Eighteenth-Century American Constitutionalism

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The era of the American Revolution was the greatest and most creative age of constitutionalism in American history. During the last part of the eighteenth century Americans established the modern idea of a written constitution. There had been written constitutions before in Western history, but Americans did something new and different. They made written constitutions a practical and everyday part of governmental life. They showed the world not only how written constitutions could be made truly fundamental, distinguishable from ordinary legislation, but also how such constitutions could be interpreted on a regular basis and altered when necessary. Further, they offered the world concrete and usable governmental in situations for the carrying out of these constitutional tasks. All in all it was an extraordinary achievement, scarcely duplicated by any modern country in such a brief period of time.

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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. "By constitution," wrote Lord Bolingbroke in 1733, "we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed." The English constitution, in other words, 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." And, said Paine, it was "not a thing in name only; but in fact." For Americans a constitution was like a bible, possessed by every family and every member of government. "It is the body of elements, to which you can refer, and quote article by article; and which contains . everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound." 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." If the English thought this American idea of a constitution was, as Arthur Young caustically suggested in 1792, like "a pudding made by a recipe", the Americans had become convinced the English no longer had a constitution at all.

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.

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. Eighteenth-century colonists had no reason to think about government much differently. Time and again in the colonial period the colonists had been forced to defend themselves against the intrusions of royal prerogative power. They relied for defense on their colonial assemblies, their rights as Englishmen, and hat they called their ancient charters. In the seventeenth century many of the colonies had been established by crown charters, corporate or proprietary grants made by the king to groups like the Massachusetts Puritans or to individuals like William Penn and Lord Baltimore to found colonies in the New World. In subsequent years these written charters gradually lost their original purpose in the eyes of the colonists and took on a new importance, both as prescriptions for government and as devices guaranteeing the rights of the people against their royal governors. In fact, the whole of the colonists' past was littered with such charters and other written documents of various sorts to which the colonial assemblies had repeatedly appealed in their squabbles with royal power.

In appealing to written documents as confirmations of their liberties the colonists acted no differently from other Englishmen. From almost the beginning of their his tory, Britons had continually invoked written documents and charters in defense of their rights against the crown's power. "Anxious to preserve and transmit" their liberties "unimpaired to posterity", the English people, observed one colonist on the eve of the Revolution, had repeatedly "caused them to be reduced to writing, and in the most solemn manner to be recognized, ratified and confirmed," first by King John with Magna Carta, then by Henry III and Edward 1, and "afterwards by a multitude of corroborating acts, reckoned in all, by Lord Cook, to be thirty-two from Edw. lst to Hen. 4th. and since, in a great variety of instances, by the bills of rights and acts of settlement." All of these documents, from Magna Carta to the Bill of Rights of the Glorious Revolution of 1689, were merely written evidence of those "fixed principles of reason" from which Bolingbroke had said the English constitution was derived.

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 Habeus 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 con stitutional. "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 all free States," said Samuel Adams in 1768, "The Constitution is fixed; and as the supreme Legislature derives its Powers and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation." Thus in 1776, when Americans came to make their own constitutions for their ir newly independent states, it was inevitable that they would seek to make them fundamental and explicitly write them out in documents. It was one thing, however, to define the constitution as fundamental law, different from ordinary legislation and circumscribing the institutions of government; it was quite another to make such a distinction effective. 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 con stitutions 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, and in general, as one victim complained, violated "those fundamental principles which first induced men to come into civil compact."

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."

No one wrestled more persistently with this problem of distinguishing between statutory ,and fundamental law than did Jefferson. In 1779 Jefferson knew from experience that no legislature "elected by the people for the ordinary purposes of legislation only" could restrain the acts of succeeding legislatures. Thus he realized that to declare his great act for Establishing Religious Freedom in Virginia to be "irrevocable would be of no effect in law; yet we are free," he wrote into the bill in frustration, "to declare, and do declare, that . if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." But such a paper declaration was obviously not enough; he realized that something more was needed. By the 1780s both he and Madison were eager "to form a real constitution" for Virginia; the existing one was merely an "ordinance" with "no higher authority than the other ordinances of the same session." They wanted a constitution that would be "perpetual" and unalterable by other legislatures." But how? That was the rub. Somehow or other, if the constitution were to be truly fundamental and immune from legislative tampering, it would have to be created, as Jefferson put it, "by a power superior to that of the legislature." By the time Jefferson came to write his Notes on the State of Virginia in the early 1780s the answer had become clear. "To render a form of government unalterable by ordinary acts of assembly," said Jefferson, "the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments." In 1775-76 conventions or congresses had been legally deficient legislatures made necessary by the refusal of the royal governors to call together the regular and legal representatives of the people. Now, however, these conventions were seen to be special alternative representations of the people with the exclusive authority to frame or amend constitutions. When Massachusetts and New Hampshire wrote new constitutions in the early 1780s, the proper pattern of constitution-making and constitution-altering was set: constitutions were formed by specially elected conventions and then placed before the people for ratification. Thus in 1787 those who wished to change the federal government knew precisely what to do: they called a convention in Philadelphia and sent the resultant document to the states for approval. Even the French in their own revolution several years later followed the American pattern. Conventions and the process of ratification made the people the actual constituent

power. Such institutions, historian R. R. Palmer has said, were the most distinctive contributions the American Revolution made to Western politics.

But these were not the only contributions. 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-that remarkable 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. There is nothing quite like it anywhere else in the world.

The development of judicial review came slowly. It was not easy for people in the eighteenth century, even those who were convinced that many of the acts of the state legislatures in the 1780s were unjust and unconstitutional, to believe that unelected judges could set aside acts of the popularly-elected legislatures; this prerogative seemed to be an undemocratic judicial usurpation of power. But as early as 1787 James Iredell of North Carolina, soon to be appointed a justice of the newly- created Supreme Court of the United States, saw that the new meaning Americans had given to a constitution had clarified the responsibility of judges to determine the law. A constitution in America, said Iredell, was not only "a fundamental law" but also a special popularly-created "law in writing . limiting the powers of the Legislature, and with which every exercise of those powers must necessarily be compared." Judges were not arbiters of the constitution or usurpers of legislative power. They were, said Iredell, merely judicial officials fulfilling their duty of applying the proper law. When faced with a decision between "the fundamental unrepealable law" made specially by the people and an ordinary statute enacted by a legislature contrary to the constitution, they must simply determine which law was superior. Judges could not avoid exercising this authority, concluded Iredell, for in America a constitution was not "a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot witfully blind themselves." Although Iredell may have been wrong about the number of different opinions that could be formed over a constitution, he was certainly right about the direction judicial authority in America would take. Through the subsequent development of the doctrine of judicial review judges in America came to exercise a power over govern mental life unparalleled by any other judiciary in the world.

These then were the great contributions to constitutionalism that Americans in the Revolutionary era made to the world-the modern idea of a constitution as a written document, the device of a convention for creating and amending constitutions, the process of popular ratification, and the practice of judicial review. The sources of these constitutional contributions went back deep in Western history. For centuries people had talked about fundamental law and the placing of limits on the operations of government. But not until the American Revolution had anyone ever developed such regular and everyday institutions not only for controlling government and protecting the rights of individuals but also for changing the very framework by which the government operated. Americans in 1787 and in numerous state constitutional conventions thereafter demonstrated to the world how a people could fundamentally and yet peaceably alter their forms of government. In effect they had institutionalized and legitimized revolution. After these American achievements, discussions of constitutionalism could never again be quite the same.

Suggested Additional Reading: Edward S. Corwin, *"The Higher Law": Background of American Constitutional Law* (1959)

J.W. Gough, *Fundamental Law in English Constitutional History* (1951) Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (1932) Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969)

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