



***The Political Thought of the American Revolution***

# The influence of old English constitutionalism

- British colonization of North America starts in 1607.
- The settlers keep their identity of English citizens in their full right;
- They have a direct political and legal connection with the King, as acknowledged and guaranteed by the various "charters" (fundamental laws of the colonies).
- From the appeal to the principles of English common law (known through legal thinkers such as Coke and John Locke), through the experience of the Revolution a new form of constitutionalism emerges;
- This constitutionalism introduces for the first time the new principle of a written and rigid constitution that is superior to the government and any law.

# No taxation without representation

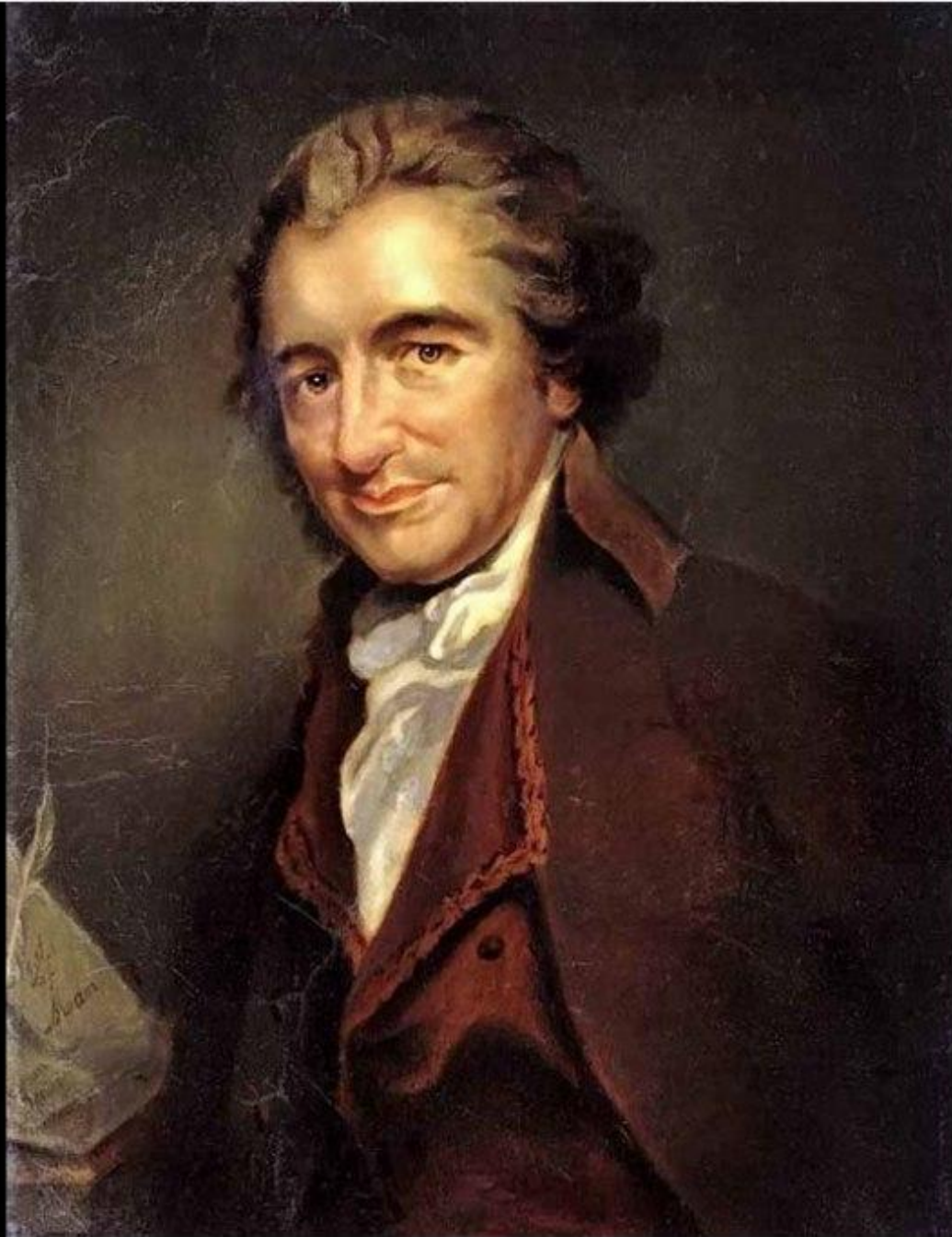
- In 1761, the Boston lawyer **James Otis** (1725-1783) claims the superiority of the fundamental law of a community over the laws made by the English Parliament.
- In his booklet of 1764 "**The Rights of the British Colonies**" he rejects the claim of the Parliament of imposing taxes upon the colonies;
- This on the basis of the old English principle "**no taxation without representation**".
- Otis mentions that the settlers elect their representatives in the colonial organs, not in London.
- The settlers' consent to the English Commonwealth happens directly through the King, not through the Parliament.
- This is the first formalization of the opposition between colonies and the metropole.

# Phases of the rebellion

- This divide leads to the open rebellion of the Boston Tea Party (1773) and then to the proclamation of national independence.
- Historically, this process develops as protests against single acts of the Parliament: The Sugar Act (1764, tax on sugar); Stamp Act (1765, tax on official stamp); Declaratory Act (1766, reaffirmation of the right of the Parliament to impose taxes in the colonies); Tea Act (1773, tax on tea to protect the East India Company).

# A few English authors support the colonies

- There is at this stage a kind of alliance between the settlers' struggle in America and the attempts in England by some radical political leaders and intellectuals to reform the English political system in a more democratic way.
- We mention the politician John Wilkes (1727-1797) and the political writers Thomas Gordon (1662-1723) and John Trenchard (d. 1750).
- This culminates in 1776 with the dramatic political events in America and with the publication in England of Jeremy Bentham's "Fragment on Government".



Thomas Paine (1737 – 1809), oil painting by en:Auguste Millière (1880), after an engraving by William Sharp, after a portrait by George Romney (1792). 16 x 12 inches (406 x 305 mm). National Portrait Gallery, London

# Paine and Price

- At the beginning of 1776 two very important books are published in England.
- "**Common sense**" by **Tom Paine** (1737-1809) and
- "**Observations on the Nature of Civil Liberty**" by **Richard Price** (1723-1791).
- These very influential books clearly describe the nature of the opposition between England and American colonies, and (especially Paine)
- They promote independence and the establishment of a **republic**.
- The republic is presented as a more suitable form of state for a civil society independent and liberated from the mistakes of the English traditions.

# Paine: Society vs. government

- In Paine's thought there plays a central role the opposition between "society" and "government".
- He criticizes the many authors who didn't see any distinction between them.
- Inspired by Protestant ethics, he says that society descends from the positive need of addressing and solving human problems and needs that go beyond the individual sphere;
- government, instead, has the negative function of repressing the natural evilness of human beings.
- Society comes from our needs; government comes from our evilness and our sins.



# Paine: Government as necessary evil

- Government is a necessary evil that, in order to work and to be tolerated, must always be morally perfect and absolutely free from corruption.
- This is not the case of the English government.
- Therefore the colonies have the right to separate from it to establish their own.
- Price's position is less radical and hopes that the colonial struggle will help England reform its politics and its government in more just and more free ways.

# Jefferson

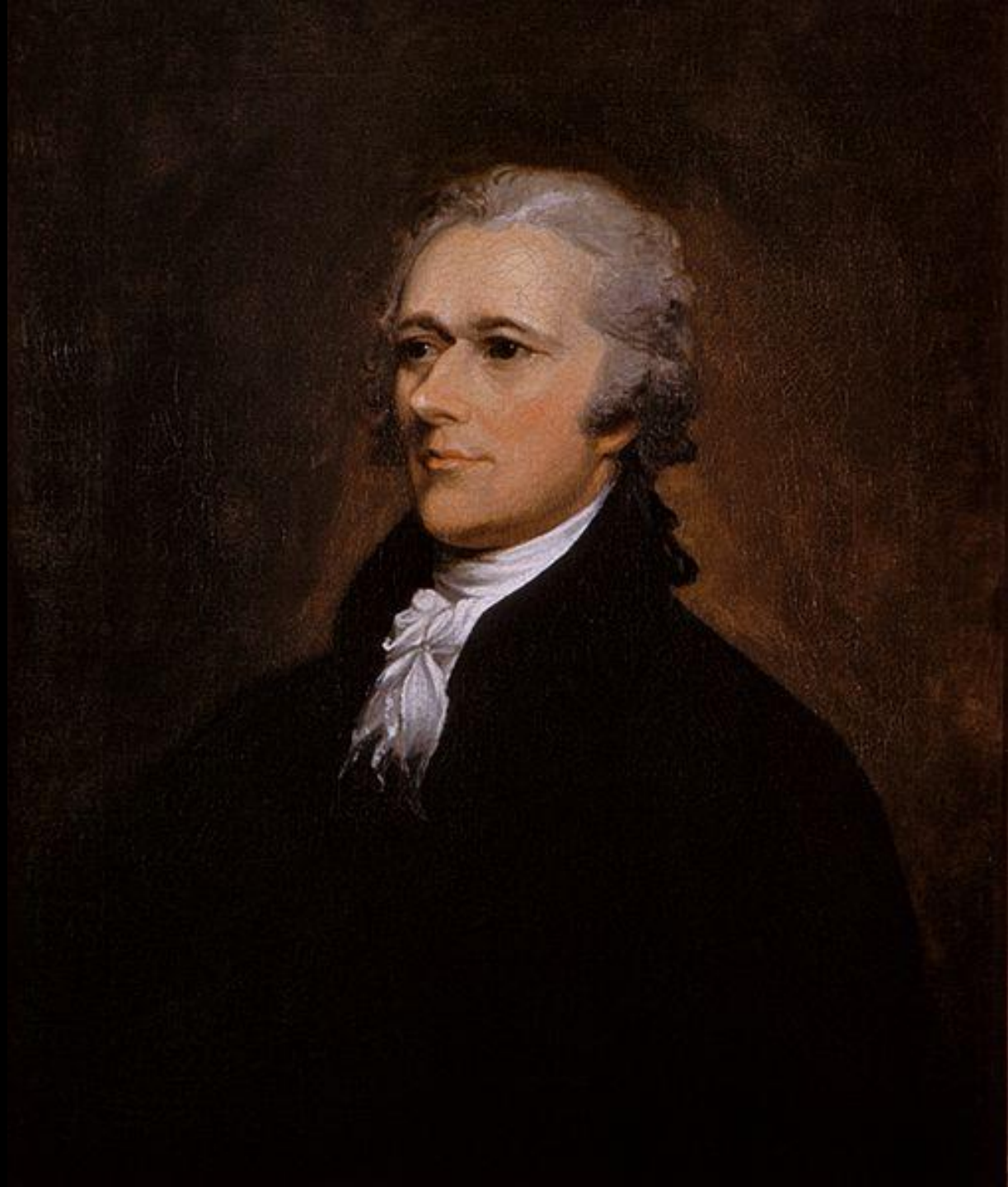
- Paine's and Price's arguments are accepted by the revolutionary leaders;
- especially by those like **Thomas Jefferson** from Virginia (future 3rd President) who are closer to the English republican tradition.
- In his "**Notes on Virginia**" (1781), Jefferson describes his model of democratic and pluralistic society;
- his ideal society is a rural society centered on the free cultivator, on local self-government, and on corresponding representative bodies.

# A new constitutionalism: The Federation

- By approving the **Declaration of Independence** (1776) the colonies conduct a common war on the basis of the **Articles of Confederation**, that will enter into force in 1781, and
- The various states adopt constitutions (starting from New Hampshire, 1776).
- The various states also have to decide the relations with the other former colonies.
- Even if in the end a federalist approach prevails, there is significant opposition to it.
- For example, the Virginian **Richard Henry Lee** (1732-1794) and **George Mason** (1725-1792) fear that federalism may become a threat not only for the autonomy of the states but also for the democratic character of the Union itself.

# “The Federalist”

- The new federalist thought is expressed especially by “**The Federalist**” (1787-1788), a very important work by **Alexander Hamilton** (1755-1804), **James Madison** (1751-1836), and **John Jay** (1745-1829).
- The work is a collection of articles appeared on some newspapers in the State of New York to promote the ratification by the states of the federal **Constitution** approved by the Philadelphia Convention of 1787.
- (more on this in part 2 of this class)



# John Adams

- Another important author is the Massachusetts lawyer and 2nd US President **John Adams**.
- His main theoretical works are "**Thoughts on Government**" (1776), and
- "**Defence of the Constitutions of Government of the United States of America**" (1787).
- Adams' emphasizes especially the liberal separation and distribution of powers, and the prevalence of the "rule of laws" over the "rule of men".
- Also, he thinks that the power of the legislative bodies must be kept in check and must not become excessive.

# Adams: The pursuit of happiness as state's goal

- Adams' aim is designing a form of government that pursues the goal of the "**happiness of society**" - defined as welfare and security for the highest number of people.
- The solution is the republic, defined as "rule of the laws and not of men".
- The republic allows "the exact and impartial execution of the laws".
- Its main characteristics are:
- The principle of representation; the subdivision into two chambers; the distinction between legislative and executive power; the existence of a judicial power that is independent from the government and controls the legitimacy of both legislative and government acts.

- **Especially important is the separation of powers**, by which Adams also anticipates the liberal constitutionalism of the next century (Constant, Tocqueville, J. S. Mill).
- Adams defends the two-chamber systems against the criticisms of the European radicals and Enlightenment authors such as Price, Turgot, Mably, who are fascinated by an idealized view of the English system with just one elective chamber.



# A deep change in constitutional thought

- Before the era of the American Revolution a constitution was rarely ever distinguished from the government and its operations.
- Traditionally in English culture a constitution referred not only to fundamental rights but also to the way the government was put together or constituted.
- A constitution was the disposition of the government; it even had medical or physiological connotations, like the constitution of the human body.
- The English constitution included both fundamental principles and rights and the existing arrangement of governmental laws, customs, and institutions.

- By the end of the Revolutionary era, however, the Americans' idea of a constitution had become very different from that of the English.
- A constitution was now seen to be no part of the government at all.
- A constitution was a written document distinct from and superior to all the operations of government ' It was, as Thomas Paine said in 1791, "a thing antecedent to a government; and a government is only the creature of a constitution."

- A constitution thus could never be an act of a legislature or of a government;
- it had to be the act of the people themselves, declared James Wilson in 1790, one of the principal framers of the federal Constitution of 1787; and "in their hands it is clay in the hands of a potter; they have the right to mould, to preserve, to improve, to refine, and to furnish it as they please."
- It was a momentous transformation of meaning. It involved not just a change in the Americans' political vocabulary but an upheaval in their whole political culture.
- In the short span of less than three decades Americans created a whole new way of looking at government.

# From English citizens to Americans

- The colonists began the imperial crisis in the early 1760s thinking about constitutional issues in much the same way as their fellow Britons.
- Like the English at home they believed that the principal threat to the people's ancient rights and liberties had always been the prerogative powers of the king, those vague and discretionary but equally ancient rights of authority that the king possessed in order to carry out his responsibility for governing the realm.
- Indeed, eighteenth-century English citizens saw their history as essentially a struggle between these conflicting rights, between a centralizing monarchy on one hand and localist-minded nobles and people on the other.

- Although eighteenth-century Englishmen talked about the fixed principles and the fundamental law of the English constitution, few of them doubted that Parliament, as the representative of the nobles and people and as the sovereign lawmaking body of the nation, was the supreme guarantor and interpreter of these fixed principles and fundamental law.
- Parliament was in fact the bulwark of the people's liberties against the crown's encroachments; it alone defended and confirmed the people's rights.
- The **Petition of Right**, the act of **Habeas Corpus**, the **Bill of Rights** were all acts of Parliament, statutes not different in form from other laws passed by Parliament.

- For Englishmen therefore, as William Blackstone, the great eighteenth-century jurist pointed out, there could be no distinction between the "constitution or frame of government" and "the system of laws".
- All were of a piece: every act of Parliament was part of the English constitution and all law, customary and statute, was thus constitutional.
- "Therefore," concluded the English theorist William Paley, "the terms constitutional and unconstitutional, mean legal and illegal."

- Nothing could be more strikingly different from what Americans came to believe. Indeed, it was precisely on this distinction between "legal" and "constitutional" that the American and the British constitutional traditions diverged at the Revolution.
- During the 1760s and seventies the colonists came to realize that although acts of Parliament, like the Stamp Act of 1765, might be legal, that is, in accord with the acceptable way of making law, such acts could not thereby be automatically considered constitutional, that is, in accord with the basic principles of rights and justice that made the English constitution what it was.

- It was true that the English Bill of Rights and the act of settlement in 1689 were only statutes of Parliament, but surely, the colonists insisted, they were of "a nature more sacred than those which established a turnpike road."
- Under this pressure of events the Americans came to believe that the fundamental principles of the English constitution had to be lifted out of the law-making and other institutions of government and set above them.



- In the years following the Declaration of Independence, many Americans paid lip service to the fundamental character of their state constitutions, but like eighteenth-century Britons they continued to believe that their legislatures were the best instruments for interpreting and changing these constitutions.
- The state legislatures were the representatives of the people, and the people, it seemed, could scarcely tyrannize themselves.
- Thus in the late 1770s and early eighties, several state legislatures, acting on behalf of the people, set aside parts of their constitutions by statute and interpreted and altered them, as one American observed, "upon any occasion to serve a purpose."
- Time and again the legislatures interfered with the governors' legitimate powers, rejected judicial decisions, disregarded individual liberties and property rights.

# Checking legislative power

- By the mid-1780s many American leaders had come to believe that the state legislatures, not the governors as they had thought in 1776, were the political authority to be most feared.
- Legislators were supposedly the representatives of the people who annually elected them; but "173 despots would surely be as oppressive as one," wrote Thomas Jefferson.
- "An elective despotism was not the government we fought for."
- It increasingly seemed to many that the idea of a constitution as fundamental law had no real meaning after all.
- "if it were possible it would be well to define the extent of the Legislative power, but," concluded a discouraged James Madison in 1785, "the nature of it seems in many respects to be indefinite."
- So the constitution had to be clearly distinct from statutory law, and put well above it.

# The beginnings of judicial review

- With the idea of a constitution as fundamental law immune from legislative encroachment more firmly in hand, some state judges during the 1780s began cautiously moving in isolated cases to impose restraints on what the assemblies were enacting as law.
- In effect they said to the legislatures, as George Wythe, judge of the Virginia supreme court did in 1782, "Here is the limit of your authority; and hither shall you go, but no further."
- These were the hesitant beginnings of what would come to be called **judicial review** - the American practice by which judges in the ordinary courts of law have the authority to determine the constitutionality of acts of the state and federal legislatures.