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Mr. Benjamin Hart
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The Heritage Foundation
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Aug. 11 1981

THE WHITE HOUSE

Dear Ben:

Thanks for the early draft of your next book — or at least a Fourth of it. Will take it along to Santa Barbara. Say hello to your dad for me. Read his columns regularly in the Union Leader.

Best, Pat

The Heritage Foundation

A tax-exempt public policy research institute

August 5, 1986

Mr. Patrick Buchanan
THE WHITE HOUSE
Washington, D.C.

Dear Pat,

Enclosed you will find the first quarter of a draft of a book I am writing on the historical and philosophical origins of the U.S. Constitution, to be published in conjunction with the Bicentenial next year.

It seems to me knowledge of this subject could add a good deal of weight to Presidential speeches.

I expect to complete the first draft by Labor Day. I thought you might enjoy perusing the pages if you get a moment.

Best Wishes,

Benjamin Hart
Director,
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ACCIDENT OF FREEDOM

The Meaning and Destiny of America's Political Achievement

By Benjamin Hart

CHAPTER ONE

The American Revolution was a remarkable event in history, not because of what it destroyed, but because of what it created. It brought down an existing government and replaced it with something better. An oppressive form of rule gave way to lasting protection of liberty for the individual. It was the first time in history that such a thing had happened. The French Revolution which followed and the Russian Revolution of this century ended in even more despotic and tyranical ruling establishments. Revolution almost inevitably involves the replacing of an oppressive regime with an absolute dictatorship, followed by the annhilation of a large portion of the population. Dozens of nations since the Vietnam War have achieved independence, only to see the emergence of a Pol Pot, an Ayatollah Khomeni, a Muamar Khadaffy, or some similar figure.

If America had followed the usual pattern of revolution, we should have expected George Washington to seize power immediately after winning the war against the British, a reign of terror to extinguish all political opponents, and the establishment of an absolute military despotism. He was elected president by a unanimous vote (check this) at the Philadelphia convention. He had the stature, admiration and love of the people to have assumed total dictatorial power if he had wanted it. But the unique fact of the founding of America was that the Revolutionary leaders never sought to gain control in order to direct it.

Revolution is a radical act. People for the most part are docile and obedient to authority. Even when dissatisfied, most people will choose business-as-usual over an unknown alternative. [redacted] As Boston minister Jonathan Mayhew observed in 1750, the people are naturally "so gentle that there was never a government yet in which thousands of mistakes were not overlooked." Men's natural urge is "to believe whatever is taught, and bear all that is imposed." (Wood p. 38) People are not easily persuaded to revolt. For rebellion does not guarantee improvement. More often it means a bloodbath, and paves the way for the emergence of even more vicious rulers, the type of people who are capable of toppling an established regime.

What made the American Revolution different from any other was that while the act of rebellion was radical, the motives behind it were profoundly conservative. Its foundation rested upon an existing political and intellectual tradition. The aim of America's revolutionaries was to preserve liberties that were already guaranteed in the English constitution, [redacted]. The colonists were in fact extremely proud of their British heritage. James Wilson in a 1775 speech said he was convinced that "both the spirit and the letter of the British constitution justified their resistance." The American revolutionaries were not creating new rights, but asserting existing ones that were not being upheld by the 18th century British ruling establishment. To make their case, the colonists

cited profusely every conceivable English writer, including Hume, Locke, Addison, Swift, James Thompson, and British constitutional scholars Edward Coke and William Blackstone. They quoted scripture, and pointed to Plato, Aristotle, Cicero, Livy and figures of all sorts from the classical world. The truely startling fact of the American Revolution was that not not one of its leaders felt the need to repudiate his English past.

The state constitutions, in fact, were largely copied directly from their orginal royal charters, which in turn were taken from a British legal tradition that extended back to King John's signing of the Great Charter of Liberites in 1215. Even though the theory of constitutional government began in England, the ruling establishment there had too much at stake to adhere closely to its mission, which was the protection of individual rights. To use the often quoted dictum of Lord Acton: "Power corrupts, and absolute power corrupts absolutely." The British understood the theory of liberty, but had not yet discovered how to protect it from being trampled upon by the authorities.

The justification for rebellion on the part of the colonists was the corruption of principles of government that all Englishmen knew to be true. The colonists saw that their constitutional freedoms had been gradually undermined by the crown, "till at length, under the hands of bribary and corruption," proclaimed Reverend Enoch Huntington in a sermon in

1775, "it seems rotten to the very core,"

A distinguishing feature of the American Revolution was that the colonists were not, in fact, an oppressed people; they had no monarch or crushing feudal Aristocracy to overthrow. They merely had to disolve their relationship from a rather detached ruler thousands of miles away. True, the colonists, previously neglected, rebelled against a sudden crackdown on the part of British authorities. But the nature of oppression was nothing compared to 18th century France, where the monarchy was on the scene all the time. The colonists sought to preserve the freedoms they already enjoyed. They had no urge to replace British rule with something completely new, such as Lenin established in Russia. "Experience must be our only guide," declared John Dickinson at the Philadelphia Convention in 1787. "Reason may mislead us."

It is a common mistake of historians to think that the founders of America knew exactly what it was they wanted, or that they had some pre-conceived blueprint for American society in mind. This was not the case. Rebellion evolved from the necessity of events. Most Americans, infact, were extremely sceptical of the benefits of severing their connection with mother England. It was King George III's sudden implemtation of draconian restrictions on freedom, particularly regarding trade, and the Crown's determination to see its polices enforced, that ultimately gave the colonists little choice. When Thomas

Jefferson wrote his Declaration, he presented no new theory of government. He was merely restating British political philosophy. And it was this restatement of the Englaish concept of government that strengthened the case of the colonists and provided so much power to Jefferson's catalogue of grievances against the Crown.

The story of America is one of men groping to find a way, through trial and error, building slowly on experiences of the past, to implement England's highest political ideals in an actual governing establishent. There was a big difference between the lofty platitudes expressed by Thomas Jefferson's Declaration and the actual construction of a social order that upholds original principles, while at the same time coping with the realities of life.

Revolution is easy if one is willing to bear the cost in terms of human suffering. Determined radicals have succeeded any number of times in toppling existing orders, breaking the law in order to achieve independence. The difficult task is to reesetablish the rule of law on new institutional foundations. The price of failing in this final task is the ruin of countless lives, compounded by generations of misery. This the American Revolution avoided.

At the core of American political theory is the belief in constitutional government. The central issue of of the

constiutional debates in 1787 was the disposition of authority. There was widespread disagreement at the time over precisely how a governing structure of American society ought to be set up. But all agreed on the following propositions: a) power is the enemy of liberty, but that b) power, as wielded by an authority, is required to preserve freedom from attacks by society's malefactors: criminals, foreign aggressors, and so forth.

A central assumption of America's founders was Original Sin, meaning the corruption of man's character. Self-interest, they believed, was the most powerful of all human motives. If properly channelled, the desire to improve one's condition, to elevate oneself, can lead to tremendous accomplishments, and can lift the entire community. But government, because it is in the hands of men, has the same motive. It addresses its own aims first, which is the accumulation of wealth and power for itself. Government, by its nature, has no qualms about sacrificing the interests of the weak and isolated individual for its own aggrandizement.

In the minds of the framers, politics was nothing more than the perpetual struggle between the passions of those in power and the rights of the people. "Whatever is good for the people," wrote Thomas Gordon in Cato's Letters, one of the most influential works of the period, "is bad for the governors." The nature of power, wrote one 18th Century American poet, is that "if at first it meets with no control [it] creeps by degrees and

quick subdues the whole" (Balyn p. 57).

Until the American Revolution, power had always emerged victorious over freedom. Individual liberty directly challenges the domain of authority. It is, therefore, not in government's interest to permit freedom to flourish. Moreover, restricitng choice is what government is supposed to do. Government acts as umpire, regulator, jailer, war maker and, sometimes, executioner. Its function is to force indivduals to do things for which they would not otherwise volunteer, like pay taxes, or stand in front of a firing squad. The trick is to prevent government from compelling people to do these things illigitamately. The theory says that individuals have an inalienable right to life, liberty and property, and that it is government's responsibility to protect these rights. But it is the very essence of government to take away all three. Moreover, it is in the interest of government to do so.

Until the creation of the American Republic, no society had solved this dilema. The framers managed to devise constituional mechanisms to limit and difuse authority, thus making illegal uses of power on the part of our governors less likely, or at least less disasterous. The abolition of privilege, regular elections, separation of powers, checks and balances, executive veto, judicial review, states rights and open markets all served to protect citizens from government encroachment. Compared to

other societies, this political arrangement has worked very well. America, 200 years later, has the oldest written constitution still in use.

Americans today usually display shock when they conditions under which people are forced to live overseas. Television footage of starvation in Ethiopia, Mozambique and the Sudan stunned America into sending boatloads of food and millions of dollars to Africa. Network broadcasts of poverty in Latin America are treated with incredulity. Famines, it is commonly thought, are aberrations resulting from unpredictable weather patterns. This is understandable given that the American experience is one of unparralled surpluses.

But America is not like the rest of the world, especially the non-Western World, where starvation and shortage is the norm. It is not the famines of Africa that are the aberration. They most closely approximate man's condition through history. It is America that is unusual, representing the highest level of material -- and I would argue spiritual -- progress ever achieved.

It is the American form of government, created during that 11 year period from 1776 to 1787, that has allowed the remarkable transformation in the fortune of western man to occur. So staggering was the American political achievement, that the French government in the mid-nineteen century commissioned Alexis de Toqueville (tk other examples of european political scientists

travelling to the New World) to study the secret of its success.

But American consitutional democracy has not proved exportable to many other parts of the globe. Only Western Europe and tiny parts of Asia have successfully imitated the American example. There are reasons for this.

It is unlikely that constitutional democracy could have taken root in America without the British heritage. Spain, which had no constitutional tradition, colonized Latin America, where despotic regimes still reign and poverty prevails. Perhaps it would be possible to establish a working constitutional democracy in, say, India. But I doubt it. The ruling establishment has a personal interest in maintaining the repressive caste system, in place now for centuries (date this).

In his Advice to the Privileged Orders in the Several States of Europe, published in 1792, Joel Barlow said that what separated the free from the oppressed was a "habit of thinking." Tyranny is legitimized in people's minds if they have known nothing else. America, though, was a new frontier, with no established tradition of rule. It was a blank slate. For more than a century, the English colonists lived in only loose affiliation with a government. From this experience, they formed a new habit of thinking that they were free. The missing element for establishing free societies elsewhere seems to be the frontier. Everywhere on the globe ruling establishments have

taken firm root, and most of these are either authoritarian or tyranical. They will not give up power easily. It seems virtually impossible to constuct free political institutions in nations that have no experience of liberty, no heritage to draw from.

Moreover, since World War II free territory has steadliy given way to totalitarian aggression. Former Soviet Premier Leonoid Breznev was fond of boasting that once a country drops into the Soviet orbit, it will never leave the communst camp. With but one or two minor exceptions Brezhnev's prophesy has proven correct. Eleven nations (check this) since Vietnam have been subsumed by the red tide (footnote listing countries). For the vast majority of people, the political dynamic is stacked heavily against liberty and in favor of state power. Before we surrender it too easily, therefore, it is important to examine precisely what went into the establishment of a constitutional democracy.

In addition, we should reflect on the likely consequences of permitting the errosion of its foundations. There has emerged inside America's borders a new form of despotism, unique to democratic governing establishments, that exerts continuous pressure on our constitutional liberities. Already the public sector in the United States consumes almost 40 percent of the total economy. (tk examples encroachment by the U.S. government on individual freedoms).

Writing in the 19th Century, Alexis de Toqueville predicted its rise of this enormous governing structure, and described its likely character: Over its people will stand "an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate," wrote Toqueville. "It gladly works for their happiness but wants to be the sole agent and judge of it. It provides for their security, forsees and supplies their necessities, facilitates their plessures, manages their principal concerns, directs their industry. makes rules for their testaments, and divides their inheritances . . .

"Thus it daily makes the excercise of free choice less useful and rarer, restricts the activity of free will within a narrower compass, and little by little robs each citizen of the proper use of his own faculties."

Americans today are increasingly threatened by just such a despotism. Government has creeped its way into almost every aspect of life, making decisions for individuals, and consuming resources in way not envisioned by the framers of the consitution. Toqueville warned of the threat to liberty posed by an ever-expanding paternalistic power, covering "the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd. It does not break men's will, but softens, bends and

guides it; it seldom enjoins, but often inhibits action; it does not destroy anything, but prevents much from being born."

If allowed, authority will inevitably seize total power. In a consitutional democracy, this does not happen very easily. We will probably never see a military junta take over the Capital in Washington. Government in America has increased it domain incrementally by paying off certain favored voter blocks through the federal trough at the expense its political opposition, with the ultimate aim of perpetuating itself, and making as many people as possible dependent upon its generosity. This is how democratic governments achieve dominon over the population. They hand out the tax payers' money, and follow that money with a host of regulations restricting individual choice. Whenever we ask government to intervene on our behalf, we can expect a corresponding reduction in the area of freedom.

"It is therefore especially necessary in our own democratic age for the true friends of liberty and of human dignity to be on the alert to prevent the social power from lightly sacrificing the private rights of some individuals while carrying through its general designs," said Toqueville. "No citizen is so insignificant that he can be trodden down without very dangerous results, and no private rights are of such little importance that they can safely be left subject to arbitrary decisions."

As we allow our constitutional protections to erode, we begin to forget exactly what it means to be free. For a nation

based on the sanctity of individual liberty, infrignement on any right, observed Toqueville, "deeply corrupts the mores of the nation and puts the whole society in danger, because the very idea of this kind of right tends constantly among us to be impaired and lost." Americans have already adopted a new "habit of thinking," seeing government as a provider; not as policeman or arbiter of disputes, but as arbiter of decisions that in an earlier age were thought the domain of the individual. America today with its bloated federal bureaucracy, and budget now of more than a trillion dollars, is far removed from the notion the American colonists had when they forged a new nation out of the wilderness, one "conceived in liberty."

Political freedom is extremely rare. The road to Philadelphia Constitutional convention of 1787 was long and arduous -- in fact, spanning some five centuries. The creation of the American Republic came about under historical circumstances that probably can never be duplicated.

But Americans at this point in history seem reluctant to confront the reality of this conflict beween the ceaseless claims of the state and the rights of the individual. Perhaps believing, after 200 years, that constitutional democracy is a permanent institution that cannot be torn assunder by the passion for power -- or that officials in Washington are somehow different in nature from officals in other capitals -- Americans

have grown passive in their material comforts, and seem largely unaware of the cost involved in preserving their unusual heritage. (insert Jefferson quote about the tree of liberty needing continuous watering by the blood of martyrs and tyrants). Jefferson knew that freedom may be nothing more than a blip on the screen of human history, a parenthesis that will certainly close if we surrender to governors the power to make decisions.

According to Machiavelli's maxim, "All human constitutions are subject to corruption and must perish, unless they are timely renewed by reducing them to their first principles." (check exact quote) It is time to refresh our memories as to exactly how it is we came to be Americans, and what is required if we are to remain Americans in the original sense of the word.

Liberty today is under attack in all quarters of existence: in brutal fashion by totalitarian powers abroad, and in mild form by our own government here at home. It should not surprise anyone that this perennial struggle between the rulers and the ruled continues unabaited. As long as men must live together in society, we know from past experience that this battle will never end.

CHAPTER TWO

Even after the American example, modernity has not touched more than ten percent of the world's population. But before the American Revolution, the history of the world's people was charaterized by unbelievable misery. Only a fraction of one percent (check this) lived above subsistance, mostly kings, nobles and feudal lords profiting from the servile labor of others.

It is worth looking briefly at life as most people experienced it at the height of the Middle Ages, a century or so before Columbus set foot on the American continent. Many of us have a romantic view of the Middle Ages, which largely has been passed down to us through the literature of the period: visions of knights, fair maidens, cathedrals, magicians. We think of St. Francis of Assisi roaming the streets and fields of Italy searching for converts and playing his lute, or St. Thomas Aquinas emersed in thought, working undisturbed on his Summa Theologica in a library at the University of Paris. We sympathize with Don Quixote's quest for the ideals associated with Knight errantry. No child tires of listening to tales of Robin Hood and King Arthur's court. Many American writers today look back to the Middle Ages with nostalgia, lamenting the loss of romance, community and relgious faith.

There was order in Midieval Europe. Everyone knew their place in society. There was little uncertainly about anyone's beliefs. For these things were all determined by centuries of

custom. Ambition was not much of a factor in every day life. A son generally entered the profession of his father, who in turn had inherited it from his father, a pattern that was repeated for generations. Life was stable and predictable. One knew his neighbors, and would almost certainly marry one of them. The idea of Medieval life -- unchanging, timeless, and rooted in the soil -- often sounds appealing to a modern American, who, in all liklihood, leads a cosmopolitan life with all its unpredictability and disillusion.

The serene and romantic Medieval ideal, however, begins to lose its lustre when one considers that life in those days bore no resemblance to the Gothic romance novel. The overarching daily concern of the average person up until about the 18th Century was survival.

About 90 percent of the population of Medieval Europe spent his waking hours in agriculture. The fact that food was such a major preoccupation of Medieval life is an indication of how difficult it was to obtain. Whether or not one could eat on a particular day was a major source of insecurity. While the hub of modern Western society is the city -- the center of large-scale finance and trade -- Medieval life was almost completely rural. The limited scale on which commerce was conducted can be seen in the fact that Cologne, a major German city and center of trade today, had a population in the 15th Century of only 20,000,

even though it is located where two branches of the Rhine connect -- perfect for transporting large cargos by ship or barge from port to port. (Rosenberg and Birdzell. p.40). because everything in Medieval society was produced on such a small scale, poor weather often meant starvation.

Medieval life was organized primarily around the manor -- much like the southern plantation in the american colonies. The manor, and the land around it, was owned by a lord, or sovereign. It was maintained and cultivated by tenants, who were bound to the manor, and served at the whim of the lord, who granted all their economic and political privileges.

The manorial lord, or baron, was in turn bound, albeit loosely, to some king or independent prince. Kings and princes in Medieval times were not the powers they became in the 16th and 17th centuries, as there was little way they could enforce their rule. Transportation, communication and weaponry -- essential for any centralized power -- were extremely primative. In addition, the vast majority of wealth and manpower resided in the manor. If a king needed to raise an army, he would need the support of the manorial lords. The doctrine of the devine right of kings -- the subject of much contention in Shakespeare's history plays -- arose out of this social and political climate. In making a stronger case to the baronage for the funding of a particular project, such as waging a war, a king often attempted to connect loyalty to him with duty to God. This, in essential

terms, was the structure of feudal society in Europe in the year 1450, and before.

The manorial lord gained in political and economic power from the compulsory labor of tenants living on his property. Typically, an occupant and his family would be assigned a tract of land to cultivate, from which he would be permitted to keep a small percentage of what was produced, usually substance level, sometimes less. The amount confiscated by the lord in terms of taxes, duties and actual goods varied from manor to manor. It was understood by all involved, however, that everyone worked for the benefit of their lord -- not themselves, and certainly not for profit.

The tenants, or serfs, were bound by law to the land. They inherited their status and were born into their respective manors. As such the tenants were part of the property. If any tried to escape, they were subject to capture. They were different from slaves in one respect. Their lord could not sell them. The tenants were permanent residents. They inherited their lord, and their lord inherited them.

There was some trade within the manorial system, although on a very primitive basis. After a serf had met his obligations to his lord -- in terms of labor, taxes, duties, etcetera -- what was left became his own. He could use that which he did not consume to engage in limited trade. Exchanges were almost never

mediated by money. Usually a serf would trade his labor or use of his land for a particular product he could not produce himself. Or he might take any surplus of crops, or crudely manufactured clothing, into town and trade them for whatever he could not obtain from the manor. The lord, of course, was more involved in trade outside the manor, using whatever was produced by his serfs to trade for weapons, jewels, and finer garments. But only about 20 percent of Europe's people lived outside the manor, meaning opportunities for trade were very limited.

It was rare to find someone who made his living through trade, that is as a broker who would buy someone's handiwork and sell it to someone else as a profit. One reason for this was the "just price" and "just wage" theories, promulgated mainly through the Catholic Church. The idea that a price could be settled through negotiation between buyer and seller was an entirely alien notion in Medieval society. Instead, prices and wages were set by custom. Every service and every product had a fixed price. Sometimes it was impossible to provide a given service or product without suffering a financial setback for which the fixed price could not adequately compensate. A drought, for example, would cause a food shortage. In a market economy we could expect a rise in prices for crops. Not so in medieval society. Prices remained fixed regardless.

Naturally, one would expect a labor shortage if by working one ends up with less than he started with. Thus, laws were

passed requiring that people provide their particular service at the fixed price, no matter what extraaneous factors might be involved.

It was easy to identify precisely what srvice a village resident was to furnish, since he was required to belong to a guild. Clearly it was preferable to to be a member of a guild, and thus living in town, than it was to be marooned on a manorial plantation. The town, from the serf's perspective, was a haven of boundless opportunity. Nevertheless, gaining access to a guild was all but impossible. Again, one gained his position in this structure almost entirely through inheritance. In addition, the guild enforced all regulations of the trade -- prices, wages, rules for workmanship and so forth -- and administered punishments for transgressors. (Describe some types of punishments).

The merchant was seen as a scurrilous character in feudal Europe. To most, he seemed to provide nothing of obvious value, serving as middleman who skimmed his profit off the labor of others, buying cheaply and selling to someone else for more than it was worth. His contracts, therfore, were not enforced in the feudal court system.

An essential requirement for a merchant's ability to conduct business is the capacity to calculate with reliability the future delivery of a cargo, and subsequent payment. But this notion was

entirely alien to the Medieval concept of justice. Charging interest on money was prohibited by the Church, as was the selling of insurance, thus making it difficult for a merchant to hedge his bets against possible future calamity. Such taboos made the amassing of wealth through a combination of skill, luck, and sure calcluation all but impossible.

The idea that new products could be developed, larger markets found, or that a service could be delivered more efficiently, cheaply, and with higher quality if competition were permitted and agreements enforced, was not part of the Medieval experience, or its understanding of a just social order. Indeed, the Englsih royal courts did not resign itself to the enforcement of merchants' contracts until well into the 18th century [illegible] [illegible] of Lord Mansfield.

The prejudice the businessman endured in English society is apparent in Shakespeare's Merchant of Venice, in which Shylock "The Jew" tricks (Tk name) into accepting unreasonable and deadly terms on the delivery of a Cargo. Naturally, justice prevails in the play and the Merchant of Venice is comically disgraced.

Ever since Adam Smith published The Wealth of Nations, in 1776 (check date), in which he set forth an economic model based on his observation of human behavior, we have referred to the inexorable laws of economics. But Medieval society had no understanding of these forces that drive men to choose some things over others. Thus when feudal lawmakers were confronted

with the first of the major plague epidemics, which eventually wiped out about one-third of Europe's population, their response was not to allow a wage increase to account for an accompanying labor shortage. Rather, the English Parliment enacted the Statute of Labourers in 1350, requiring a cut in what workers were to be paid.

The determination to enforce custom, tradition and habit, excluded the possibility of buying grain on credit in order to protect oneself against a poor harvest. Thus, paradoxically, we find that by prohibiting interest on money and, therefore, outlawing the financial risk-taker from this protected, security-conscious social order, the Medieval world reduced the security of the vast majority of people. The iron-clad rigidity and adherence to custom, as enforced by law, eventually lead to the break-down of the feudal system. Just as it is the architect's responsibility to build flexibility into a skyscraper so that it will not snap in a stiff breeze, so a political order must learn to adjust to the winds of change. This, the feudal system was incapable of doing. It was enventually overwhelmed by man's most natural desire, the desire to improve his situation.

CHAPTER THREE

The fact that free societies exist at all can be traced to an accident of history that occurred some seven centuries ago. The idea that the individual -- or at least some idividuals -- have rights that transcend the demands of the ruler, was first set down in concrete terms in England, in (TK), with Henry I's Charter of Liberties. The motive behind the Charter, on Henry's part, however, was not to relinquish the Crown's power. It was a political attack on the feudal lords, and Church authority, who consistenty resisted any movement towards centralizaiton. The Crown wanted more power for itself, while, for obvious reasons, the barons and clergy wanted things to remain as they were.

The Charter of Liberties was used particularly well to advance the political fortunes of Henry II, who had the instincts of a lawyer. He succeeded in restricting the hereditary privileges of the barons to the narrowest of limits, but failed in his attempt to bring spiritual leaders under the authority of ordinary civil law. Perhaps most important of all his achievements -- which came to the detriment of the baronage -- was the development of the Grand Jury and system of ciruit courts to enforce the Henry's Charter of Liberties and protect individuals against unfair prosecution. The Charter of Liberites was enormously popular, and enhanced the esteem of the Crown. But more importantly, as far as the King was concerned, it increased his power.

Henry's successor, John, did not, however, use the Crown's new authority to advance the sprirt of the law as written down in the Charter. He confiscated much of the barons' property and used the increased administrative machinery at his disposal to oppress every class of citizen. He levied heavy taxes against the small, but increasingly wealthy, merchant class. Originally intended to protect individuals against arbitrary government actions, the courts he used as instruments of extortion. Most imprudent of all, from his perspective, was his attack on the Church, oracle of all moral spiritual authority, and with plenty of political power at its disposal. Thus, he incurred against him the wrath of all interests and classes, who had at their disposal a written contract from the Crown that their rights would be protected. John was forced to sign an expanded version of Henry's Charter in June of 1215 at Runnymede, after which it was known as Magna Carta, or The Great Charter. From that point on, the oppressed in England constantly referred to the Charter to lend credence to their grievances.

The Great Charter was the first written constitution. Developed by Henry as part of a plan to seize power, and centralize the administrative authority of the King, it backfired against royal perogative. King John did not anticipate that both sides of a political dispute could use the Great Charter as a weapon to take power away from the other.

We have found that to this day, in America, both the right

and left, Republicans and Democrats, accuse their opponents' proposals of being unconstitutional. The ACLU wraps itself in the First Amendment, with the unstated purpose of advancing a liberal agenda. The NRA has built an entire (TK member) lobby around the (Tk) amendment which guarantees the right to keep and bear arms. (TK on "Takings clause" due process, etc. there is the "Right to Life" movement versus the "pro-choice" movement, etc.) All are movements whose stated purpose is to restrict the domain of government. The unstated purpose, however, is often to empower the state in other areas, favored by the particular lobby. People, in general, are advocates of freedom for themselves, but not those who disagree or who have competing interests. It's the nature of man to behave that way.

The Charter of Liberties provided a set of procedures under which government was to operate. By promising certain rights to individuals in order to use them as bulwarks against the clergy and landed barons, Henry I inadvertently put a check on his own whim. "Form," says Jhering, "is the sworn enemy of caprice, the twin sister of liberty." (p. 14. Roscoe Pound) The rule of law really means that everyone -- rulers and ruled -- will be subject to the same code, and judged according to the same procedures.

The expanded version of the Charter of Liberties the barons forced John to sign, defined freedom, not as a concession to the

people by the King, but as legal propositions that could be violated by no one. Moreover, it did not make general declarations in universal terms, but sought to address specific grievances, and remedy specific ills. This is the secret of its enduring importance. John's signing, under duress, of Magna Carta was the beginning of a legal tradition that involves examining particular cases, using precedent to judge future disputes, and addressing unforseen grievances. It looked at things in the concrete, as they came up, and went forward cautiously, and in light of experience. It is this document that shaped the thinking of the modern lawyer. It formed the basis of the U.S. Constitution. It's methodology is scrupulously followed today in good American law schools.

Magna Carta, though, was made possible, not by any great desire for a free society on the part of rulers of Medieval England. It came about because power was sufficiently dispersed, and more-or-less equally, between King, clergy, and landlords. Each wanted to protect their own interests from encroachment by the other two. The rising merchant class also had an interest in the Great Charter. There is no incentive for any ruler to guarantee liberties for others if all authority resides with him. Thus, Magna Carta arose out of a politcal accident of history, and this accident provided the basis for the separation of powers doctrine, and the States Rights notion embodied in the U.S. Constitution. The more power is dispersed, the greater chance a

society has of remaining free, or nearly free.

Magna Carta declared that property could not be taken by the King for his own purpsoes unless he payed the landowner for it. It called for reasonable fines in proportion to the offense. It said that no free man can be imprisoned, banished, outlawed, punished in any way, or deprived of established privileges without lawful judgement; that there should be a division in authority between the temporal and spiritual authority (to protect the Church from encroachments by the King); and for the merchants it called for uniform weights and measures, the freedom to travel, and freedom from arbitrary taxation.

These provisions formed the fundamental basis for the American Bill of Rights, which have been applied and interpreted in U.S. Courts for two hundred years.

Liberty came under attack again during the reign of Henry III. But the combined forces of the various classes under seige managed to reaffirm the priciples of the written document. Magna Carta became embedded in the English tradition during the reign of Edward I, who ruled for a generation. Although his main wish was to gain political allies close to home to combat the still formidable power of manorial lords in the hinterlands, Edward, much to his credit, completed the organization of Parliment and the courts, which in turn took away his power over finance. He was forbidden from levying taxes on the towns without consulting

Parlimant. Edward I's Confirmation of the Charter of Liberties marked the beginning of the modern British legal tradition, which was eventually exported to the American colonies, where it's provisions, guaranteeing liberty, would form the foundation upon which our nation could be created.

CHAPTER FOUR

The Sixteenth century was a period of centralization. Continental Europe saw the rise of the absolute monarchies that continued into the 18th century. In England, Parlimant and the courts were in a life and death struggle with the Crown, until the Glorious Revolution of 1688 temporarilly settled the question. It wasn't long, however, until the Crown began encroaching on the rights of English speaking people again, causing the American colonists to revolt against Royal authority [illegible], after the government's demands grew intolerable. Thus, the pitched battle between the rule of law and the caprice of rulers never ends. It has raged in England since the the signing of Magan Carta in (TK), and is no less fervent in America 200 years after ratification of the U.S. Constitution.

The Reformation abolished about half the provisions contained in Magna Carta. Judges could no longer strike down Parlimentary legislation that encroached on the domain of the church. Abolished in 1535 were the Year Books which had recorded every juudicial decision since Edward I. It appeared that British Law would be replaced by Roman Law, where the Judiciary would be replaced by new tribunals with minimal respect for rights of the individual, and the legal code would be discarded in favor of more absolute control for the monarchy. Characterizing the tribunals of the period were the Court of Requests, the Star Chamber and the King's Council, which were not tied down by the formal procedures that had evolved over three

centuries of experience.

The Wars of the Roses had decimated the barronage, which as bad as they were, had served as an effective counterweight to absolute monarchial power. Parlimant had surrendered to the Crown the power to simply proclaim legislation. France and Spain saw the rise of the absolute monarchies of Francis I and Charles V. The two continental powers had not developed a constitutional tradition, and so there was little resistance to the ascendacy of all-powerful kings there. Prospects for freedom's survival would have been extremely bleak if it had not been for two unanticiapted developments that allowed individuals move beyond the reach of the Monarch's arm.

The first, was the increased wealth and mobility of the merchant class, operating on the fringes of established society. The second, was the discovery of the New World. The period between the middle of the fifteenth century and the eighteenth saw the emergence of trade, and the development of institutions favorable to commerce.

At the beginning of the Sixteenth Century, feudalism and the landed manorial system was on the wain, slowly losing its grip over the peasantry, and giving way to the incresingly formidable centralized powers. The catastrophic plagues of (Tk) and (Tk), which cut Europe's population by about one third also created gaping cracks in the old order. There was a power vacuum, and

the rising merchant class took full advantage of it to break out of the guilded system, to fill new niches in markets, and to find expanded opportunities for wealth over seas.

The most important asset a trader has at his disposal is mobility, which is why the development of the three-masted ship in the latter fifteenth century was vital to the development of capitalism. It offered the merchant the possibility to transport Westerners and large quantities of goods, inexpensively, to unexplored corners of Asia and America. The seas were beyond the reach of the single sovereign, who had not yet consolidated his victory over the barronage; and attempts by the Papacy to proclaim for the Church domain over non-European markets only fanned the fires of the Protestant Reformation.

The overseas markets of Asia, the East Indies and America, in turn, fed the acqisitive nature of traders, and created new appetites that could not be fed by the static guilds. It was the injection of the desire for more gold, finer silks, richer spices and cheaper tobacco into the widening cracks of feudal Euorpe, and the quest for better and more efficient ways of transforming raw materials into finished products, that finally killed off the old order. Marx and Engles provide exactly this explanation in their Communist Manifesto, published in 1848 (check this):

> The discovery of America, the rounding of the Cape, opened up fresh ground for the rising bourgeoise. The East-Indian and Chinese

> markets, the colonization of America, trade with the colonies, the increase in the means of exchange and in commodities generally, gave to commerce, to navigation, to industry, an impulse never before known, and thereby, to the revolutionary element in the tottering feudal society, a rapid development. The feudal system of industry, under which industrial production was monoploized by closed guilds, now no longer sufficed for the growing wants of new markets.

It is a mistake to think that the increase in commercial power of the merchants came at the expense of the barronage other other powers that be. First, there was no sudden capitalist revolution in Europe. Its emergence was slow and steady -- almost unnoticed. In addition, the financial opportunities were available not only to merchants, but also to the manorial lords, princes, kings and anyone with assets. As the barronage lost its political clout, it began to divert its energies elsewhere. The expansion of trade overseas would have been impossible if it could not have attracted capital, which means selling the pricipal holders of wealth on the financial soundness of a given enterprise. Gradually, the barronage found it far more profitable for them to trade with merchants, and invest in their voyages, than to spend energy and resources exacting trifling dues from impoverished serfs. They also began to relize that it was far more efficient to contract with a specialist for a particular job, than to provide for every need of a tenant and his family in paternalistic fashion. Eventually, serfs were permitted to leave the manorial estates

and move to the urban centers, which opened up new horizons for them as well. The evidence indicates that the wealth of the feudal lordship increased, and quite dramatically, during the decline of feudalism. But other classes of people were growing rich as well. The pie was getting larger, and more people were getting a piece of it.

By the time the central governments had consolidated their power, which was the 17th century (check exact dates of first aboslute monarchies), the merchant class had become an affluent and potent political force. Royal authorities saw that it was to its own advantage to make the interests of the commercial powers one and the same with the Crown's. They also saw the merchants as abundant sources of revenue, and who could provide far more in terms of taxes than the static resources of the old feudal manors. In return for taxes and duties levied on the commerical interests, the government would grant monopolies, and prohibit competitors from gaining access to trade routes already in use. This was the precise purpose of the British Navigation Acts, first passed in (TK Year), and formed the essence of the Merchantilist philsophy of commerce that prevailed until 1776 when Adam Smith published his Wealth of Nations, which made the case that the freeer the trade, the better for all concerned. The Navigation Acts were continuously expanded and made more oppressive throughout the seventeenth and eighteen centuries, and lead ultimately to Revolution on the part of the American

colonies.

Nevertheless, merchantilism, even as reglated as it was, was a decisive victory for freedom over the old, stratified, heirarchical order. It permitted the rise of capitalism, because it accomodated the interests of the ruling establishment.

A trade economy presupposes a certain amount of freedom. Merchants must be free to move around. They must be free to negotiate prices, whether buying or selling. They must be subject to laws different than those in the lower ranks of feudal society. They must be free from customary ties, duties and obligations to the manor, baron or guild. Thus, governments would grant corporate charters providing exemptions from the old laws to certain merchants in return for a portion of the profits. Such charters, exempting certain traders from the feudal order, played a large role in the development of urban centers, usually located on the coast, or on the shores of large rivers, thus providing easy access to ships with large cargos. The Royal corporate Charters were very similar to the enterprise zone concept of today, granting special privileges to certain classes of people in order to accompish a political or social objective.

Economic growth is integrally connected with the rise of urban life. Cites that prospered increased in population, while those that did not lost people. Moreover, institutions required for large scale commercial activity can only flourish in densely

populated areas because of the large volume of clients, money, raw materials and finished products needed to turn a profit. This is true for banks, insurance companies, or any dealer in commodities, all of which needed to be exempt from just price and just wage laws, prohibitions against the charging of interest and gambling on the success or failure of a given enterprise. Bills of exchange were introduced to allow for easy transfer of money. Lloyds of London is the oldest insurance company in existance. Dating back to the late seventeenth century, a group of investers would gather regularly at Lloyd's coffee house and set premiums for shipowners. Merchants who were charged with delivering valuable and large cargos needed to insure themselves against mishaps at sea. Stocks were traded freely in embryo stock markets in London, Paris and Amserdam. The corporation became a means of assembling enough capital to embark on large commercial projects not dreamed of in an earlier day. The Bank of Amserdam was formed in the Seventeenth Century and was followed by the Bank of England. Large Corporations like the English and Dutch East India Companies were granted government charters in (TK year) and (TK year) to assemble capital for exploration overseas.

This commerical revolution finished off the Middle Ages. Centuries of changlessness, evolved, very slowly and imperceptably at first, into a period of ceaseless growth, feeding on itself, and increasing exponentially. Commercial expansion became the central characteristic of this civilization,

which burst the seams of feudal society, and lept the oceans. It continued on the North American continent. Unhampered by custom and traditional taboo, the capitalist spirit dominated the souls of the colonists, and eventually shattered what European-imposed contraints still remained. This seething desire to hide from authority, acquire wealth, and probe human frontiers, led man to leave the safe confines of the Old World. He was willing to risk starvation, plague, death by savages, and catastrophy at sea to find something better. Even if he did not know exactly what it was was searching for, he wanted it to be new.

CHAPTER FIVE

The Middle Ages, despite its rigid adherance to the time-tested ways of the past, watered the seeds of the new order. It placed high value on gallantry, daring and the spirit of adventure seen in the travels of Marco Polo, the Crusades, and pilgrimages to religious shrines and holy lands. There were myths of Knight errantry, (Tk, Tk . . .). This mythology was important for inculcating the spirit of the entrepreneur found in the great explorers of later centuries. Christopher Columbus represented this ideal when he eventually persuaded the joint Spanish Sovereigns, Ferdinand and Isabella, to give him three ships, a cut of all riches and precious metals he brought home with him, and the title of Admiral of the Ocean Sea. He declared his mission to be two fold: discover a short-cut to the Indies, thus tapping into Asian wealth directly without having to pay caravans of camel jockies, junk sailors and assorted middlemen; his other goal, no less important, was to convert the heathen to Christianity, which was especially appealing to the Spanish authorities, who had been engaged in horrific religious wars with Islam. Columbus means "Christ Bearer," and he saw is mission as inspired by God.

On October 12, 1492, a lookout in the Pinta sighted one of the Bahama Islands. Columbus named it San Salvador, which it retains to this day. The Admiral thought he had made it to the Indies, and so called the natives Indians. Columbus had with him a letter from Ferdinand and Isabelle to "The Grand Khan," the

supposed Emporer of China. The natives were peaceful, scantilly clad and, to the great disappointment of Columbus, had no gold.

The Admiral then set sail for Cuba, taking with him some natives as guides. Eager to please, the Indians -- Arawaks -- led him to believe he would find gold there. He found tobacco, and his crew enjoyed the cigars. The cultivation and use of tobacco had already spread throughout the New World, and it would not be long before Europeans would reap enormous profits from the nicotine leaf by shipping it to the Old World. But Columbus saw little advantage in the tobacco, and was distressed at finding no valuable spices of the Orient, such as cinnamon and cloves.

The Great discovery had been made, but Columbus did not realize it. To him, the Bahamas and Cuba were island outposts to Asia. Japan and China must be near by. Before setting sail again for Spain, he noticed the Indians on the Island of Hispanolia wore God jewlery, which they made from yellow metals obtained from panning in the streams. The amounts weren't significant, but Columbus thought it wise to set up a small trading post there anyway.

He returned to Spain, reported on his discovery to Ferdiand and Isabella, and convinced them that more trips were needed. He set sail again on (tk), 1493, with a fleet of 17 ships and 1200 men, discovering yet more islands which he named: Lesser Antilles, Guadeloupe, Antigua, Nevis, St. Croix, the

Vrigin Islands, Puerto Rico. He found to his chagrin, however, that his trading post on Hispaniola had been wiped out by Indians. Evidently, his sailors had run afoul of the local chief, named Caonabo, who did not appreciate their womanizing or or their implacable lust for the yellow metal.

Columbus started a new colony, more abitious in scope, about 75 miles north on Hispaniola, and named it Isabella. There he forced gold tributes from the natives, who had little use for the commodity, and who had even less of it. In order to keep the colony going, Columbus divided up the land, awarding the territories to his men, who could use the natives who lived on it as forced laborors. He then sailed to neighboring islands where he captured more natives and brought them back to the colony. This was a standard Spanish practice, and within fifty years there were no more natives in the Bahamas, while those of Hispaniola numbered about 300,000.

Columbus convinced Ferdinand and Isabella that his discovery was valuable, and they allowed him to two more voyages, one in 1494, and another in 1498, when he sailed farther south. He did find pearls in Venuzuala, but for the most part encountered more naked Indians. Columbus returned to Spain, where he died poor and despised. His discoveries were regarded by Spanish authorities as useless.

(Tk briefly the exploits of other spanish explorers, Cortez, De Soto, etc. and exploits into North America) Spain rapidly

colonized Granada, the Canary Islands of the West Indies (Tk dates) and later Mexico, Venuzuala and Peru, and, with the exception of Brazil which fell under the domain of the Portugese, swept every inch of soil from Cape Horn to the Rio Grande into the Spanish empire. In one generation Spain conquered more territory than Rome had over five centuries. In the year 1580 Phillip II ascended to the thrones of both Portugal and Spain, thus consolidating two empires. It was a staggering military and political accomplishment. Nothing like it had occurred in human history. Spain was the envy of the World. It would be 27 years before the British could place a single Englishman on the American continent.

It is a peculiar fact then that Spain, which began colonizing the New World more than a century before the British, had so little impact over the future development of North America, and that the effects of European colonization in Central and South America were so unimpressive.

Spain ultimately failed in the New World because it retained the military spirit of feudalism longer than did the British. The reasons were mainly the geographical, relgious, and political differences between the two nations. Spain was engaged in wars with the Muslims that spanned centuries. Islam, the more advanced civilization at the time, had, in fact, conquered about half of Spain by (Tk), when the Spanish finally began pushing

them back. Wars always have the effect of centralizing power. In addition, in an arid climate, like Spain's, sheep and cattle farmers predominate over agriculture, requiring horseback riders, instead of farmers. Thus Spain, a nation of ranchers, could easy convert their economy into a formidable military machine, unlike England, which was a nation of farmers.

Because the nature of the wars fought between Spain and Islam, religious tolerance was not a charateristic of either culture. The Inquisition was especially severe in Spain because heresy was regarded not only as contagious and deadly to souls, but also as a threat to national security. Hence, trade had little chance to flourish is Spanish culture, whose primary concern was survival. The notion that liberty for the individual ought to be guaranteed by the government was not the foremost thought on the mind of the average Spaniard.

Voyages to foreign lands for the Spanish were not primarily for the purpose of trade, but rather to obtain raw materials. War and plunder was the preferred method. Only if absolutely necessary would they trade for their gold, silver and other valubles. (cite example of Cortez). Thus, the Spanish rarely left anything of value in the areas they colonized: certainly no tradition of law or protection for the individual.

Institutionally, the Spanish Empire more resembled the Roman Empire than the British. Spain brought its culture, its form of government, and its administrative apparatus to each new

colony. Its method of conquest was one of exploitation of native Indian labor and imported African slaves, which was enforced by a more-or-less skeleton Spanish military presence. Villages were awarded to particular Conquistadores, who acquired the natives as slaves, or serfs, who labored in the cotton fields, provided food, and worked in the mines. Spain built tremendous cities, luxurius palaces, and beautiful cathedrals throughout Latin America and the Carribean with the forced labor of the native population. Thus, Spain was very well equipped to exploit the New World for immediate gain, but created nothing on the American continent that would grow and prosper. The political tradition it left behind was one where the conquered would serve the whim of the ruler.

North America, with the exception of Quebec, was stamped with the British tradition of law, which protected the rights of the individual. In addition, the Britsh sought to populate the New World with British subjects, and make it an attractive place to live. British rule in North America was extremely lackadasical in comparrison the Spanish colonizing enterprise in the South. British authorities permitted the early colonists to adapt British institutions and culture to the realities of the New World and discard elements of the mother country's tradition that were inapplicable. Rather than conquering America militarily, the British, as much as possible, ignored the

native population, and brought the New World within European civilization by encouraging massive migration. The British saw the New World primarily as a commercial opportunity, and an ally in trade, rather than as another land to be conquered. Whereas the British allowed for a large amount of autonomous rule on the part of its colonies, the Spanish regulated their new territories from Madrid to the minutest detail. The British revolutionized the theory of empire building, while Spanish did it the old way, the Roman way. The contrast between the British and Spanish methods of colonization were stark, and the results can be seen today.

CHAPTER SIX