

THE AMERICAN REVOLUTION AS A CONSTITUTIONAL CONTROVERSY

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We begin with a mystery. In 1763, the British Empire was the most successful, and the freest, that the world had ever seen. And yet, within thirteen years, the thirteen mainland colonies of British North America -- the jewel in that empire's crown -- attempted something that no colony had yet managed to do in human history: to revolt against the mother country. The British could not understand it, nor could many Americans who wished to remain loyal to King and country. What happened?

I. DEFINING THE CONSTITUTIONAL CONTEXT

Many myths surround what happened between Great Britain and her rebellious colonists -- myths that had great persuasive power then, and still do today. The most popular and most pervasive myth is that the American Revolution was a simple tax revolt launched by people who were tired of the burdens of paying for "big government" -- though not of the benefits it conferred. According to this view, the Revolution had no larger principled or substantive reason behind it.

Even many scholars who realize that the Americans and the British were arguing about something real and important in the years between 1763 and 1776 do not grasp what the controversy was about. Many previous historians lined up along the fault-lines of what is, in essence, a false choice. Some historians (such as Robert Livingston Schuyler and P.D.G. Thomas) insist that, when American colonists denounced British colonial policy as unconstitutional, they were arguing bad law, and they knew it. Because the British consistently rejected those arguments as bad law, the Americans invoked other arguments based on such vague notions as natural rights and natural law. Other historians (such as Charles McIlwain) insist that, when British policy-makers defended their policies as constitutional against American arguments of unconstitutionality, they were arguing bad law, and they knew it.

These arguments focus on what is essentially a false choice. We have lived under a written constitution at the core of which is the concept of federalism, and under which perhaps the most enduring and perplexing problem has been: which has the final word in a constitutional dispute over the meaning of federalism, the states or the federal government? The problem is that the framers and ratifiers of the Constitution wrote and adopted that document against the background of the American Revolution. They were aware of the dangers of a constitutional system in which there was no way to resolve disputes between the center and the peripheries -- between the general government and the states, in the American setting, or between the mother country and the colonies, in the British colonial context. Thus, under the Constitution, the issue "who was right?" becomes a pivotal one, and devising a means to resolve such issues becomes an issue of profound significance.

By contrast, the real state of affairs between Great Britain and the British colonists of North America between 1763 and 1776 was far more complicated and agonizing than we remember it to be. Professor John Phillip Reid of New York University Law School, the first historian to examine seriously the constitutional history of the American Revolution in decades, has provided the key. He argues that the initial stage of the Revolution (1763-1776) was a complex constitutional argument. At issue in that argument were two competing versions of the unwritten British constitution, both of them rooted in the tumultuous constitutional struggles of the seventeenth century.

We must first understand what an unwritten constitution is: Great Britain's constitution is not like the United States Constitution in that it is not written down, or codified, in one authoritative document that was framed and adopted at a specific time, or revised by amendment at specific times. When eighteenth-century Britons -- or such approving foreign observers as Voltaire and Montesquieu -- extolled the British constitution, they meant the entire complex of statutes, common-law judicial precedents, individual documents having constitutional status (the most famous of which was Magna Carta), and customs and usages making up, or constituting, the structure of government. Indeed, it was only as a result of the dispute with Great Britain, leading to independence, that American politicians and political thinkers reformulated the idea of constitution to mean a single written document at the core of a polity, defining its government's powers and responsibilities and the limits on those powers and specifying the rights of the people.

Because the British constitution was unwritten, however, that meant that an array of understandings of its principles and terms could spring up. Two of these understandings became the opposing positions in the struggle between Great Britain and her American colonists in the 1760s and 1770s: The version of the British constitution espoused by the Americans taught that the British constitution is a restraint on arbitrary power, from whatever source that threat comes -- whether King, Lords, or Commons. Arbitrary power -- that is, unchecked power -- was a concept broader than actual tyranny; it also included the potential to create or impose tyranny. Thus, if Parliament could legislate for the colonies without anyone being able to call it to account, then it was acting arbitrarily and fostering tyranny. In sum, it was acting unconstitutionally. Moreover, under this understanding of the unwritten British constitution, the only persons whom a legislature such as Parliament could tax were those who were actually represented there. Parliament could not tax the Americans because no American could vote for any member of the House of Commons; the only legislatures that could impose taxes on Americans were the individual colonial legislatures. Representation had to be actual, or it could not exist.

By contrast, the version of the British constitution expounded and defended by British politicians -- and by such legal authorities as Sir William Blackstone in his *Commentaries on the Laws of England* (1765-1769) -- put Parliament at the core of the constitutional system. Parliament (specifically, the House of Commons) was the guardian of British constitutional liberty; it had earned and confirmed its role by its valiant struggles against the tyranny of the Stuart kings of England (notably Charles I and James II), who had tried to usurp power that the constitution did not give them, even to the extent of trying to rule the kingdom and tax its subjects without going to Parliament. The Crown and the House of Lords, which the Americans had looked to as real

checks on Parliament, were only theoretically empowered to check the House of Commons or the King's ministers. Thus, sovereignty -- or ultimate political power -- rests with Parliament in partnership with the King. A consequence of Parliament's central role in the constitutional system was that each member of the House of Commons represented not merely those who elected him but all the King's subjects; thus, even though Americans were not actually represented in Parliament, they were virtually represented there; thus, Parliament could impose taxes or enact other legislation for the colonists even though the colonists were not actually represented in the House of Commons.

If such contrasting understandings came into conflict, how was that conflict to be resolved? These two understandings of the unwritten constitution clearly cannot coexist; the issue then arises which of the two conceptions of the British constitution is "correct." The problem is that no single person or institution has the final say in resolving such constitutional disputes. In other words, there is no final judge who can reconcile them or can choose between them in an authoritative fashion; thus, there may well be no way to determine which is "correct." Previous constitutional disputes of this sort were left prudently unresolved, for attempts to resolve them authoritatively had the risk of testing the fabric of the constitutional system too much for it to survive. Thus, in addition to assessing its substantive and principled commitments, each side in a major constitutional dispute of this sort had to gauge the stakes of pushing its constitutional arguments to the brink.

As a result, we can best see the final epic constitutional dispute (1763-1776) between Great Britain and the American colonists as a game of "chicken" on a titanic scale. Could these conflicting understandings have been resolved? James Otis -- the great Massachusetts attorney who argued the famed "Writs of Assistance Case" (1761) that established the unconstitutionality of general warrants -- hoped so. But, when he tried to reconcile the two clashing positions, the pamphlet he wrote dissolved into incoherence. Some historians (such as Gordon S. Wood) have noted that Otis's struggle to reconcile these irreconcilable viewpoints may well have helped to tear his mind to pieces. Thus, perhaps, the gap between the American and British understandings of the unwritten English constitution was perhaps unbridgeable.

II. FAILURES OF THE MIDDLE WAY: EXPERIMENTS WITH COLONIAL UNION

The British empire in North America arose almost as a series of accidents. Different groups of colonists each set forth to establish a new settlement in North America -- in different places, at different times, for different reasons. Some were commercial ventures; others were havens of religious liberty for those who founded them (but not necessarily for those of their neighbors who believed differently); at least one other (Georgia) began as a penal colony.

How to coordinate, let alone govern, an American empire that was at least two months away by ship? One way -- that, had it succeeded, would have made unnecessary conflicts between the mother country and its colonies -- would have been to forge a workable intercolonial union that could coordinate the individual colonial governments for shared goals without repeated recourse concerning individual policy decisions to the mother country. The failure of repeated attempts to

achieve this goal left Great Britain with no choice but to govern the colonies "long-distance" -- holding England's American colonies together for purposes of defense and foreign policy and dealing with them directly for the purposes of regulating trade and raising revenue. Thus, by 1763, when Great Britain confronted a host of problems posed by her American empire, British officials had no pre-existing formula for dealing with them. Rashly, they sought to coordinate imperial affairs from London -- without, however, realizing that they had to adapt constitutional principles and structures, devised for a populous but compact island nation, to an empire that seemed to be growing faster than the administrative and political expertise they had available to manage it.

The efforts to forge an intercolonial union began as early as 1643. In that year, while England was convulsed by what became the English Civil War, four of England's American colonies -- Plymouth, Massachusetts Bay, New Haven, and Connecticut -- formed the New England Confederation. (Throughout the Confederation's history, its members agreed to keep Rhode Island out, distrusting the colony because of its policy of religious liberty.) The Confederation, a defensive alliance against depredations by hostile Indian nations and the French, had a council and a president-general who worked with each colony's legislature. The Confederation was largely successful for decades; by 1690, by which time Massachusetts Bay has absorbed Plymouth and Connecticut has absorbed New Haven, the Confederation came to a quiet end.

The next attempt to create an intercolonial union was imposed from outside the colonies. Beginning in 1686, King James II sought to bring system and order to the often turbulent world of colonial American governance. He organized the Dominion of New England and sent Sir Edmund Andros to America as its governor-general. The Dominion folded all the colonies from Massachusetts to Pennsylvania into one large Dominion; its government would consist of a governor-general and a council but no representative legislative bodies. As part of the process of creating the Dominion, James revoked the colonies' existing charters, which among other things guaranteed them representative government. The colonists -- especially in Connecticut and Massachusetts -- were infuriated by what they deemed an attempt to deprive them of the rights of Englishmen. When news arrived in the colonies of the Glorious Revolution of 1688 that forced James II to flee his throne, the Americans similarly rebelled and overthrew Governor Andros. The new monarchs, King William III (of the Dutch state of Orange) and Queen Mary (sister of James II), reaffirmed the colonial charters of the colonies that had been condensed into the Dominion, thus bringing it to an end.

There attempts to formulate constitutional solutions to problems of colonial administration rested until the early 1750s. For the first half of the eighteenth century, a series of wars between the English, their American colonists, and their Indian allies, and the French, their colonists, and their Indian allies plagued the colonies. In 1754, at the Albany Congress called by New York's royal governor, Sir William Johnson, delegates from all the colonies except Georgia met with representatives of the Iroquois Confederacy to consider the likelihood of an impending war with France and to make plans to respond to such an emergency. At the same time, Benjamin Franklin, a Pennsylvania delegate to the Congress who had long pondered the problem of American union, proposed and his colonial colleagues debated and approved a Plan of Union. The Albany Plan of Union was a shrewd, well-meant attempt to secure the empire and to resolve outstanding ambiguities within the emerging imperial constitutional system; it posed the ultimate

issue in ways that could not be avoided or glossed over. It proposed that America have a general colonial legislature, which would tax the colonies for purposes of defense, thus relieving the mother country of that burden. A governor-general would represent the Crown, but the colonies still would acknowledge the monarch of Great Britain as their sovereign.

The Albany Plan failed precisely because it posed the ultimate issues so clearly, and because its solutions were too unpalatable to entrenched interests on both sides of the Atlantic. The construction of a colonial Union with its own legislature, sharing a common sovereign with Britain, struck the British as too dangerous because it threatened the power of Parliament (the sovereign). The construction of a unified, super-colonial legislature overshadowing the colonial legislatures struck colonial politicians as too dangerous because it threatened the power of the colonial legislatures. Franklin shelved his plan, bitterly complaining in later years that its adoption would have rendered an American Revolution unnecessary. Thus ended the last real attempt to devise intercolonial union. In the years following the Treaty of Paris of 1763, rather than grasping and accommodating themselves to the realities of a farflung imperial system that required tact and sensitivity to administer, British officials acted on the basis of unexamined assumptions mingled with a mother country's arrogant disdain for peripheral colonials.

III. THE CONSEQUENCES OF CONSTITUTIONAL INCOHERENCE

At least one first-rank leader of the American Revolution dated the crisis that led to that Revolution to 1761. In that year, at the height of the war between France and Great Britain (in Europe known as the Seven Years' War; in America, called the French and Indian War), a court in Massachusetts decided what soon became known as the "Writs of Assistance case." Writs of assistance were general warrants allowing the bearer, usually a British customs or excise official, to search any premises he chose and seize any contraband he might find there. It was a measure to help customs authorities combat smuggling, but Americans who valued their rights as Englishmen deemed these writs dangerous because customs officials could use these writs as weapons against anyone and everyone who stood in their way, whether they were smugglers or not. Massachusetts lawyer James Otis persuaded the court that writs of assistance were invalid under the unwritten British constitution. Decades later, the aged John Adams, who as a young lawyer had watched Otis's argument and the court's decision, declared, "Then and there the Child Independence was born."

By 1763, with the end of the French and Indian (Seven Years') War, Britain confronted a massive war debt. British politicians soon became convinced that American colonists had had a free ride on the backs of British taxpayers and determined to redress the balance. Moreover, British officials had to try to organize and administer this vast empire, taking account of the competing claims of the residents of the colonies won from the defeated French, the Native American nations and their leaders who sought to be free of colonial interference, and the demands of colonists for the fruits of victory -- expanded land for settlement and speculation. The task that the British government assumed of reconciling these competing and irreconcilable claims soon spun out of control. The familiar events of the 1760s and 1770s marked out a stark

pattern, one that increasingly suggested that tensions within the British constitution as adapted to govern a British empire in America were not only unresolved but unresolvable.

The great tragedy of this dispute was that neither side could grasp the constitutional position of the other, let alone abandon its own position to find common ground for compromise. And yet the dispute over the meaning of the unwritten British constitution remained the context within which the controversy between the colonists and the mother country worsened and approached open breach.

Remembering this context provides an added layer of meaning for three key episodes of the critical year 1776. First, in January, the pamphleteer and journalist Thomas Paine published his widely influential pamphlet, *Common Sense*. Paine's tract succeeded in large part because Paine, fully aware of the constitutional context of the dispute between the mother country and the colonies, shattered that context -- because he recognized that, as long as Americans remained within it, it would imprison them and prevent them from taking the final necessary step of embracing independence. Therefore, Paine demolished the pretensions of the British constitutional system as a guarantor of liberty and as consistent with reason and human needs. He launched his enterprise with a withering attack on the pretensions of monarchy -- after the rejection of the Olive Branch Petition, the new focus of the Americans' sense of betrayal and wrath. Loyalty to the monarchy was the last linchpin in the Americans' loyalty to Britain and its constitutional system. By demolishing monarchy, and then by exposing the vaunted British constitution as built on monarchy, Paine put independence on the table as a legitimate option for the Americans to consider. Furthermore, by exploding the constitutional context, he also transformed the argument from being the sole province of those politicians learned in the law, customs, and usages of the British system to an argument in which all Americans could and should take part.

Second, in May of 1776, the Second Continental Congress yielded to a solid year of argument and importunity by John Adams of Massachusetts and adopted a resolution calling on the Americans to frame new constitutions to replace the colonial charters. George III's declaration the previous fall that the colonies were out of his allegiance and protection provided the justification for Congress's resolution. In an adroit preamble (drafted by Adams), the Americans shifted to the King the blame for the collapse of colonial governments and the need to frame new independent constitutions of government. Yet again, the structure and assumptions of the constitutional argument between Britain and her American colonists was proving to be a force impelling Americans to break with the mother country -- in the service of the goals and principles they had long identified as central to Anglo-American constitutionalism.

Third, on 2 July 1776, the Second Continental Congress adopted a resolution (offered the previous month by Richard Henry Lee of Virginia) declaring that the colonies "are, and of right ought to be, free and independent states." Two days later, Congress adopted a Declaration of Independence -- the latest in a series of formal declarations and resolutions that marked out the spine of its ongoing argument with Great Britain. The Declaration has become a pivotal document in American public life; its eloquent preamble has come to symbolize the central tenets of the American political creed. And yet, what was the Declaration's purpose? Why did it

assume the structure of argument that it did? And what functions did Congress intend it to perform?

In 1981, in a pathbreaking essay entitled "The Irrelevance of the Declaration," John Phillip Reid of New York University Law School argued that the important part of the Declaration was not its preamble, but rather its body of charges against George III. As Reid argued, the Americans had not picked on the hapless monarch as an easy target; rather, because of George's actions in late 1775 and early 1776, he had had -- and had thrown away -- the last clear chance to avoid an open breach with the colonies. Previously, the Americans had addressed their complaints to Parliament; in the summer of 1775, in the Olive Branch Petition (drafted by John Dickinson), they had shifted ground and invoked the King's role as the nonpartisan patriot monarch of his whole people, appealing to him to intervene in the dispute between Parliament and the colonists. When George refused to do so, he assumed full responsibility for the list of charges set forth as the body of the Declaration. That list of charges became the Americans' last word in the constitutional argument that had raged for more than a decade.

In *American Scripture*, her 1997 study of the Declaration, Pauline Maier in essence argues that the declaration of American independence was a political and constitutional act, by an institution (the Second Continental Congress), by a people (as evidenced by the profusion of local resolutions and declarations calling for independence before Congress acted), through a process of literary reshaping of an explanatory document (by Congress editing Jefferson's draft of the Declaration) -- a document that, in turn, took on a life of its own as a cultural, political, and constitutional symbol. The question Maier poses is: "Which is more important, the action itself or the document that has come to be the symbol of that action?"

One answer may be that all these scholars are right about at least part of the question. The Declaration is Janus-faced; it looks backward, tying off the constitutional dispute with the former mother country, and forward, as a codification of political and constitutional principles on which the Americans would base their new experiments in government. As the political scientist Donald S. Lutz of the University of Houston has argued in his 1988 study *The Origins of American Constitutionalism*, the Declaration formed part of the American set of founding covenants -- with each of the state constitutions (some of which had incorporated the Declaration's text into their preambles) and, on the national level, first with the Articles of Confederation and then with the United States Constitution.

Moreover, as John Phillip Reid points out in the afterword to his 1995 abridged edition of his *Constitutional History of the American Revolution*, the constitutional argument between Britain and the Americans persisted as well in specific clauses and institutional arrangements of the American's state and federal constitutions. Moreover, the need for an authoritative final judge in disputes between the center and the periphery -- disputes that in the years between 1765 and 1776 could not be resolved -- contributed to the American development of the doctrine of judicial review as a bulwark of constitutional federalism. In these ways, the long and bitter argument between Britons and Americans had a lasting, and positive, political, constitutional, and jurisprudential legacy.