BEYOND LOCKE AND TOWARDS A MORE ACCURATE INTELLECTUAL HISTORY OF AMERICAN CONSTITUTIONALISM

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Although he died in 1704, John Locke lives on in judicial opinions. His name and the ideas he purportedly propagated are peppered throughout reporters. Indeed, Locke and his political thought played a major role in the Indiana Supreme Court's recent decision in *Members of the Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.*[1] There, the state's highest court held that its state constitution does not guarantee an expansive right to abortion. Before reaching that conclusion, the court held that the provisions contained in Article 1, Section 1 of the Indiana Constitution[2] are "Lockean Natural Rights Guarantees."[3] To the court, the language of that article was standard in founding-era state constitutions and was "generally understood as constitutionalizing the social contract theory of the English political philosopher John Locke."[4] In the end, despite finding that the constitutional provision protects a Lockean conception of "unenumerated," "fundamental" rights,[5] the court ultimately held that the right to an abortion fell outside that constitutional ambit.

Perhaps, originalists may celebrate this decision. Indeed, the Indiana high court's *methodological* approach would make any originalist proud. But the court's invocation of Locke might give some originalists pause. Just a few years ago the Supreme Court of Kansas used almost identical logic to reach the exact opposite conclusion.[6] That court, too, noted that its state constitution contained "Lockean Natural Rights Guarantees."[7] And, in the end, after a

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[1] 211 N.E.3d 957 (Ind. 2023).

[2] Which reads: "WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government." IND. CONST. ART. 1, § 1. This language mirrors what was written in the Virginia Declaration of Rights. *See Members of the Medical Licensing Board*, 211 N.E.3d at 967.

[3] *Members of the Medical Licensing Board*, 211 N.E.3d at 966.

[4] *Id.* at 967.

[5] *Id.* at 968–69.

[6] Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610 (2019) (per curiam).

[7] *Id.* at 626.

consideration of, among other factors, "natural rights philosophy"[8] and "Lockean principles,"[9] the court held that its state constitution *guaranteed* a right to an abortion.[10]

This essay is not about whether or not the Indiana or Kansas state constitutions guarantee a right to an abortion. The following is, however, about John Locke and his intellectual grip on American legal and political thought. Even though these opinions diverged in their outcomes, they shared in their reliance on the political philosopher and his purported ideas. These opinions reflect a broader trend in American legal thought: many view Locke as the intellectual forefather of the American founding and American constitutionalism. To them, to understand the federal and state constitutions, we must understand Locke.[11]

That position on Locke, however, is curious given that our conception of the philosopher was reinvented in the mid-twentieth century by Peter Laslett[12] and John Dunn.[13] And, later, our understanding of Locke's role in the American founding was revolutionized by Gordon Wood[14] and J.G.A. Pocock.[15] Laslett and Dunn pushed back against an interpretation of Locke as a prototypical liberal thinker. Pocock and Wood forcefully demonstrated that Locke was a "visible but hardly a dominant figure" in Revolutionary America.[16] However, for many, it's as if this entire wave of scholarship never happened.

To understand why this stereotype of Locke, based on partial readings of the *Second Treatise*,[17] still dominates, we should consult Claire Rydell Arcenas's new book.[18] *America's Philosopher: John Locke in American Intellectual Life* not only bolsters some of the earlier claims of Wood and Pocock, but it also explains *when*, precisely, Locke became a mythical figure in the American pantheon of "liberalism."

LOCKE AT THE FOUNDING

As Arcenas points out, Locke was best known in early America for his work in philosophy, specifically his *Essays Concerning Human Understanding*.[19] It was Locke's epistemology, not his

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[8] *Id.* at 645.

[9] *Id.* at 644.

[10] *Id.* at 680.

[11] However, below, when I discuss Locke, I will often talk about his purported influence on the federal Constitution. But the following analysis applies equally to Locke's alleged intellectual role in the formation of state constitutions. *See* CLAIRE RYDELL ARCENAS, AMERICA'S PHILOSOPHER: JOHN LOCKE IN AMERICAN INTELLECTUAL LIFE 54, 71, 78, 81–82 (2022). Of course, it should also be noted that many of the men who were involved in the formation of the federal Constitution were previously involved in the ratification of state constitutions. *See* Robert F. Williams, *Experience Must Be Our Only Guide: The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405 (1988).

[12] JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[13] JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT (1969).

[14] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969).

[15] J. G. A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); J. G. A. Pocock, *Machiavelli, Harrington and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549 (1965).

[16] J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119, 127 (1972) (reviewing Wood, *supra* note 14 and GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT (1970)).

[17] *Supra* note 12.

[18] ARCENAS, *supra* note 11.

[19] *Id.* at 9.

political thought, that enjoyed great purchase in the nascent nation. In fact, Locke was often associated with that piece of writing—not his *Second Treatise*.[20] Along with his philosophical contributions, Americans regularly engaged with Locke's important ideas regarding education,[21] child rearing,[22] and self-improvement.[23] Of course, his *Letter Concerning Toleration* was also widely regarded as an essential exposition of religious freedom in the nascent republic.[24] Yet, despite Locke's otherwise warm reception, his political thought did not enjoy the same purchase.

The framing generation, as they endeavored to craft founding documents, sought out practical lessons in statecraft.[25] Locke offered valuable theories on the nature of civil society, but, to this generation, his ideas were just that—theories. His musings on the state of nature did not provide the new republic with a concrete blueprint for state formation. The framers were aware of Locke, then, but largely disregarded his political thought. Instead, they found what they were looking for—tangible ideas regarding constitutional construction—in other thinkers, including Baron de Montesquieu and James Harrington.[26] Locke's political thought, in fact, was "a negative model, an example of what Americans should avoid: namely, a reliance on theory or abstract philosophy, rather than practice or experience."[27]

Indeed, early Americans observed how Locke's abstract political theory was haphazardly translated into constitutional government, and they did not like the result. In particular, the framing generation took issue with Locke's involvement in the writing of the *Fundamental Constitutions of Carolina*[28]—"120 briefly stated declarations, or laws, for the English colony of Carolina."[29] John Adams, for instance, bemoaned the fact that Locke "gave the whole authority, executive and legislative, to the eight proprietors, [several lords], and their heirs."[30] Adams viewed Locke's plan for Carolina as a "new oligarchical sovereignty."[31] To Adams, Locke did not appreciate that "when popular elections are given up, liberty and free government must be given up."[32]

In other words, in his single foray into constitution making, Locke contemplated a government that was anathema to the core principles Americans sought to protect, chiefly popular sovereignty. Notably, Locke—who would centuries later be championed as the prototypical liberal democratic theorist—was pilloried for proposing a rather *undemocratic* form of government. That is not to say, however, that Adams viewed Locke as an illiberal thinker. In

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[20] *Id.* at 22.
[21] *Id.* at 40.
[22] *Id.* at 11.
[23] *Id.* at 30.
[24] *Id.* at 27.
[25] *Id.* at 53.
[26] *Id.*
[27] *Id.* at 68.
[28] Fundamental Constitutions of Carolina (1669), *reprinted* in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971).
[29] ARCENAS, *supra* note 11, at 68.
[30] JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, *reprinted in* 4 THE WORKS OF JOHN ADAMS 463 (Charles Francis Adams ed., 1851).
[31] *Id.*
[32] *Id.* at 466.

fact, quite the opposite is true.[33] But, irrespective of Locke's liberal political thought, the *Fundamental Constitutions* failed at putting liberal theory into practice. As Americans saw it, "good laws and good governments originated organically from the people and conditions on the ground"; they did not, as Locke reputedly believed, derive "abstractly or speculatively from the private study of a philosopher."[34] The American reaction to Locke's constitutional failure evinces that the philosopher offered very little to the statesmen contemplating constitutional design.

While not outrightly rejected, Locke's conception of natural rights was also of little interest to the framing generation. Although Michael Zuckert has argued that Locke's natural rights theory fused with Whig political science to usher in a newly conceived "natural rights republicanism,"[35] Arcenas shows how Locke's arguments, with respect to natural rights, were "thought to lie at the heart of the English constitution itself."[36] In other words, Locke's ideas were not radical or revolutionary; they were recycled. They were viewed as largely derivative of "English and British constitutional legal sources that the founders and framers knew well."[37]

Even the Declaration of Independence, so religiously associated with Locke, had little to do with his political thought. Many understandably read the "Declaration of Independence's 'pursuit of Happiness' as a substitution for, or translation of, Locke's 'property'' in the *Second Treatise*.'"[38] But "happiness" to the Revolutionary generation did not equate with the protection of private, individual property. Instead, "happiness" was "synonymous with public, social happiness resulting from a people's well-being . . . not as atomistic individuals but as a society."[39] In this respect, Locke and the Declaration were out of step.

Arcenas puts it bluntly: "A central myth of the American Revolution is that John Locke (who died in 1704) first gave life to American independence and then to the United States itself."[40] But "it is entirely possible to write about Locke in the eighteenth century without mentioning the American founding documents."[41]

However, despite the compelling historical evidence that a strand of Locke's political thought was cast aside by the individuals who crafted the federal and state constitutions, his political thought experienced a revitalization at a moment when America yearned for a liberal leader.

LOCKE REINVENTED

In fact, it should not be surprising that Locke's rise to intellectual fame coincides with the onset of the Cold War. Although scholars began exploring Locke's affinity for private property and individualism in the early twentieth century,[42] the end of World War Two brought with it a

[33] *Id.* at 463 (arguing that Locke "defend[ed] the principles of liberty and the rights of mankind with great abilities and success").
[34] ARCENAS, *supra* note 11, at 71.
[35] MICHAEL ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 319 (1998).
[36] ARCENAS, *supra* note 11, at 50.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 51.
[40] *Id.* at 49.
[41] *Id.*
[42] *Id.* at 103–20.

renewed interest in the philosopher.[43] It was then, of course, that the United States faced off against its most formidable geopolitical rival, the Soviet Union. The Cold War was not just one of economic and military hostility—it was also an ideological battle. Americans were at war with communism. And on that battlefield of ideas, Americans endeavored to create a distinctive political tradition—the "American political tradition."[44] The hope was that a cogent story about our country's intellectual history would galvanize the nation against the evils of collectivism and statism.[45] Scholars and politicians sought to construct a coherent intellectual narrative that would stand as an ideological foil to the Soviet Union. When the dust settled, the "American political tradition" was created. And for the first time, it was identified as something that was distinctly and exclusively liberal, individualistic, and deeply concerned with the protection of private property.[46]

This reimagined intellectual tradition needed a leader. Noticing the centrality of Karl Marx within the Soviet intellectual ecosystem, Americans searched for their counterpart.[47] As they looked to history for a philosophical hero, Locke emerged.

Focusing in on the country's purported "commitment to . . . the sanctity of individual rights, private property ownership, and equality of opportunity," these twentieth-century scholars, led by Harvard historian Louis Hartz, argued that Locke was "so omnipresent . . . that he 'dominates American political thought, as no thinker anywhere dominates the political thought of a nation.'"[48] These ideals, to Hartz, were not just characteristic of standard liberalism; they belonged to a newly minted intellectual tradition: "Lockean liberalism."[49]

Even though Locke's political influence on the framers was tenuous at best, Hartz argued that we should understand the American political tradition, from its inception to present day, as a "liberal consensus," with Locke as its intellectual nucleus.[50] Of course, this Hartzian view of American intellectual history would likely befuddle the framers,[51] who either ignored Locke in favor of other political theorists or thought of him as just one, of many, important thinkers of the era. But, despite it resting on historically shaky ground, this new understanding of the American political tradition, with Locke and his strand of liberalism at its core, became—and still remains—ubiquitous.

THE STRAUSSIANS, THE LIBERTARIANS, AND THE COURTS

The echoes of the Locke mythology still live on today. The stewards of Locke's legacy are often Straussian political theorists, a cohort of scholars influenced by the thought and methodology of Leo Strauss. The Straussian embrace of Locke is curious, however, as Strauss himself was deeply critical of Hartz's revisionism and questioned the nation's idolatrous worship

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[43] *Id.* at 125.
[44] *Id.* at 129–30.
[45] *Id.* at 125–28.
[46] *Id.* at 126.
[47] *Id.* at 136–38.
[48] *Id.* at 138 (quoting LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 140 (1955)).
[49] *Id.*
[50] *Id.* at 147.
[51] *Id.* at 49–52.

of Locke.[52] Still, prominent Straussian academics, like Michael Zuckert[53] and Thomas Pangle,[54] have endeavored to demonstrate that Locke was not only a major player in revolutionary thought, but also that his intellectual legacy can teach us something about American republicanism today.

Yet, in the quest to render Locke into the intellectual hero of individualism, Robert Nozick took the lead. In *Anarchy, State, and Utopia*,[55] Nozick, leaning further into the Hartzian interpretation, fashioned Locke into a libertarian theorist.[56] Through Locke, Nozick argued for a minimal state, fiercely protective of private property and individual liberty.

While Arcenas discusses how Locke's reimagined legacy lives on in certain academic circles, not being a legal scholar, she doesn't have much to say about the use made of Locke by the contemporary judiciary. But, as we have seen from the opinions in Indiana and Kansas, judges are some of the most visible governmental actors who have woven the myth of a Lockean America into the fabric of our nation's law. In short, Locke's starring role in judicial opinions requires our attention.

A More Accurate Intellectual History of American Constitutionalism

At a time when originalism is supposedly at its high-water mark, an ahistorical myth about Locke and his influence persists. Courts have embraced a story about Locke and the American founding—invented in the twentieth century—and turned it into an authoritative "history" of 1787. And it's not their fault. The myth of Locke has simply become so pervasive, dominating the academic, political, and legal realms. Even so, it is incumbent on originalists, who care deeply about the original legal ideas of the founding, to not lose sight of the original political thought of the period. Originalists should speak up when they witness invocations of Locke that don't pass historical muster.

That is chiefly because the myth of Locke ultimately undermines originalism. Originalism is steadfastly committed to recovering the original meaning, intent, and purpose of the nation's foundational texts. So, it cannot give short shrift to ascertaining the political thought that gave life to those texts. This lack of attention to the history of ideas has resulted in an embrace of incomplete accounts of American constitutionalism's intellectual genesis. Perhaps, during the Cold War era, the myth of Locke's influence was politically convenient to some scholars and politicians. But that story of Locke does little for modern interpreters trying to understand the original public meaning of the federal and state constitutions. To push back against these narratives, originalists should insist that we all return to the discipline of intellectual history. And, as we come back to studying the history of ideas, we will soon realize what Arcenas's book reveals—Locke is not American constitutionalism's intellectual forefather.

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[52] *Id*. at 147–57; *see* LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953).

[53] ZUCKERT, *supra* note 35.

[54] THOMAS PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988).

[55] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[56] ARCENAS, *supra* note 11, at 160.

In fact, originalists might realize that the Lockean myth has locked our understanding of American constitutionalism into an inflexible libertarianism that increasingly seems out of step with the times and is inconsistent with the values of the framers and ratifying public. Once originalists push back on the prevailing story of Locke and uncover the real intellectual driving forces behind American constitutionalism, they might soon recognize that they don't need—and perhaps no longer want—the myth of Locke to justify the constitutional values they hold dear. Leaving Locke, in other words, won't mean leaving important constitutional principles behind.

Indeed, as they delve more deeply into the intellectual history of American constitutionalism, originalists might unearth an alternative intellectual tradition—the classical republican tradition.[57] As Arcenas, Wood, and Pocock demonstrate, when the framing generation had questions about constitutional design, they found answers—not in Locke—but in the likes of Harrington and Montesquieu. These classical republican thinkers appreciated the separation of powers, checks and balances, and consent of the governed. Yet, to that cohort, these institutional mechanisms were not designed to accomplish liberal, "Lockean" ends; instead, they were directed at ensuring republican stability and cultivating the public good.[58] For instance, to Montesquieu—James Madison's "oracle"[59]—the mixed regime had two ends or *teloi.* First, it was concerned with "preservation," that is stability and longevity.[60] Next, departing from the Lockean paradigm, the mixed regime was *not* meant to protect what Montesquieu called "independence"—that is "unlimited freedom" to do what you wish; instead, the separation of powers was intended to facilitate "political liberty"—the mere right to do what the laws permit.[61] And, in Montesquieu's ideal mixed regime, a love of those laws "require[d] a constant preference of [the] public [over the] private interest."[62]

To be sure, a recognition of the classical republican tradition will not frequently lead to different constitutional outcomes. Instead, such a recognition would mainly call into question the *intellectual justifications* for those outcomes. However, departing from Locke will force us to reconsider our conception of fundamental rights, their contours, and their ends. That reconsideration would compel us to rethink, for instance, the logic undergirding the Kansas and Indiana opinions.

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[57] Professor Cass R. Sunstein has made a qualified form of this argument, insisting that the founders were "liberal republicans" and that "American public law would [not] have to adhere to republican thought if republicanism were without contemporary relevance or appeal." *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1563 (1988).

[58] POCOCK, THE MACHIAVELLIAN MOMENT, *supra* note 15, at 523; see ADAMS, *supra* note 30, at 410 (arguing that properly constructed government "is to no more end than to persuade every man in a popular government not to carve himself of that which he desires most, but to be mannerly at the public table, and give the best from himself to decency and the common interest") (quoting JAMES HARRINGTON, "THE COMMONWEALTH OF OCEANA" AND A "SYSTEM OF POLITICS" 22 (J.G.A. Pocock ed., Cambridge University Press, 1992) (1656)); THE FEDERALIST NO. 37, at 223 (James Madison) (Clinton Rossiter ed., 1999) (1788) ("*Stability* in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society." (emphasis added)); THE FEDERALIST NO. 62 (probably James Madison), at 380 ("No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable, without possessing a certain portion of *order* and *stability*." (emphasis added)).

[59] THE FEDERALIST NO. 47 (James Madison), *supra* note 58, at 298.

[60] MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 5 at 150 (Thomas Nugent trans., Hafner Pub. 1949) (1748)).

[61] *Id.* at bk. XI, ch. 3, at 150.; *see* ADAMS, *supra* note 30, at 402–05 (discussing Montesquieu's, Machiavelli's, and Harrington's shared conception of liberty).

[62] *Id.* at bk. IV, ch. 5 at 34.

CONCLUSION

Judges have not shied away from consulting intellectual history. And they shouldn't. As I have argued elsewhere, "constitutional text must be read with an eye towards the paradigmatic ideas, constraints, and theories that imbued [the founding] era of American history."[63] But if constitutional interpreters, especially those who subscribe to originalism, continue to reference the political thought of the founding, they should get their intellectual history right. Doing so would require recognizing that the Lockean tradition played a minor role in the formation of the federal and state constitutions. In fact, it may necessitate that they let go of Locke and embrace the classical republican thinkers whose ideas dominated the minds of the framing generation and permeated the constitutional text. Then, and only then, will they be able to truly understand the text, purpose, and broader teleological goals of America's constitutions.

In short, we all need to move beyond Locke and towards a more accurate intellectual history of American constitutionalism. It's a tall order, but if we are up for the challenge, Arcenas's essential book seems like an awfully good place to start.

[63] Elias Neibart, *Originalism as Intellectual History*, 28 HARV. J.L. & PUB. POL'Y: PER CURIAM 1, 4 (2022).