance of one was often taken as an instance of the other.” GAY, *supra* note 257, at 29. Professor Gay listed the following examples:

Montesquieu listing the rights of accused persons, Lessing advocating tolerance of Jews, Beccaria constructing a humane jurisprudence, Rousseau defending the claims of the child, Voltaire rehabilitating the victims of judicial miscarriage, Kant analyzing the preconditions for world peace, all were elaborating a single view of man and of politics—a single view of man in politics—which offers no surprises, since it follows with inescapable logic from their general way of thinking.

*Id.* at 398; *see also id.* at 30–45.
derstand that Rule, whether it be the law of Nature or the municipal Law of their Country they are to govern themselves by: Capable, I say, to know it, as well as several others, who live, as Free-men, under that law.259

Locke’s argument deserves amplification. Locke, unlike Filmer, approved of limits on parental authority. Such limits, Locke explained, are warranted. Parents should recognize independence when children acquire reason to think for themselves. Locke’s formulations of the family enabled him to challenge Filmer’s support for patriarchy. Filmer had discounted the possibility that children could ever possess the reason necessary to be responsible political actors; hence, on his terms, men were forever dependent on the fatherly guidance of the king. But according to Locke, because men were said to possess such reason, they could not logically be required to confer authority on the king. No less important, Locke implied that parental authority could not extend to govern children in the political realm, because parental authority did not equate to political authority.260 Elsewhere he advised parents that

in a great many things [the child] must be trusted to his own conduct, since there cannot always be a guard upon him, except what you have put into his own mind by good principles and established habits, which is the best and surest, and therefore most to be taken care of.261

Such views were widespread by the eighteenth century.262 Instead of coercion, parents were expected to treat their children with love and to prepare them to lead independent lives as adults.263

259. LOCKE, supra note 135, at 381.

260. Locke later made this point explicit: “[T]he Paternal is a natural Government, but not at all extending it self to the Ends, and Jurisdictions of that which is Political. The Power of the Father doth not reach at all to the Property of the Child, which is only in his own disposing.” Id.


262. Professor Wood wrote:

Nearly every work of the age—whether of history, fiction, or pedagogy, from Marmontel’s Memoirs to Goldsmith’s Vicar of Wakefield to Chesterfield’s Letters—dwelt on issues of familial responsibility and warned against the evils of parental tyranny and the harsh and arbitrary modes of child-rearing of an older, more savage age. Charles Rollin’s Ancient History attacked primogeniture and other legal devices that supported an artificial patriarchal authority. Samuel Richardson’s Clarissa criticized parents who placed family
If parents were supposed to raise their children in preparation for republican government, men were already expected to exemplify those virtues necessary for its success. “Always at the center of this [Enlightenment] advance,” Professor Wood wrote, “was the changing idea of a gentleman.” Among monarchists, a gentleman was a member of the aristocracy by good birth and landed wealth, not through earned effort. By contrast, in America, the gentleman defined himself through the social products of self-improvement: “politeness, grace, taste, learning, and character.” Such traits were acutely valuable in a republic where all power resided with the people. As Wood concluded, “We shall never understand the unique character of the revolutionary leaders until we appreciate the seriousness with which they took these new republican ideas of what it was to be a gentleman.” Yet what precisely did the gentleman’s “politeness, grace, taste, learning, and character” mean? The best answer to this question lies in the example of George Washington, a nonpareil of the enlightened republican gentleman. Although we now remember him for his reputed honesty, Washington’s most celebrated virtue was perhaps his studiously

pride and wealth ahead of the desires and integrity of their children. Even Hogarth’s popular series of prints Marriage à la Mode pointed out the dangers of parents arranging their children’s marriages. Being a parent was no longer simply a biological fact; it was also a cultural responsibility. As Fénelon’s Telemachus attested, a child’s true parents were not his blood relatives but those moral preceptors like Mentor who shaped his mind and raised him to become a reasoning moral adult in a corrupt and complex world. Children were no longer merely dependents but moral beings to be cared for and educated.

WOOD, supra note 157, at 148–49 (footnote omitted).


264. WOOD, supra note 157, at 194.

265. See id. at 194–95.

266. Id. at 195. (“The colonists were eager to create a new kind of aristocracy, based on principles that could be learned and were superior to those of birth and family, and even great wealth.”). It is worth considering that so many Founding Fathers were not men of high birth. The following men, for example, were the first in their families to attend college and acquire the sort of liberal arts education idealized by the Enlightenment: “Samuel Adams, John Adams, Thomas Jefferson, James Otis, John Jay, James Madison, David Ramsay, Benjamin Rush, James Wilson, John Marshall.” Id. at 197. “Gentleman,” however, was not fully divorced from its class-based connotations. See KANN, supra note 23, at 23–24.

267. WOOD, supra note 157, at 197–98 (“All the founding fathers were aware of these conventions of civility, and all in varying degrees tried to live up to them.”).
crafted civility. As a child, Washington had copied The Rules of Civility and Decent Behavior in Company and Conversation, a collection of 110 maxims. The rules are useful for comparing Washington’s mindset with that of the inexorably testy men described by Hobbes. Here are some of the rules that young George copied: “Show not yourself glad at the misfortune of another though he were your enemy” (rule 22); “If any one come to speak to you while you are ... sitting, stand up, though he be your inferior ...” (rule 28); “To one that is your equal, or not much inferior, you are to give the chief place in your lodging, and he to whom it is offered ought at the first to refuse it, but at the second to accept though not without acknowledging his own unworthiness” (rule 32); “Use no reproachful language against any one; neither curse nor revile” (rule 49).

Washington’s rules of civility were more than quaint. They were the means by which the colonial men tried to work together as rough social equals in a republic. Illustrative of the civility of Carter and Shils, the rules reflected an aspiration to develop an account of gentlemanliness that could facilitate cooperation among a diversity of men by acknowledging their equal rights to dignity. This perspective became more obvious when Washington warmed civility into the rhetoric of affection. After the Revolutionary War, he announced his retirement as general and sent to the States a letter containing his hopes and concerns for the new Republic. He urged as “essential to the well being” of the United States:

[.]The prevalence of that pacific and friendly Disposition, among the People of the United States, which will induce them to forget their local prejudices and policies, to make those mutual concessions which are requisite to the general

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268. Professor Wood suggested that “Washington’s behavior, for example, is incomprehensible except in terms of these new, enlightened standards of gentility. Few were more eager to participate in the rolling back of parochialism, fanaticism, and barbarism.” Id. at 197. Later, Professor Wood wrote that “Washington’s Enlightenment was a more down-to-earth affair, concerned with social behavior and living in the everyday world of people. His Enlightenment involved civility.” Id. at 198.

269. See Prologue to GEORGE WASHINGTON, A COLLECTION 2, 3 (William B. Allen ed., Liberty Fund 1988) [hereinafter WASHINGTON COLLECTION].

270. GEORGE WASHINGTON, THE RULES OF CIVILITY AND DECENT BEHAVIOR IN COMPANY AND CONVERSATION, in WASHINGTON COLLECTION, supra note 269, at 6, 7.

271. Id. at 8.

272. Id. at 9.
prosperity, and in some instances, to sacrifice their individual advantages to the interest of the Community.273

Washington concluded the letter with a prayer that Americans would “entertain a brotherly affection and love for one another, for their fellow Citizens of the United States at large, and particularly for their brethren who have served in the Field.”274 Washington warned of how competing views and interests bred jealousy and even hate among the States. It is no wonder that in his Presidential farewell address he again spoke of his yearning that “your Union and brotherly affection may be perpetual.”275 Washington felt affection for men across religions as well. Addressing Jewish congregations in various cities, he observed that the “liberal sentiment towards each other which marks every political and religious denomination of men in this country stands unrivalled in the history of nations.”276 More than polite toleration, Washington meant “[t]he affection of such a people,” which he prized as “a treasure beyond the reach of calculation.”277 In a show of political inclusion, he eagerly informed the congregations that the “affectionate expressions of your address again excite my gratitude, and receive my warmest acknowledgements.”278

We can enrich our understanding of Washington by turning to an analysis of Washington’s favorite play, Joseph Addison’s Cato.279 Although penned by an Englishman, it became the chief artistic voice for the Americans’ republicanism.280 Washington

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273. George Washington, Circular to the States (June 14, 1783) in WASHINGTON COLLECTION, supra note 269, at 239, 242.
274. Id. at 249.
275. George Washington, Farewell Address (Sept. 19, 1796), in WASHINGTON COLLECTION, supra note 269, at 512, 514.
277. Id.
278. Id. at 546.
279. JOSEPH ADDISON, CATO: A TRAGEDY, AND SELECTED ESSAYS (Christine Dunn Henderson & Mark E. Yellin eds., Liberty Fund 2004) [hereinafter ADDISON COLLECTION]. For the proposition that Cato was Washington’s favorite play, see Forrest McDonald, Foreword to id. at viii, and GARRY WILLS, CINCIINNATIUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 8 (1984).
280. See Christine Dunn Henderson & Mark E. Yellin, Introduction to ADDISON COLLECTION, supra note 279, at xi, xxii; McDonald, supra note 279, at viii–x; WILLS, supra note 279, at 137 (calling Cato “the most popular [play] in eighteenth-century America”).
saw *Cato* many times and often quoted from it.\(^{281}\) He also had it staged for dispirited troops at Valley Forge, and, when his officers threatened mutiny in 1783, he shamed them, as only he could, by reciting apt lines from the play.\(^{282}\) The play celebrates public-spiritedness in the service of war, and so one can understand why it would resonate with Americans during the Revolution.\(^{283}\) Much of the dialogue, however, lauds those virtues which are peculiarly useful for peace and cooperation. Washington identified with Juba, the young African prince who idolizes the Roman Cato and is devoted to the latter’s fight to protect Rome’s democracy against Caesar’s dictatorship.\(^{284}\) Although Juba’s reputation for bravery is unassailable, he does not glamorize war as a bid for manly valor. He treats war as a means to make and defend a world where men may engage each other with gentleness. The African military general Syphax mocks the Roman soldiers as effeminate for lacking the killer instincts and martial fortitude of their African counterparts. Juba chides him:

> These all are virtues of a meaner rank,  
> Perfections that are placed in bones and nerves.  
> A Roman soul is bent on higher views:  
> To civilize the rude, unpolished world,  
> And lay it under the restraint of laws;  
> To make man mild, and sociable to man;  
> To cultivate the wild, licentious savage  
> With wisdom, discipline, and liberal arts—  
> The embellishments of life; virtues like these  
> Make human nature shine, reform the soul,  
> And break our fierce barbarians into men.\(^{285}\)

\(^{281}\) See McDonald, *supra* note 279, at viii; see also WOOD, *supra* note 157, at 197–98 (“Washington loved Joseph Addison’s play *Cato* and saw it over and over and incorporated its lines into his correspondence. The play, very much an Enlightenment tract, helped to teach him what it meant to be liberal and virtuous, what it meant to be a stoical classical hero.”).

\(^{282}\) See McDonald, *supra* note 279, at viii; see also MCDONALD, *supra* note 190, at 195 (“It seems likely that the source of the [republican] ideal, in Washington’s case, was Joseph Addison’s play *Cato*. . . . That it offered a role model that was strikingly similar to the way in which Washington patterned his life is indicated by a careful reading of the play.”). Patrick Henry’s cry of “[g]ive me liberty or give me death” was also quietly lifted from *Cato*. See *id.* at 10.

\(^{283}\) See McDonald, *supra* note 279, at ix.

\(^{284}\) See *id*.

\(^{285}\) JOSEPH ADDISON, *CATO*, *reprinted in ADDISON COLLECTION*, *supra* note 279, at 1, 18 (footnotes omitted).
Juba transitions from biological to cultural meanings of gender. To be “men” is to be other than “barbarians” and “savages.” It is, ideally, to be “mild” and “sociable,” absent the “rude” and “unpolished.” In an uncanny paradox, the valiant warrior Juba states that men earn their gendered identity as such when they learn to value the traditionally feminine virtues of civility and sociability.

Addison himself extolled such virtues. Dwelling on his views may help to illuminate Cato’s attractions for Washington and his contemporaries. Addison derided those who “think it more honourable to revenge, than to forgive an injury; who make no scruple of telling a lie, but would put any man to death that accuses them of it; who are more careful to guard their reputation by their courage, than by their virtue.”286 Elsewhere, he surmised that “[h]alf the Misery of Human Life might be extinguished, would Men alleviate the general Curse they lye under, by mutual Offices of Compassion, Benevolence, and Humanity.”287 And against the obsession with public slights in early modern England, Addison reminded the reader that

*Plutarch* says very finely, that a Man should not allow himself to hate even his Enemies, because, says he, if you indulge this Passion in some Occasions, it will rise of it self in others; if you hate your Enemies, you will contract such a vicious Habit of Mind, as by Degrees will break out upon those who are your Friends, or those who are indifferent to you.288

Addison commended forgiveness and its correlating civility for their benefits to social relationships, not, like Christianity, for their intrinsic worth. Forgiveness and civility, in Addison’s hands, take shape as *public* virtues, allusive of civility’s past association with citizenship and government.

One might object that the foregoing analysis of Washington piously omits his military service and, thus, his propensity for conduct that is not civil. Yet, even here, our received picture of Washington glows as a paragon of civility. We remember Washington as the “perfect Cincinnatus, the Roman patriot

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who returned to his farm after his victories in war.” 289 He devoted himself to his country, and, even though he could have exploited his fame to obtain more political power, he resigned as commander-in-chief of the colonial Army. 290 By doing so, he offered for view a modesty that was virtually unimaginable, even for a gentleman. Consider how his resignation deflected the charges of hypermasculinity that Paine had effortlessly flung at the king. Whereas the king had brutally usurped power, Washington declined it in a gesture that is a monument to civility’s gentle self-effacement. And whereas Paine’s king arrogantly placed himself outside the rule of law, Washington’s resignation represented a civility in which he preferred to don the egalitarian dignity of his fellow citizens than to bask in the privileged honor of the few. Evoking the older meaning of civility as citizenship, Washington bypassed a potential opportunity for emperors hip to become a regular citizen. 291 This performance, of course, was consciously staged and Washington “knew at once that he had acquired instant fame as a modern

289. WOOD, supra note 157, at 205 (“The greatest act of his life, the one that gave him his greatest fame, was his resignation as commander in chief of the American forces.”).
290. See id. at 205–06 (“He was trying to live up to the age’s image of a classical disinterested patriot who devotes his life to his country.”).
291. The manner in which Washington’s contemporaries portrayed him in art is telling. Wills explained:

The instinct for a secular and simple representation of Washington’s heroism is nowhere better demonstrated than in the fact that the most popular portraits of all were the presidential portraits done by Gilbert Stuart . . . where [Washington] appears simply as Citizen Washington, wearing the black suit of his inauguration . . . His favorite form of address, when speaking to his countrymen, whether as Commander in Chief or as President, was “my fellow citizens”; and the republic repaid this compliment by sensing that the highest recognition it could offer him was as a citizen leader. The man whose glory came from his return to the plow could gain no luster by mounting a throne or wearing a crown.

WILLS, supra note 279, at 79–80. So, too, Wills commented:

The secular and civilian ideal of Cincinnatus made American artists represent Washington, even in his military days, with great restraint. There was less emphasis on the glory of battle than on dutiful service. The city of Charleston rejected the painting it had commissioned from [John] Trumbull, because it showed Washington standing by a theatrically rearing horse . . . When Thomas Sully attempted a heroic equestrian in his Crossing of the Delaware, it stayed rolled up in his studio, since he could not interest a buyer.

Id. at 82. On a related note, Washington’s famous “Farewell Address” acquired its name from someone other than Washington, for “he gave it no more formal title than the republican salutation, ‘Friends and Fellow Citizens.’” Id. at 88.
Cincinnatus,” making him internationally famous. Still, what is important here is that Washington’s public civility was a silent admission of his own democratic dependence on the good wishes of the people. In his grand coyness, Washington acknowledged that a leader, even one who was venerated, ran a risk in openly seeking political power in a republican nation; the presidency could not be seized by one but had to be offered by the many. The young republic had come a long way from rule by a king who was, in Paine’s words, the “principal ruffian of some restless gang.”

Civility did more than govern the conduct of the first President. The government as a whole was expected to recognize its norms. The Third and Fourth Amendments of the Constitution contain, respectively, the right against the quartering of troops in private homes and the right against unreasonable searches and seizures of persons, houses, papers, and effects. One can

292. WOOD, supra note 157, at 206. Wills observed of Washington:

He was a virtuoso of resignations. He perfected the art of getting power by giving it away. . . .

Unlike other officers in the Revolution, he did not resign or threaten to resign when baffled of honor or advantage. He did not want to cheapen the currency; he would not anticipate his promised abdication at war’s end. His whole war service was urged forward under the archway of two pledges—to receive no pay, and to resign when independence was won. He was choreographing his departure with great care. It was an act of pedagogical theater; and the world applauded.

WILLS, supra note 279, at 3 (citation omitted).

293. Wills remarked:

Washington was constantly testing public opinion and tailoring his actions to suit it. If there was widespread fear that hereditary membership in the Society of the Cincinnati [a club of distinguished and upper class war veterans] would create an aristocracy, then Washington would abolish that item, though he thought the public mistaken in its fears. . . .

Washington realized that power is a tree that grows by a constant prudent trimming; that winning the people’s long-term confidence is a more solid ground for achievement than either pandering to their whims or defying their expectations.

WILLS, supra note 279, at 103-04.

294. Consider Wills’s argument that Washington’s charisma “came from a prominently displayed eagerness to transcend itself; he gained power from his readiness to give it up. And in accepting the ideal of Cincinnati, Washington automatically limited the dangers of charismatic leadership, which is always at least quasi-religious, an assertion of semi-divine ‘grace.’” WILLS, supra note 279, at 23.

295. PAINE, supra note 121, at 16.

296. U.S. CONST. amend. III.

297. U.S. CONST. amend. IV.
understand both Amendments as prohibiting governmental intrusion because it is violative of one’s dignity, and thus, by convention, rude; imagine the uncivil handling one would experience by a throng of soldiers who have their way in one’s home or by even something as commonplace as a pat-down by the constable. Perhaps most conspicuously, the Constitution does not permit cruel and unusual punishment, the grossest example of brutal intemperance by the government. Here, one will remember civility’s philology as citizenship and the right to equal dignity that imbues it. What makes cruel and unusual punishment uncivil is not only its outward barbarity but also its attack on the principle of equal dignity. Other constituent parts of the Constitution also allude to this latter view of civility. The Religion Clauses prohibit majority religions that control government from degrading the dignity of minority faiths. We can infer that Article VI performs the same function by banning the government from administering religious tests as a precondition to hold office. The First Amendment’s rights of speech and press protect people and

298. Justice Joseph Story feared that, in the absence of the Third Amendment, people’s lives would be “full of inconvenience and peril.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1893 (1833) reprinted in 5 THE FOUNDERS’ CONSTITUTION, supra note 189, at 218, 218.
299. See Cooper, supra note 2, at 5–6.
300. U.S. CONST. amend. VIII.
301. See supra notes 192–99 and accompanying text.
302. See, e.g., William J. Brennan, Constitutional Adjudication and the Death Penalty: A View from the Court, 100 HARV. L. REV. 313, 330–31 (1986) (arguing that the death penalty is unconstitutional because it violates norms of human dignity that inform the Eighth Amendment); Arthur J. Goldberg & Alan M. Dershowitz, Declaring the Death Penalty Unconstitutional, 83 HARV. L. REV. 1773, 1784–85 (1970) (arguing that the death penalty is unconstitutional because it is at least highly suspect under these norms).
303. Kenneth Karst offered a vigorous argument that the Constitution is animated by something akin to what has been described here as civility in a principle of “equal citizenship.” KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).
305. U.S. CONST. art. VI.
publishers against an analogous degradation for their political and social beliefs.\footnote{306 Note the common-law prohibition against viewpoint discrimination. See, e.g., Police Dep’t v. Mosley 408 U.S. 92, 95 (1972) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").}

3. *Necessary for Adjudication*

John Adams took civility in a somewhat different direction by explaining how it was essential for a political society that was dedicated to impartial adjudication. "The judicial Power of the United States," according to Article III of the Constitution, "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."\footnote{307 U.S. CONST. art. III.} In Hobbes’s state of nature, however, all men retained the authority to decide disputes for themselves, and, driven by hypermasculinity, they exercised their freedom in ways that were incompatible with civil society.\footnote{308 See supra Part I.} John Adams fretted that men in America behaved all too similarly. Denouncing fistfights among a group of public officials, he wrote that "[m]an is distinguished from other animals, his fellow inhabitants of this planet, by a capacity of acquiring knowledge and civility, more than by any excellency, corporeal, or mental, with which mere nature has furnished his species."\footnote{309 JOHN ADAMS, On Private Revenge: No. 1, in THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 1, 3 (C. Bradley Thompson ed., Liberty Fund 2000) [hereinafter WRITINGS].} Life prior to the invention of civility is, Adams argued, a prepolitical existence, and his descriptions should call to mind Hobbes’s state of nature. When men first walked the earth, "[e]ach individual [was] his own sovereign, accountable to no other upon earth, and punishable by none."\footnote{310 Id. at 4.} In this savage state," Adams wrote, "courage, hardiness, activity, and strength, the virtues of their brother brutes, are the only excellencies to which men can aspire."\footnote{311 Id.} These "excellencies" are the explosive ingredients for a violent culture of honor:

Emulations and competitions for superiority in such qualities [as courage, hardiness, strength, and so on], will soon
commence; and any action which may be taken for an insult, will be considered as a pretension to such superiority; it will raise resentment in proportion, and shame and grief will prompt the savage to claim satisfaction or to take revenge.\textsuperscript{312}

This passage was part of Adams’s project to stigmatize hypermasculinity. He continued: “The doctrine, that the person assaulted ‘should act with spirit,’ ‘should defend himself by drawing his sword and killing, or by wringing noses, and boxing it out with the offender,’ is the tenet of a coxcomb and the sentiment of a brute.”\textsuperscript{313} Adams scoffed, “are cocks and bulls and horses the proper exemplars for the imitation of men, especially of men of sense, and even of the highest personages in the government!”\textsuperscript{314}

The harm transcends the embarrassing ascription of animality. Hypermasculinity, Adams warned, is incompatible with government under a rule of law. For in a violent culture of honor, any request by an aggrieved man for an impartial judge would amount to self-inflicted emasculation, a confession that he lacked the manly resolve to settle the score.\textsuperscript{315} The willingness to accept impartial adjudication was, for Adams, what separated “savage nations” from “polite ones”: “that among the former every individual is his own judge and his own executioner; but among the latter all pretensions to judgment and punishment are resigned to tribunals erected by the public.”\textsuperscript{316}

Apparently, though, these distinctions are not hermetic. Even in polite societies, “boxing, clubs, swords, or firearms, are resorted to for deciding every quarrel, about a girl, a game at cards, or any little accident that wine or folly or jealousy may suspect to be an affront.”\textsuperscript{317} There is also the danger that soldiers will ridicule the senate and “slight the orders sent them by a body of men whom they look upon as cowards, and therefore unworthy to command

\textsuperscript{312} Id.
\textsuperscript{313} Id. at 6.
\textsuperscript{314} Id.
\textsuperscript{315} See id. at 4 (“The father, the brother, or the friend begins then to espouse the cause of the deceased; not, indeed, so much from any love he bore him living, or from any grief he suffers for him dead, as from a principle of bravery and honor, to show himself able and willing to encounter the man who had just before vanquished another.”).
\textsuperscript{316} Id. at 5.
\textsuperscript{317} Id.
Because of hypermasculinity’s threats to republican government, Adams advised men to adopt a new conception of male identity. He stated that even in the army “every gentleman, every man of sense ... has a more delicate and manly way of thinking, and from his heart despises all such little, narrow, sordid notions.” To be manly, then, is to submit to civil authority, not to flaunt one’s soldierly masculinity. Adams closed his essay On Revenge with lines that read like censure to the honor-obsessed men of early modern England. He reminded men to “consider how extremely addicted they are to magnify and exaggerate the injuries that are offered to themselves, and to diminish and extenuate the wrongs that they offer to others.”

One might be tempted here to treat the duel between Aaron Burr and Alexander Hamilton as a colorful reproof to hopes for a republican culture dedicated to peaceful adjudication. Their deadly conflict derived exclusively from considerations of personal honor and would thus hearken to the brutal grudges borne by men in early modern England over analogous issues of status. Stewing for over a decade, the mutual contempt between Burr and Hamilton had reached a boil in 1804. By then, both men had garnered extraordinary honors: Hamilton had been Secretary of Treasury and, after Washington, the most powerful member of the Federalist Party, while Burr was Vice President and a gubernatorial candidate in New York. For men such as these, whose public identities were sewn from emblems of honor, the practice of insults (both inflicting and suffering) was always a solemn matter.

318. Id. at 6 (quoting Montesquieu).
319. Id. Earlier, Adams asserted that “[t]o exterminate from among mankind such revengeful sentiments and tempers, is one of the highest and most important strains of civil and humane policy.” Id. at 5. And he pleaded:
   Far from aiming at a reputation for such qualities and accomplishments as those of boxing or cuffing, a man of sense would hold even the true martial qualities, courage, strength, and skill in war, in a much lower estimation than the attributes of wisdom and virtue, skill in arts and sciences, and a true taste to what is right, what is fit, what is true, generous, manly, and noble, in civil life.

320. Id. at 17.
322. See id. at 32, 39.
So it was no surprise that Burr grew inconsolably livid when Hamilton publicly called him “despicable.”323 Burr’s emissary demanded that Hamilton retract his insult, regardless of whether it referred to Burr’s politics or person: “No denial or declaration will be satisfactory . . . unless it be general, so as to wholly exclude the idea that rumors derogatory to Col. Burr’s honor have originated with [General] Hamilton or have been fairly inferred from anything he has said.”324 Hamilton refused to abide, for that would be to compromise his honor. “I have not censured him on light grounds,” Hamilton defended, “or from unworthy inducements. I certainly have had strong reasons for what I may have said.”325 A quandary ensued: Hamilton and Burr could uphold their respective honor only by ruining the other’s. After awkward attempts by Hamilton for a face-saving exit, Burr angrily issued an invitation for a duel, which Hamilton hesitatingly accepted, to his demise.326

Historian Joseph Ellis believed that through their violent contest for honor Burr and Hamilton “managed to make a dramatic final statement about the time of their time.”327 Ellis elaborated:

Honor mattered because character mattered. And character mattered because the fate of the American experiment with republican government still required virtuous leaders to survive. . . . [America] still required honorable and virtuous leaders to endure. Both Burr and Hamilton came to the [duel] because they wished to be regarded as part of such company.328

One problem here is the casual rendering of “honorable” and “virtuous” as consonant. As illustrated earlier through Pastor Samuel McClintock, John Adams, and others, there was ample contempt for those obsessed with personal honor at the expense of public virtue.329 Thomas Paine, for one, condemned

323. See id. at 32.
324. Id. at 35 (internal quotation marks omitted).
325. Id. at 38 (internal quotation marks omitted).
326. See id. at 35–36.
327. Id. at 47.
328. Id.
329. See supra notes 190–91 and accompanying text. James Wilson, one of the six original Justices of the U.S. Supreme Court, also captured the ethos of the times in these remarks from the mid-eighteenth century:

The wisest and most benign constitution of a rational and moral system is that, in which the degree of private affection, most useful to the individual, is, at the same time, consistent with the greatest interest of the
duels as “gothic and absurd.”

Also telling is that New York, where Burr and Hamilton arranged the duel’s terms, had prohibited dueling, and this was why the members of their respective entourages, to avoid becoming legally compromised as witnesses, were not allowed to see the fight. Aware of its legal stigma, Burr and Hamilton referred to their duel as an “interview” and thus injected the “language of deniability,” should the case ever go to court. Hamilton also tried to justify in his “Statement on the Impending Duel” how someone of his maturity and position could yield to such a shameful exercise in adolescent pride. Even Professor Ellis qualified that the famous duel “represented a momentary breakdown in the dominant pattern of nonviolent conflict within the American revolutionary generation.” In any case, after Hamilton’s death, the North-

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1 JAMES WILSON, Of Man, as a Member of Society, in COLLECTED WORKS OF JAMES WILSON 621, 634 (Kermit L. Hall & Mark David Hall eds., 2007).


31. ELLIS, supra note 31, at 23.

32. Id. (internal quotation marks omitted).

33. See id. at 37 (internal quotation marks omitted). Professor Mansfield casually noted that Hamilton was “not a gender-neutral but a man who gave up his life in a duel because he was a gentleman.” MANSFIELD, supra note 90, at 6. Hamilton, however, was hardly the gentleman by participating in a ritual prompted by hypermasculine passions.

34. ELLIS, supra note 324, at 39. Professor Wood commented on dueling and civility:

As honor came under attack, so too did dueling—as the special means by which gentlemen protected their honor. Despite growing criticism throughout the Western world, dueling continued to be practiced, especially by military officers and Southerners. Some justified dueling on the grounds that it was a civilizing agent, inhibiting gentlemen from using “illiberal language” with one another. Others saw dueling as a means of maintaining courage as a virtue amidst the spread of an effeminizing luxury. Although Aaron Burr’s killing of Alexander Hamilton in 1804 in a duel did much to intensify condemnation of the practice, it was the spread of egalitarian sentiments that most effectively undermined it.
ern public lost whatever begrudging tolerance it may have had for duels.\textsuperscript{335} New York prosecuted the men who helped Hamilton and Burr to arrange the duel, denying them their voting rights.\textsuperscript{336} Burr was reviled and disgracefully took flight from pending murder charges in New York and New Jersey; his political career was in tatters.\textsuperscript{337} "In the years following the duel, Northern public opinion turned permanently against dueling, and the practice nearly disappeared in the North."\textsuperscript{338} The duel was therefore mostly an aberration in a republican culture of civility, at least in the North.\textsuperscript{339}

The Americans’ emphasis on deliberation, however, was not an aberration; it was important to them as a means to discover truth. If civility represented the American male’s willingness to accommodate the socially offensive, deliberation represented the other pole where the American male refused to defer to authority and insisted on thinking for himself. The former tended to deflect Hobbes’s indictment of hypermasculinity whereas the latter tended to refute Filmer’s portrait of men other than the king as infantile and overly dependent.

\subsection*{B. Deliberation}

The careful weighing presupposed by deliberation of competing arguments and diverse ideas was philosophically valuable for a government where authority formally resided with the people. After all, if the people were ruled by their impulses, or for whatever reason failed to exercise their deliberative abilities, the very idea of giving authority to them would seem questionable. This was a central premise in the arguments of Hobbes and Filmer.\textsuperscript{340} They braced their opposition to constitu-

\begin{itemize}
  \item WOOD, supra note 157, at 344–45.
  \item 336. See id.
  \item 337. See id.
  \item 338. Id.
  \item 339. This is not to suggest that duels were nonexistent in colonial America, especially in the South. There, “in the early 1800s the duel developed into one of the central rituals of the planter elite that dominated Southern society.” \textit{Id.} at 1821. The South never quite adopted the republican ethos described in this Article. See MCDONALD, supra note 190, at 73–77. I hope to address this aspect of republicanism and manliness in a future article.
  \item 340. See supra Parts I & II.
\end{itemize}
tional democracy by ascribing to men a lack of deliberative capacity. Hobbes argued that too many men, being robustly hypermasculine, regularly boiled with rage because of some trifle insult, instead of demonstrating sustained deliberation. And from the other side, Filmer happily observed that men, lacking manly independence, blankly deferred to their masters. To realize the self-government imagined by republican constitution-alism, American men aspired to be deliberative beings who were manly enough to think for themselves.341

In 1787 Noah Webster, the dictionary author and political writer, declared fatuously that America is “an empire of reason.”342 Self-congratulation gave way to entreaty, however, as Webster announced that in a government dedicated to reason,

it is not only the right, but the indispensable duty of every citizen to examine the principles of it, to compare them with the principles of other governments, with a constant eye to our particular situation and circumstances, and thus endeavor to foresee the future operations of our own system, and its effects upon human happiness.343

Men are expected to renounce their hypermasculine passions in favor of “examining” and “comparing” political principles. Rather than being a handmaiden to the self-regard of hypermasculinity, deliberation should serve the collective aim of “human happiness.” Webster’s esteem for deliberation also speaks to the maturity that Filmer denied in men, as the former calls on men to tackle the most fundamental issues of politics instead of reflexively submitting to their social betters. Likewise, Nicholas Collin, a prominent minister and board member of what would become the University of Pennsylvania, argued that under a republican government,

341. The ability to think for oneself was part of a larger effort by republican men to be independent of government. Professor McDonald argued that in the southern United States, men did not subscribe to the republican virtue espoused by their Yankee counterparts, opting instead for private property as the main source for political independence from the government. The rationale was that a man who was financially dependent on the government would also likely be politically dependent on, and thus subject to domination by, the government. MCDONALD, supra note 190, at 74.


343. Id. at 374.
the people cannot be led as children, or drove as mules [and] the only method is, to make them rational beings. Men of reflection have the advantage, not only to see things in extensive combinations, and remote consequences, but to feel an important truth with more sensibility . . . .

It was unrealistic, Collin later wrote, to make “every citizen an enlightened patriot,” but through “various excellent improvements in the public education [and] the institution of political societies throughout the continent, much may be done.”

If these glosses on deliberation attend only indirectly to how it pertains to male identity, Madison’s *Federalist* No. 57 provides more explicit treatments:

If it be asked, what is to restrain the house of representatives from making legal discriminations in favour of themselves, and a particular class of the society? I answer, the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and *manly* spirit which actuates the people of America; a spirit which nourishes freedom, and in return is nourished by it.

“Manly spirit” combats government corruption and bias and secures the people’s freedom. But what exactly is manly spirit? Madison’s *Federalist* No. 14 provides an attempted answer, dressed as a question:

Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to over-rule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?

Madison called this disposition to think for oneself “manly.” Americans, unlike the overly dependent boy-men in Filmer’s cosmology, are said to be manly in their independence, but this

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345. Id. at 409.
346. THE FEDERALIST NO. 57 (James Madison), supra note 167, at 297 (emphasis added).
347. Id. No. 14, at 67 (James Madison).
348. Id. (“To this manly spirit, posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre, in favour of private rights and public happiness.”).
Manliness and the Constitution

Independence never veers into the Hobbesian world of hypermasculinity. For men are supposed to use their independence to defend those “private rights” which all Americans enjoy, and thus ultimately, for the “public happiness.” It is an independence that repudiates “blind veneration” for antiquity, custom, or names—the social accoutrements that organized the patriarchy of Filmer’s England and whose honorifics caused Hobbes’s men to fight each other. Manly independence calls upon men to deliberate what is true, not to act out of fear or instinct.

John Adams echoed Madison’s insistence that manliness requires sober deliberation:

Let us examine, then, with a sober, a manly, a British, and a Christian spirit; let us neglect all party virulence and advert to facts; let us believe no man to be infallible or impeccable in government, any more than in religion; take no man’s word against evidence, nor implicitly adopt the sentiments of others, who may be deceived themselves, or may be interested in deceiving us.349

Although here British culture and Christianity slovenly commingle with “manly spirit,” Adams, like Madison, also treated manliness as the desire to think for oneself. True, men in early modern England were also presumably thinking for themselves when they pounced on someone who slighted them, but Adams did not want men to act so impulsively. He valued independence of mind as a means for men to discover the truth through deliberation. To be guided by a manly spirit is to “neglect all party virulence and advert to facts” and to “take no man’s word against evidence, nor implicitly [to] adopt the sentiments of others.”350 American men, said Adams, have lacked this manly spirit, for the “true source of our sufferings has been our timidity.”351 In short, “We have been afraid to think” and “have felt a reluctance to examin[e] . . . the grounds of our privi-

349. JOHN ADAMS, On Self-Delusion, in WRITINGS, supra note 309, at 7, 11–12 (emphasis added).
350. Id.
351. JOHN ADAMS, A Dissertation on the Canon and Feudal Law, in WRITINGS, supra note 309, at 21, 30.
leges, and the extent in which we have an indisputable right to
demand them, against all the power and authority on earth."\textsuperscript{352}

Like Madison and Adams, Thomas Paine praised independence of mind. Against Filmer, Paine declared that every man must ensure "he does not adopt the slavish custom of following what in other governments are called LEADERS,"\textsuperscript{353} Paine explained:

This is not inflaming or exaggerating matters, but trying them by those feelings and affections which nature justifies, and without which, we should be incapable of discharging the social duties of life, or enjoying the felicities of it. I mean not to exhibit horror for the purpose of provoking revenge, but to awaken us from fatal and unmanly slumbers, that we may pursue determinately some fixed object. It is not in the power of Britain or of Europe to conquer America, if she do not conquer herself by delay and timidity.\textsuperscript{354}

Paine called on men to assert their independence against Britain and to awaken from their "unmanly slumbers." To act manly, though, is not to indulge one's passions, as did Hobbes's hypermasculine men. It is not to explode with "revenge" based on the perception of "inflaming or exaggerating matters." For Paine, to act manly is to "pursue determinately some fixed object" distilled through deliberation and according to "those feelings and affections which nature justifies," and, therefore, on the basis of legitimate reasons. Paine reminded Americans that deliberation is a political duty arising from membership in a constitutional democracy. In such a government, "[e]very man," Paine

\textsuperscript{352} Id. Worth noting here is another bid by Adams to ally manliness with republican government and deliberation, against the mindless foppishness of the monarchy. He wrote that a republican government, altho it will infallibly beggar me and my Children, will produce Strength, Hardiness, Activity, Courage, Fortitude and Enterprise; the manly noble and Sublime Qualities in Human Nature, in Abundance. A Monarchy would probably, somehow or other make me rich, but it would produce so much Taste and Politeness so much Elegance in Dress, Furniture, Equipage, so much Musick and Dancing, so much Fencing and Skating, so much Cards and Backgammon; so much Horse Racing and Cockfighting, so many Balls and Assemblies, so many Plays and Concerts that the very Imagination of them makes me feel vain, light, frivolous and insignificant. Adams Letter, supra note 189, at 669.

\textsuperscript{353} THOMAS PAINE, THE RIGHTS OF MAN, PART THE SECOND (1776), reprinted in PAINЕ COLLECTION, supra note 121, at 541, 571.

\textsuperscript{354} PAINE, supra note 121, at 5, 27.
wrote, “is a proprietor in government, and considers it a necessary part of his business to understand.”

Notice how Paine, Adams, and Madison silently evoked courage in their calls for deliberation. Paine urged a manly deliberation to prevent Britain from conquering America; Adams upbraided men for blindly following convention and being too “timid” to think for themselves; Madison exhorted men to stand up to government by deliberating the rightness of its actions. Men are charged in all three examples to confront intimidating forces: the greatest military empire in history, the scorn of popular opinion, and powerful governmental leaders. Deliberation under these circumstances is dangerous; a man could lose his freedom, his reputation, or his life.

The prospect of danger also makes courage—and the deliberation it wills—a masculine virtue. William Ian Miller provided this etymological commentary:

So bound up is courage with manhood that it is nearly impossible to speak of it without invoking male body parts or the word for man itself. Greek andreia (courage, literally manliness) is derived from the stem and- (adult male). The Hebrew root G-B(V)-R (man) yields GEV(B)URA (courage). Latin vir (man) gives us “virtue”; although in modern English “virtue” has come to indicate general moral excellence, it used to mean, more narrowly, in earlier English as well as in Latin (virtus), courage, valor, forcefulness, strength, manliness.

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355. Id. at 571.
356. See William Ian Miller, The Mystery of Courage 232 (2000) (“There is no getting around the fact that courage as traditionally conceptualized, and conceptions of manhood are intimately bound up with each other.”) Miller elaborated:

[M]en bear the burden of living up to a murderous and terrifying ideal; women bear the burden of being excluded from living up to it, which, though saving them from fighting wars, was forever used to justify their subordination. Women, instead, in many cultures, were relegated to the virtue of chastity.

Id. Professor Mansfield added that “[t]he manly man is in control when control is difficult or contested—in a situation of risk,” and “[m]anliness, like suffering, deals with fear.” MANSFIELD, supra note 90, at 16, 18.

357. MILLER, supra note 356, at 233. Miller also added: “With courage comes embedded a theory of manhood. In a significant number of cultures, as chastity was to women, so courage was to men: the virtue at the center of their gendered identity . . . .” Id. at 13. Miller elaborated: “Courage, manliness, manly virtue, is defined less by what it is than by what it is never supposed to be: womanish or effeminate.” Id. at 233. As Miller argues, for good or for ill, men, not women, are expected to be courageous. Id.
When summoned by courage, deliberation became a masculine activity that symbolically elevated men from the infantilization presupposed by patriarchy. At the same time, because the task of deliberation is necessarily tentative and involves habits of restraint and caution, it suggests calm maturity, not violent hypermasculinity.

Although a desire for deliberation was crucial for republican virtue, the term, like hypermasculinity and civility, does not make a direct appearance in the Constitution’s text. Notwithstanding this silence, the Constitution has crafted institutions that promote deliberation. A superb example is the Electoral College. Hamilton explained how

as the electors, chosen in each state, are to assemble and vote in the state in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, that might be communicated from them to the people, than if they were all to be convened at one time, and in one place.

Similar reasons were advanced for Article III, Section 1’s establishment of life tenure for federal judges. “Periodical appointments,” Federalist No. 78 warns, “would, in some way or other, be fatal to their necessary independence.” After all, if federal judges could be removed by either the legislature or the executive, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws.

358. See U.S. Const. art. II, § 1, cl. 3, amended by U.S. Const. amend. XII; see also SUNSTEIN, supra note 165, at 21 (“[The Electoral College] was, at the inception, to be a deliberative body, one that would discuss who ought to be President, rather than simply register votes.”).

359. THE FEDERALIST NO. 68 (Alexander Hamilton), supra note 167, at 352 (“It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation. . . . A small number of persons, elected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.”).

360. See U.S. Const. art. III, § 1.


362. Id. Similar arguments were marshaled for Article III, Section 1’s guarantee that the salaries of federal judges would not be diminished while they were in office. Hamilton argued that “[i]n the general course of human nature, a power
In other words, life tenure would be conducive to a deliberation that would not be vexed by vocational uncertainty. Related concerns prompted the creation of relatively long terms for federal senators.363 “Sufficient permanency,” Madison declared, was necessary “to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.”364 Sparta and Rome had senators “for life” partly for the purpose of serving as “an anchor against popular fluctuations.”365 So, too, American senators, with longer terms than House representatives, could serve as “the cool and deliberate sense of the community” when the people were “stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentation of interested men.”366 Senators were also required by the Constitution to be at least thirty years old367 and, the President, thirty-five.368 Both prerequisites were intended to “confine[...] the elections to men of whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which, like transient meteors, sometimes mislead as well as dazzle.”369

The Constitution’s formal dedication to the public good also promotes deliberation.370 The Constitution’s Preamble situates the authority for the Constitution in “We the People” and declares that among the Constitution’s purposes are to “provide for the common defence” and to “promote the general Welfare.”371 Accordingly, governmental officials are expected to justify their political positions in terms that are most likely to benefit the public, not particular interests.372 This expectation, in turn, requires that public leaders deliberate over the argu-

over a man’s subsistence amounts to a power over his will.” Id. No. 79, at 408 (Alexander Hamilton) (emphasis removed).

363. See U.S. CONST. art. I, § 3, cl. 1; see also SUNSTEIN, supra note 165, at 21.
364. THE FEDERALIST NO. 63 (James Madison), supra note 167, at 326–27.
365. Id. at 328.
366. Id. at 327.
367. U.S. CONST. art. I, § 3, cl. 3.
368. U.S. CONST. art. II, § 1, cl. 5.
369. THE FEDERALIST NO. 64 (John Jay), supra note 167, at 333.
370. See SUNSTEIN, supra note 165, at 22–23.
372. For analogous arguments, see SUNSTEIN, supra note 165, at 17–27.
ments that they intend to submit to the people.\textsuperscript{373} Unintelligent, or, worse, unintelligible arguments would not benefit the public; neither would those that only pay lip service to the public good. Other parts of the Constitution also imply this expectation. The Commerce Clause of Article I, Section 8 states that only Congress may regulate commerce “among the several States.”\textsuperscript{374} Courts have read the clause in its “dormant” form to prevent a state from discriminating against others to benefit financially its own residents.\textsuperscript{375} For instance, under the Dormant Commerce Clause, Maine would have to show that there are good public-regarding reasons rooted in health and safety, rather than economic protectionism, for forbidding the introduction of live baitfish from other states.\textsuperscript{376} The same logic applies to the Privileges and Immunities Clause of Article IV.\textsuperscript{377} It, too, prohibits discrimination against out-of-staters and requires that states proffer persuasive arguments in public-regarding terms to justify laws that appear biased.\textsuperscript{378}

V. THE AMBITIOUS PLACE OF THE GENTLEMAN IN THE CONSTITUTIONAL ORDER

From the perspective of constitutional enterprise, should we create and sustain conditions for the ideal of the gentleman to thrive?\textsuperscript{379} Although a thorough examination of the question will require another article, a preliminary response may begin by recognizing the answer’s unavoidable ambivalence.

In some ways, the gentleman’s ethos can help to undergird aspects of the Constitution. Consider the First Amendment right to free speech. As construed by the Supreme Court, the First Amendment protects speech that can be terribly offensive: racist speech,\textsuperscript{380} subversive speech,\textsuperscript{381} pornography that glori-

\begin{itemize}
\item \textsuperscript{373} See id.
\item \textsuperscript{374} U.S. Const., art. I, § 8, cl. 3.
\item \textsuperscript{375} See SUNSTEIN, supra note 165, at 32.
\item \textsuperscript{376} The facts are from Maine v. Taylor, 477 U.S. 131 (1986).
\item \textsuperscript{377} U.S. Const., art. IV, § 2, cl. 1.; see also SUNSTEIN, supra note 165, at 32–33.
\item \textsuperscript{378} See SUNSTEIN, supra note 165, at 32–33.
\item \textsuperscript{379} Perhaps the point is moot to some. See MANSFIELD, supra note 90, at 230 (lamenting that “[t]he entire enterprise of modernity could be understood as a project to keep manliness unemployed”).
\item \textsuperscript{381} See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969).
\end{itemize}
fies rape,\textsuperscript{382} and bawdy profanity.\textsuperscript{383} All of this speech is protected partly because of its potential to facilitate the audience in discovering an idea of truth.\textsuperscript{384} The premise here is that the audience is more likely to ascertain the truth if it has access to a diversity of ideas and viewpoints.\textsuperscript{385} A proper man, as the Founding Fathers had conceived him, would embrace the general merits of this premise.\textsuperscript{386} Madison and Adams, for example, had implored men to keep an open mind as they commanded themselves in unending deliberation.\textsuperscript{387} By contrast, such deliberation was incompatible with both the zealous myopia which plagued Hobbes’s hypermasculine men and the reflexive deference to social betters which infantilized Filmer’s subjects.\textsuperscript{388}

Then there is the role of the gentleman’s civility. Notice that the deliberation presupposed by the Court’s justification for free speech also requires a firm tolerance. Although civility is not equivalent to tolerance, it embodies similar traits in publicly accommodating views that are distasteful or disagreeable. Because civility requires the gentleman to treat all as deserving dignity, it can be enlisted to support the Fourteenth Amendment’s Equal Protection Clause. The clause is arguably animated by a principle of equal respect whereby all persons are entitled to a presumption that they are worthy members of the community.\textsuperscript{389}

Despite these positive reconstructions, the Supreme Court cases discussed at the beginning of this Article are heirs to an ideal of manliness that has performed with troubling conse-

\textsuperscript{382} See, e.g., Am. Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
\textsuperscript{385} See Kang, supra note 384, at 9–20.
\textsuperscript{386} See supra Part IV.B.
\textsuperscript{387} For Madison, see supra notes 346–48 and accompanying text. For Adams, see supra notes 349–52 and accompanying text.
\textsuperscript{388} For Hobbes, see supra notes 80–89 and accompanying text. For Filmer, see supra notes 94–96 and accompanying text.
\textsuperscript{389} See Kang, supra note 192 (arguing that people’s sincere embrace of the equal worth of all people is unnecessary for successful enforcement of equality under the law). See generally Karst, supra note 303 (arguing that a principle of equal citizenship animates the Constitution and, specifically, the Fourteenth Amendment).
quences. Recall Justice Brandeis’s opinion in Whitney. He praised civic courage as a distinctly manly virtue that was necessary to discover truth in the marketplace of ideas.\textsuperscript{390} Justice Brandeis argued that the Founders “believed liberty to be the secret of happiness and courage to be the secret of liberty.”\textsuperscript{391} He added, “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”\textsuperscript{392}

There is a distressing but suggestive paradox in Justice Brandeis’s statements. His discussion notwithstanding, if there is a courageous figure in Whitney, it is not some man or group of men. Nor is it Justice Brandeis, who concurred with the judgment to reaffirm Whitney’s conviction. It is Charlotte Anita Whitney herself. A Wellesley graduate, Whitney came from a distinguished upper-class family that boasted a state senator and a Supreme Court Justice.\textsuperscript{393} But instead of indulging the privileges that attended her status, Whitney publicly dedicated herself to controversial and unpopular causes in the early 1900s, such as the protection of African Americans from lynching, the right of women to vote, and the economic rights of labor organizations that were vilified as Communist.\textsuperscript{394} The Oakland Police Department eventually arrested Whitney for violating California’s Criminal Syndicalism Act.\textsuperscript{395} The Act forbade syndicalism, defined as advocating “the commission of crime, sabotage… or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership.”\textsuperscript{396} Jarringly, the Act also prohibited membership in a group “organized or assembled to advocate, teach or aid and abet criminal syndicalism.”\textsuperscript{397} Whitney was convicted under the latter section even though she did not formally belong to an organization advocating syndicalism.\textsuperscript{398} The Supreme Court reaffirmed her conviction and Whitney faced jail time.\textsuperscript{399} Instead of

\begin{itemize}
\item \textsuperscript{390} See supra Introduction.
\item \textsuperscript{391} Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
\item \textsuperscript{392} Id. at 376.
\item \textsuperscript{393} See Bhagwat, supra note 21, at 408.
\item \textsuperscript{394} See id. at 409–10, 412.
\item \textsuperscript{395} Whitney, 274 U.S. at 360 (majority opinion).
\item \textsuperscript{396} Id. at 359–60.
\item \textsuperscript{397} Id. at 360.
\item \textsuperscript{398} See Bhagwat, supra note 21, at 411.
\item \textsuperscript{399} See id. at 421.
\end{itemize}
requesting a pardon from the governor as her supporters urged, Whitney courageously refused on grounds that she “had done nothing to be pardoned for.”

In spite of such manifest demonstrations of bravery, Whitney was banished to invisibility in Justice Brandeis’s summons for civic courage, and this omission should temper the praise that he has received for writing perhaps the most celebrated opinion about the First Amendment. In his opinion, women merely exist as captive ciphers, awaiting rescue from gallant and enlightened men or suffering at the hands of those who are superstitious and paranoid: “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.” The apparent un-self-consciousness with which Justice Brandeis cast men, not women, as agents of political change can trace part of its cultural genealogy to the Founders who praised civic courage.

Let us return one last time to Thomas Paine, that irrepressible clarion of civic courage. Like Justice Brandeis, Paine had called upon men to deliberate pressing political issues, and, given the dangerous consequences of the decisions, he urged them to marshal their courage. When they exhibited civic courage, Paine was delighted, as when the king’s threatening

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400. See id. Her pardon was granted, however, at the request of her lawyers and after a massive statewide writing campaign led by her many prominent supporters. See id.

401. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 369 (1997) (calling the Brandeis opinion “probably the most effective judicial interpretation of the First Amendment ever written”); Blasi, supra note 18, at 668 (calling the Brandeis opinion “arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment”); G. Edward White, The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America, 95 Mich. L. Rev. 299, 325 (1996) (calling the Brandeis opinion “the first impressive appearance of the self-governance rationale in First Amendment theory”).

402. Whitney, 274 U.S. at 376. Even when the impetus for the search for truth is resignation borne of stubborn failure, rather than enlightened courage, men are the center of the action. Consider Justice Oliver Wendell Holmes, Jr.’s words:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.


403. See supra note 353–55 and accompanying text.
speech, “instead of terrifying [the colonists], prepared a way for the manly principles of independence.” \(^{404}\) On the other hand, Paine called New York City, on the verge of a raid by British troops, “the hiding place of women and children.” \(^{405}\) Similarly, Paine warned that Lord Howe’s “business in America is to conquer it, and in proportion as he finds himself unable to the task, he will employ his strength to distress women and weak minds, in order to accomplish through their fears what he cannot effect by his own force.” \(^{406}\) The degree to which Paine denied the presence of courage in women is illustrated by his spiteful barb against Tory party members who supported British rule in America. He wrote:

> There is not such a Being in America as a Tory from conscience: Some secret defect or other is interwoven in the character of all those, be they men or women, who can look with patience on the brutality, luxury and debauchery of the British court, and the violations of their army here. A woman’s virtue must sit very lightly on her who can even hint a favourable sentiment in their behalf. It is remarkable that the whole race of prostitutes in New York were Tories . . . . \(^{407}\)

For Paine, a woman’s virtue derives from her chastity; it is commensurate with the degree of sexual access to her body that she gives men. By contrast, men, as Paine had explained elsewhere, develop their virtue by awaking from their “unmanly slumbers” and battling the British Empire. \(^{408}\) Theirs is a virtue that is political and heroic, whereas women’s virtue is insular and guarded. Paine treated men’s virtue as animated by political courage while he treated women’s virtue as constituted by sexual purity. This distinction may imply that men can lose their virtue if they fail to protect women from other men’s sexual assaults, and women can lose their virtue if men fail to protect them from such assaults. A man’s virtue, according to Paine, derives from his being woman’s protector, a woman’s virtue from being man’s protected.

\(^{404}\) Paine, supra note 121, at 46.  
\(^{405}\) Thomas Paine, The American Crisis II (1776), reprinted in Paine Collection, supra note 121, at 100, 110.  
\(^{406}\) Thomas Paine, The American Crisis III (1776), reprinted in Paine Collection, supra, note 121, at 116, 141.  
\(^{407}\) See id. at 133.  
\(^{408}\) See supra note 354 and accompanying text.
This cultural dynamic is formally celebrated by Justice Scalia in the VMI case.\textsuperscript{409} VMI had required its recruits to follow a “Code of Honor” which declared that a gentleman

- Does not go to a lady’s house if he is affected by alcohol. He is temperate in the use of alcohol.

- A gentleman never discusses the merits or demerits of a lady.

- Does not slap strangers on the back nor so much as lay a finger on a lady.\textsuperscript{410}

A gentleman, the Code implored, “is the descendant of the knight, the crusader; he is the defender of the defenseless.”\textsuperscript{411} But the binary language of defender and defenseless suggests that the virtue of a knight logically requires damsels in distress in whose service said virtue can be deployed. When those damsels attempt to morph into knights, the latter’s status is besieged. That is arguably a chief reason why VMI opposed the introduction of women onto its campus.\textsuperscript{412} It is instructive that the male cadets, despite their formal overtures to protect women, treated the female cadets with a hostility that hearkened back to their more unruly ancestors in the hypermasculinity condemned by Hobbes.\textsuperscript{413}

Where does this leave the persona of the gentleman in the American constitutional enterprise? The gentleman’s ethos is no longer as relevant today as it was in Washington’s time. Today, we do not publicly say that civility, civic courage, and deliberation are gendered virtues; women can easily assume them.\textsuperscript{414} For the Supreme Court, even the very idea of male

\textsuperscript{409} See supra notes 11–15 and accompanying text.
\textsuperscript{411} Id. at 602.
\textsuperscript{413} See id.
\textsuperscript{414} Professor Mansfield observed:

We now avoid using “man” to refer to both sexes, as in the glowing phrase “rights of man” to which America was once dedicated. All the man-words have been brought to account and corrected. Mankind has become humankind . . . But even when “man” means only male, “manly” still seems pretentious in our new society, and threatening to it as well. A manly man is making a point of the bad attitude he ought to be playing down.

MANSFIELD, supra note 90, at 1.
identity is ambiguous and less tethered to gendered social conventions. In Lawrence v. Texas, Justice Kennedy for the majority offered no explicit commentaries about manliness, opting for ruminations about a “personhood” in which one should be permitted to “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” At any rate, no one today seriously believes that only men are capable of self-government. Still, we might appreciate that this condition of relative legal equality between the genders might be partly owing to the Founding Fathers having introduced a political rhetoric whose logic would eventually corrode the male-centered, white, upper-class pedestal whence it ostensibly originated. Civility, after all, requires the gentleman to treat everyone, including women, with equal respect; a gentleman, as such, is morally bound to recognize civic courage even when it is wielded by those beneath his station; and deliberation can cause a gentleman to treat with skepticism his own assumptions of superiority. We might say, then, that the gentleman who is most in furtherance of the Constitution’s values is he who has sought to diminish the formal relevance of his gender. Gentlemanliness is thus distinguished from hypermasculinity in one final respect—the modesty of the former tends to compel it to be a self-consuming artifact, whereas the latter’s arrogance insists on its perpetual domination.

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416. Professor Mansfield never quite distinguished manliness from masculinity, so he proffered a different conclusion. He advocated formal equality between men and women under the law and gender-neutrality in the public sphere, but desired for the sexes to admit their individuality and embrace distinctly “manly” and “womanly” virtues in the private sphere. See MANSFIELD, supra note 90, at 239–44.