CONSTITUTIONALISM IN AMERICAN THOUGHT, 1689-1763

By Lawrence H. Leder*

TO COLONIAL Americans no theoretical issue was as fascinating or significant as the nature of constitutions. They did not investigate the subject for its own sake, but as a means of justifying their positions on purely local issues and petty problems unconnected with imperial concerns. Americans never sought a full and comprehensive philosophy of government, rather they wanted specific justifications of *a posteriori* situations. Having adopted stances in defense of this or that principle (as a means to an end), they could not logically disavow them when they became no longer useful. Indeed, through the year 1763 these principles remained, and their continued recitation over so long a period gave them the qualities of an incantation.

The question of the nature of the British constitution was indeed important to the colonists; it had a compelling practicality for them. Given their own positions as members of the empire, they found it important to understand just how that empire was managed. But beyond this lay another, more subtle need: only by firmly establishing the nature of the British constitution could the nature of their own governments be determined. The British constitution was the model, guide—indeed the rule—for the appendages of Britain that were the empire.

Two general approaches can be distinguished in eighteenth-century American writings on this topic: one that the British constitution was a fixed and rigid collection of rules and laws; the other that Parliament itself was really the constitution and it was, therefore, constantly subject to change. Each view had major consequences for Americans. If the constitution were fixed, colonials could hope to define the relative positions of governor, council, and assembly, utilizing Britain as their example. If the constitution were mutable and flexible, colonists would be at the

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mercy of the governor who represented British authority, and their assemblies with all the powers claimed for them would be little more than air castles, subject to whimsical and capricious modification or destruction.

It is perhaps revealing that Americans did not begin to concern themselves with the nature of the British constitution until the 1720's, a period generally accepted as the real beginning of controversy over the growing power being exerted by assemblies and, simultaneously, a time of increasing rigidity in the approach of Whitehall toward imperial administration. It was also a time of growing immigration to America from non-English sources. The colonists were beginning to mature, to identify themselves as Americans, and at the same time, to grow more distant psychologically from the mother country. Thus there was a pressing need to understand the nature of the governmental structure to which they owed allegiance and which played a key role in their lives.

The subject of the British constitution was first explicated by James Logan in his charge to the Philadelphia grand jury in 1723. He began by praising the British for combining in their government the best of the three forms of monarchy, aristocracy, and democracy, and then described the roles of each. "The king as monarch is supreme, yet limited by the laws, the power of which is vested in him, jointly with the lords, the whole nobility of the kingdom, and with the commons, whose representatives . . . are selected by the votes of the freeholders." Public justice, he added, is "administered by known fixed laws, which cannot be infringed or altered by the will of any man or by any other power than the whole legislature," thereby seemingly tossing common law to the winds.[1]

The relative powers and functions of each of the three branches of government under the British constitution continually intrigued Americans and served as constant points for analyses which varied depending upon who spoke. The Pennsylvania assembly lectured Governor Patrick Gordon in 1728 and firmly declared: "But of an English government, a House of Representatives is a principal and most important part, as being the main barrier of all those

[1] James Logan, *The Charge Delivered from the Bench to the Grand Jury* (Philadelphia, 1723), pp. 4-5.

rights and privileges which British subjects enjoy."[2] But in the same year, when Governor William Burnet lectured the Massachusetts General Court on the subject, he stoutly averred: "The three distinct branches of the legislature, preserved in a due balance, form the excellency of the British constitution. If any one of these branches should become less able to support its own dignity and freedom, the whole must inevitably suffer by the alteration."[3] Significantly, Burnet's lecture was widely reprinted in the colonial press.[4]

Time and again the nature of the British constitution was discussed as a consequence of local controversies. John Peter Zenger's newspaper stirred such a discussion in 1734, and his respondent in a different journal plunged into an analysis of the weaknesses of the governments of ancient Greece and Rome, against which "Englishmen are sufficiently guarded and secured . . . by the happiness of their constitution." The key point was that "the property of the people is fenced, and the power of the prince bounded with received and established laws."[5] Another essay in the same paper considered the reconciliation of power and liberty and concluded that the excellence of the British constitution lay in "that even balance of authority resulting from the mutual dependence of its several parts, whereby the power of the sovereign is moderated, and the liberty of the people is secured."[6]

An interesting feature of the discussion was the effort to date the British constitution. A favorite approach was the use of the Glorious Revolution as the point in time when the constitution, if not created, was at least made firm and definitive. "Surely no one will pretend to say," wrote one essayist, "that we enjoyed . . . liberty in general, in the same extent we do now, before the revolution; it was then that . . . our liberties and constitution were secured and established upon a firm and lasting foundation, and from that great and happy epoch we do and ought most

[2] Pennsylvania Assembly, *To the Honourable Patrick Gordon, Esq.: Lieut. Governor* (Philadelphia, 1728), p. 6.
[3] *Boston Gazette,* July 22-29, 1728 (No. 453).
[4] [Boston] *Weekly Newsletter,* July 18-25, 1728 (No. 82); *New England Weekly Journal,* July 29, 1728 (No. 71); *New York Gazette,* July 29-August 5, 1728 (No. 144). Burnet's statement was quoted verbatim by Governor William Shirley in a similar dispute. *Pennsylvania Gazette,* March 3, 1741/2 (No. 690).
[5] *New York Gazette,* March 4, 1733/4 (No. 436).
[6] *Ibid.,* March 11-18, 1733/4 (No. 438).

properly to date the original of our present happy constitution."[7]

Regardless of the antiquity of the document itself, the theme of its fixed and finite limits on power were repeatedly mentioned by American writers. The Corporation of the City of New York in 1735 found solace in the thought that "the sovereign himself is tied down and restrained from doing evil." That restraint "is the most shining jewel, the most glorious attribute of our constitution, which prescribes the rules of acting, to the prince, as well as to the people, and marks out the boundaries of his prerogative to such exactness that he cannot step over them without apparently encroaching upon the privileges of the subject."[8]

A vastly different approach was taken by John Webbe who wrote in 1736 under the pseudonym "Z." Quoting Bracton, he began with the argument that "the king doth no wrong, for if he doth, he is not king."[9] Webbe contended that the monarch was bound by his coronation oath to govern according to the laws of the realm and to accept all laws desired by the people. His failure in either category automatically authorized the people to rise against him, but only Parliament had the power to determine when that situation had occurred. Indeed, "the power of Parliament is so great," Webbe continued, "that Burleigh used to say, they could do anything but turn a man into a woman." Parliaments were not only "the interpreters of the law," but no Parliament could be bound by the actions of any of its predecessors.[10]

Webbe's theoretical position was contrary to that espoused by nearly all other commentators in this era. To be sure, his ideas were closer to the truth of actual practice, but this was not something Americans could accept. Their development of a more fanciful, structured constitution was a direct outgrowth of their own needs. With American legislatures constantly grasping for more power and seeking to curb royal and proprietary governors, a clear need existed for a frame of reference acceptable to all right-thinking men. Had Americans utilized Webbe's thesis and then contended that their assemblies were parliaments in miniature, the English authorities would probably have been shocked into immediate and severe action. Thus the myth of a fixed British

[7] *Ibid.*, October 21-28, 1734 (No. 470).
[8] *Ibid.*, October 27-November 3, 1735 (No. 523).
[9] *Pennsylvania Gazette*, April 1-8, 1736 (No. 383).
[10] *Ibid.*, April 8-15, 1736 (No. 384).

constitution served a useful purpose, for it permitted Americans to set limits—in theory if not in practice—on the powers claimed for their assemblies and so avoid the extreme ire of the Crown and its representatives.

Webbe's argument was dangerous, and his view of the unlimited power of Parliament came in for severe criticism. "Anti-Z," writing in the *American Weekly Mercury,* declared that "resistance to the supreme executive power is no longer considered to be legal but is subjected by all the authorities to the highest penalties." To him the Glorious Revolution was simply the exception that proved the rule; it did not serve as a precedent, as Webbe suggested, for future rebellions.[11]

The continuing need of Americans for a British constitution structured on their own ideal pattern was evidenced time and again. "It is the glory and happiness of England," reported an essayist in 1748, "that the prince is entrusted with all that is necessary, either for the good of the people or his own protection, and yet is so restrained by the fundamental laws of the constitution as that the subject is in no danger of oppression and tyranny. The rights of the people and the just prerogative of the Crown are . . . far from jostling each other. . . . No man in the community (how great so ever) is above the law, and the law is the people's right and property, and cannot be wrested from them but by their own consent. To resist the king when he governs according to the law is treason against the people . . . so likewise . . . [if the king seeks] to expand the prerogative beyond the constitution, or positive law, he ought to be deemed an enemy to the community."[12]

A series of polemical essays, appearing in the *Maryland Gazette* in 1748, began exploring the various aspects of the British constitution. The first essay by "A Freeholder" asked the rhetorical question: "Whether a parliament . . . has a power, i.e., a right, to enact anything contrary to a fundamental part of the British constitution?" For his answer he cited British sources: "They say it is a vulgar mistake to imagine that a parliament is omnipotent, or may do anything for that they can't alter the constitution."[13]

[11] *American Weekly Mercury,* June 10-17, 1736 (No. 859).
[12] [Boston] *Independent Advertiser,* January 11, 1748 (No. 2).
[13] *Maryland Gazette,* February 10, 1748 (146).

Having rejected the Webbe argument, "Freeholder" then defined the constitution as "plainly an original contract betwixt the people and their rulers. . . . This was the case as well before Magna Carta as after it. . . . But whatever disputes may formerly have been, concerning the original contract, there is not the least room left for any such since the settlement made at the late revolution, which was an express renewal of it. From that happy period our constitution has taken a new aura, not that the people acquired at that time any new rights, but that their old ones were more explicitly acknowledged and ascertained."[14]

"Philanthropos" immediately rose to defend the Webbe thesis. "I take the basis, or foundation, of it, he wrote in speaking of the constitution, "to be the great law of reason, the rules whereof are deductible from the nature of things. . . . The dictates of reason, then, directed our ancestors to that mixed form of government that we now have. . . . I know of no essential or fundamental of the constitution, but parliaments; their existence was before the law, their origin cannot be founded in any law; we have laws for the choice and regulation of them, but not for their existence. An essential or fundamental must be before, or at least coeval to, the thing of which it is essential or fundamental. Now, if this be the case . . . they [Parliaments] must have an absolute and unlimited power. . . . Parliaments, then, are the very constitution itself. It would be absurd to say they can or would alter the constitution; that is, themselves. But there is nothing dependent upon the constitution, but what they can and may alter."[15]

In an effort to find a middle position between "Freeholder" and "Philanthropos," a "Native of Maryland" inquired what "part of the constitution" could not be altered by the parliament? Was not every new law made or old one repealed an alteration of the constitution? "Native" concluded that the constitution was but "a series of alterations made by parliaments," and that the power of each parliament was always "as ample and extensive" as that of its predecessors. But he warned that there were "some fundamentals which it would not be *safe* for a parliament to alter," particularly those that protected persons and property. If the legislature tampered with these, "the people would have had the

[14] *Ibid.*, March 16, 1748 (No. 151).
[15] *Ibid.*, April 27, 1748 (No. 157).

same reason to resist . . . and to return to their original state of nature, and choose a new government." Indeed, the only area of true parliamentary incompetence was "any of those powers, which by the joint consent of the community, in order to keep up their mixed form of government, the several branches of the legislature are invested with."[16]

The Maryland arguments were concluded by "Americano-Britannus" who declared: "From what has been said, it will appear that parliaments are not the constitution . . . but that they take their form, powers, and existence from it. That they cannot alter that form or alienate those powers . . . without breaking through that agreement of the society . . . which constituted them."[17] In so doing, the author pointedly rejected the arguments of "Philanthropos" and John Webbe. An omnipotent parliament and a mutable constitution were ideas fraught with danger, for they opened the doors to uncertainty for the colonies both at home and in England.

From this point forward there was no deviation from the American myth of the British constitution. Essays in Boston newspapers in 1749 and 1752 reiterated that the constitution was a set of fixed and inflexible rules. So too did William Welsteed's Boston election sermon of 1751.[18] The concept had proceeded so far by this point that the idea began to emerge that a law might even be "unconstitutional." An essayist in Massachusetts regarded a proposed excise law as "entirely unconstitutional, and therefore unknown, and never so much as once attempted in the English constitution."[19]

In at least one American mind, Magna Carta also became fixed and static. "This charter," wrote a correspondent to the *Boston Gazette* in 1756, "tho' it runs in the style of a king, yet it is not to be understood as a mere emanation of royal favor which the people could not justly challenge, or had not a right to before.

[16] *Ibid.*, May 11, 1748 (No. 158).
[17] *The Maryland Gazette Extraordinary:* An Appendix (to No. 162), June 4, 1748.
[18] [Boston] *Independent Advertiser,* February 6, 1749 (No. 58); *Boston Post-Boy,* October 9, 1752 (No. 927); William Welsteed, *The Dignity and Duty of the Civil Magistrate* (Boston, 1751), p. 33.
[19] Anon., *Some Observations on the Bill* (Boston, 1754), p. 2. See also *Pennsylvania Gazette,* June 30, 1757 (No. 1488), for a discussion of an "anticonstitutional" bill.

For a great judge of law tells us that it is only declaratory of the principal grounds, of the fundamental laws and liberties of England. . . . So that it seems rather to be a collection of ancient privileges from the common law, ratified by the suffrage of the people and claimed by them as their reserved rights.[20]

Even the Act of Union of 1707 between England and Scotland was viewed as an absolute limitation upon government. The terms of the act, a Connecticut pamphleteer declared in 1760, have been held "sacred and inviolable," because "if any act should be made inconsistent with, and contrary thereto, it would destroy the obligations to obedience." Not only did the British Parliament scrupulously adhere to the Act of Union, but so too did the courts. In explaining acts of Parliament the judges construed them in a way wholly consistent with the Act of Union, thereby suggesting that the American concept of judicial review was being employed by the English courts. A similar idea emerged almost simultaneously in Philadelphia.[21]

Agreement on the nature of constitutionalism at this level did not carry over into other areas. The variety of colonial constitutions led to sharply differing interpretations of what those documents were. Each colony sought to defend its own institutional arrangements against external pressures, but some began with greater advantages than others. The Crown colonies found themselves almost totally defenseless in theory—though not in practice—against royal intervention, while proprietary colonies had the advantage of charter rights—though these were once removed from the fount of ultimate authority—and corporate colonies were almost invulnerable from outside political forces. Consequently, crown colonies made little headway in defining constitutionalism as it applied to themselves, proprietary ones succeeded a little better, and corporate colonies structured full theoretical defenses of their positions. Colonial response in this area, however, was so uneven as to force Americans after 1763 to seek new theoretical defenses against imperial power.

Equally deficient was the colonial concept of the nature of the imperial constitution. At no time did they challenge the pronounce-

[20] *Boston Gazette and Country Journal*, May 10, 1756 (No. 58).
[21] Anon., *A Letter to a Friend Occasioned by the Unhappy Controversy at Wallingford* (New Haven, 1760), p. 5 fn.

ments of British officials in London and America that the locus of authority was Whitehall, and their refusal to recognize the Declaratory Act of 1766 was a classic illustration of their failure to understand the significance of this aspect of constitutionalism. When, after 1763, the Americans attempted to argue against British policy by means of the old shibboleths, they suddenly discovered that the frame of reference had changed. Thus they were forced to resort eventually to the rights of man rather than those peculiar to Englishmen. This was the ultimate meaning of the Declaration of Independence, a document which essentially repudiated concepts that had been developed and elaborated upon for three-quarters of a century. Only after the lapse of another two decades could the Americans return to their original view of constitutionalism at the Philadelphia convention of 1787.

TWO MEANINGS OF THE TERM CONSTITUTION: A COMMENT ON "CONSTITUTIONALISM IN AMERICAN THOUGHT"

By John L. Washburn*

LAWRENCE H. LEDER has made a major contribution to our understanding of pre-Revolutionary American political thought, which raises questions about our contemporary notions of constitution and the Constitution.[1] My intention is to develop further two aspects of the term.

Most writers have treated American political thought as a continuous, almost unilinear, development from the Mayflower Compact to the Declaration of Independence. From this perspective the theoretical justification of the American Revolution is seen as an appeal to the so-called "rights of Englishmen," the ultimate justification being epitomized in the slogan "No taxation without

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[1] The article has been expanded to form a part of Leder's recently published *Liberty and Authority: Early American Political Ideology, 1689-1763* (Chicago, 1968).

representation." The consequence of this view would be that the Revolution merely consisted of driving out the British governors who had violated the British constitution. In other words, the Revolution did not create any constitutional problems for the Americans.

For example, a recent work on American political theory summarizes American constitutional ideas in the period up to 1763 as follows: "[N]o one could doubt that certain inherited Old World ideas—particularly British constitutional ideas of liberty, representative self-government, and due process—had taken firm root in America."[2] Only a few pages later, however, the author, when speaking of post-1763 debates over the Stamp Tax and Navigation Acts, notes, apparently without seeing the theoretical problem in constitutional thought: "Frequently, the Loyalists had the best of the argument."[3] So long as Americans restricted their argument to the nature of the British constitution they had no grounds for disobedience and they logically could not counter the argument of the Loyalists. American constitutional theory had to develop a new notion of constitution to shift the argument in the colonists' favor.

Professor Leder shows that, in fact, Americans did develop a rather coherent body of political thought which saw the British constitution as fixed and static. To deal with the political problems of the period 1689-1763, the colonies (we might call them pre-Americans) found it advantageous to establish the notion of a fixed and stable constitution, containing certain clear-cut liberties, for they had to live *under* it. The point is, this view, living under a constitution that guarantees specified rights, can never justify a revolution. So far as I know, no constitution has ever provided a right of revolution, and none logically could. Logically, therefore, the view of liberties-under-a-constitution never did justify the American Revolution, and so long as the debate accepted this point of view "the Loyalists had the best of the argument" indeed. American revolutionary thought must therefore be discontinuous with constitutional thought in America before 1763.

Why have we failed to note and investigate this discontinuity? A possible clue, and a theoretical one at that, is our understanding

[2] Neal Riemer, *The Democratic Experiment: American Political Theory* (Princeton, 1967), I, p. 91.
[3] *Ibid.*, p. 99.

of contract theory. It has frequently been said that American political thought in the eighteenth century reflects the views of John Locke. That may very well be true, but Locke himself is ambiguous on the very point at issue here, the relation of a citizen to the contract-constitution, and hence the nature of the constitution. In the first place, it is debatable whether Locke really justifies revolution at all.[4] Even more important, however, is the fundamental discontinuity in his theory of the social contract.

In theory Locke, as did other seventeenth and eighteenth century thinkers, distinguished between two kinds of "social contract." One was concluded between individual persons and supposedly gave birth to society; the other concluded between a people and its ruler and supposedly resulted in legitimate government. However, the decisive difference between these two kinds were early neglected because the thinkers were primarily interested in finding a theory of obligation, social as well as political, rather than accounting for the breakthrough to new forms of constituting public relationships.

The chief differences between these two kinds of social contract may be enumerated as follows: (1) The mutual contract by which people bind themselves together in order to form a community is based on reciprocity and presupposes equality; its actual content is a promise, and its result is indeed a "society" or "cosociation" in the old Roman sense of *societas,* which means alliance. Such an alliance gathers together the isolated strength of the allied partners and binds them into a new power structure. (2) In the so-called social contract between a given society and its ruler, on the other hand, we deal with a fictitious, aboriginal act on the side of each member, by virtue of which he gives up his isolated strength and power to constitute a government; far from gaining a new power, he resigns his power such as it is, and far from binding himself through promises, he merely expresses his "consent" to be ruled by the government. (3) As far as the individual person is concerned, it is obvious that he gains as much power by the system of mutual promises as he loses by his consent to a monopoly of power in the ruler. (4)

[4] Andrew Hacker, *Political Theory: Philosophy, Ideology, Science* (New York, 1961), pp. 283-285; John Locke, *Second Treatise on Civil Government,* para. 149.

Conversely, those who "covenant and combine themselves together" (Cambridge Agreement of 1629) lose, by virtue of reciprocation, their isolation, while in the other instance it is precisely their isolation which is safeguarded and protected.[5]

The notion which Leder has identified as a theory of a fixed constitution coincides with the theory of the second contract. American political thought in this period is characterized by the belief that individuals have given up power to the government, in return for which that government is obliged to use its power to protect certain liberties of the individual. Thus the debate is focused on what specifically are the powers of the British government and what specifically are the rights of the colonists. For example, Leder quotes the *New York Gazette*: "the excellence of the British constitution lay in 'that even balance of authority resulting from the mutual dependence of its several parts, whereby the power of the sovereign is moderated, and the liberty of the people is secured.' " Power seems to be one thing, and liberty another. There is no doubt that this view has been widely accepted in America, and not only in the period 1689-1763.

But logically it required the discovery of the first contract, the view not of a citizen's liberties under a constitution but of citizens constituting themselves into a political structure before revolution could be theoretically justified. This requires seeing a constitution not as something there, a given to be consented to, but as the act of constituting itself. The intimations of this point of view expressed by John Webbe ("the power of Parliament is so great that Burleigh used to say, they could do anything but turn a man into woman") and "Philanthropos" ("I know of no essential or fundamental of the constitution, but parliaments; their existence was before the law, their origin cannot be founded in any law; we have laws for the choice and regulation of them, but not for their existence. . . . Parliaments, then, are the very constitution itself") were explicitly refuted by referring to the notion of a fixed constitution.

The answer to the question "What are the powers of government and what are our rights under the British Constitution?" became inadequate to the practical exigencies of politics in the period after 1763, for the powers of the imperial government

[5] Hannah Arendt, *On Revolution* (New York, 1963), pp. 169-170.

turned out to be restricted only by individual liberties and they could not be challenged constitutionally by colonial political bodies —their legislative assemblies. Thus, theoretical inquiry had to turn to the question of "How is political power constituted?" which became the equivalent of "How can a people constitute itself for political purposes?"—an inherently revolutionary kind of question. And the preliminary probes of Webbe and "Philanthropos" turned out to be remarkably accurate, for it was through existing political structures, their legislatures and conventions whose members were chosen by legislative bodies, that Americans enacted the Declaration of Independence, the Articles of Confederation, and the Constitution of 1787. The American Revolution was carried out, in other words, by existing constitutional bodies, who, upon the Declaration, merely had to re-constitute themselves. And, theoretically, this involved the discovery that men through mutual agreements could in fact structure their own political existence.

Consequently, we have well established in American political thought not only the notion that we each as individuals have rights under a constitution but also the notion that we can reconstitute our public life through mutual agreement in a revolutionary, though not necessarily violent, fashion. The tension between these two views provides an inherent dynamic in American political thought, for neither view of constitutions is universally accepted for long. It is possible to set off power from liberty, as did the colonists in the period 1689-1763, but it is also possible to regard power and liberty as the same, as did the colonists in the Revolutionary period. For what good is a declared liberty if one does not have the power to exercise it? And what better way to pursue it than through mutual agreements where men combine with others to increase their power to exercise liberties?

Leder has shown the extent to which the idea of a fixed constitution developed in American political thought before 1763. It remains for someone to do an investigation of the notion of constitution-making that seems likely to have developed in the period from 1763 to 1787. More generally it is also necessary to consider the extent to which the notion of a fixed, negative constitutional structure, and the notion of mutual constituting have been manifest in other American social and political struggles and under what circumstances have one or the other been adopted.