

Constitutional Origins of the American Revolution

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“Taxation without representation” is a commonly heard expression when discussing the cause for the American Revolution. Without question, taxes were a part of the conflict, but the underlying origin of the revolution was disagreements over the application of the British constitution in America. Britain, in the American sense, does not have a constitution, implying a single legal document outlining the structure and basic law of a government, but rather an uncoded British Constitution exists. The British constitution is understood to be a series of laws, traditions and legal pronouncements dating back to at least the Magna Carta. The American Constitution owes its origins to the British constitutional tradition. The English Bill of Rights, written in 1689, was one of the accomplishments of the Glorious Revolution of 1688-89. When drafting the Bill of Rights for the American Constitution, James Madison, consequently looked to the English Bill of Rights as a model. The English tradition of political liberalism traces its origins to the Magna Carta or the great charter of liberties, in which King John I signed a charter limiting his power and granting rights to his barons. This charter was the first example of limited government in western constitutional history, and it laid the foundation of British and American

constitutional tradition. The American Revolution, to a large extent, was a result of the British Authority and colonists disagreeing as to the nature of the application of British constitutional law in the United States.

James Otis Jr. was a writer who dramatically influenced the revolutionary movement and gave an intellectual justification for it as well. Otis wrote *Rights of British Colonies Asserted and Proved* in 1764 where he argues that the British taxation policy in the colonies was illegal according to Britain's own constitutional tradition. Otis cites the Glorious Revolution and the writings of John Locke as proof of Britain's constitutional liberalism and argues that the rights that the British gained from the Glorious Revolution were inherited by the American colonies and the colonial administrations denied them these rights. The subsequent revolution was a result over disputes between the American colonies and the British authorities over the constitutional legality of various taxes and legal pronouncements. Over time it became increasingly difficult to reconcile the two viewpoints and war became inevitable.

The Magna Carta was an extremely important document because it marked the first time in western history that a king's power was constrained and could be legally limited through the acts of his barons. This act of power limitation of a head of state is a politically liberal idea

that America inherited from the Magna Carta. It was the first example of constitutionalism in the western world and is regarded as the origin of not only the American Constitution but in other countries throughout the British Commonwealth as well.¹ The Magna Carta was signed at Runnymede, England by King John I on June 15th 1215 when his barons forced him to place limitations on his power in exchange for military support and tax. Magna Carta means “the great charter” in Latin, and became the basis of the American colonies.² The document outlines the limits of power of the king towards his subjects, such as protecting peoples’ property and land from arbitrary and capricious seizure by the king.

The article of the Magna Carta which is the most significant in terms of limited government and due process of law is Article 39. It states that “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”³ The British jurist Sir Edward Coke would further elaborate

¹ A. E. Dick Howard. *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: The University Press of Virginia, 1968), 1-3.

² Geoffrey Hindley, *A Brief History of Magna Carta: The Story of the Origins of Liberty* (London: Robinson Press, 2008), 2.

³ Magna Carta.

on this article in his attempt to limit the power of the Stuart monarchy – in particular, King James I, who argued that “the king could not be subject to law, because law was merely a means of executing the royal will.”⁴ Coke argued that the Magna Carta limited the royal prerogative by declaring the existence of fundamental English laws and customs that formed part of the English common law. If King John I violated these laws and customs, he would be tyrannical.⁵ Coke’s main contribution to constitutional theory is that he institutionalized the common law and made the Magna Carta something that could be enforceable upon the king to constrain him.

The next major developments of the British Constitution and British democracy were the Glorious Revolution of 1689 and the resulting formation of the English Bill of Rights. The Glorious Revolution was the result of policies of King James II towards Catholics granting legal rights and tolerance. This greatly worried Protestant leaders, who felt that King James II would establish the Catholic Church as the state church of England. The Glorious Revolution was largely bloodless. Dutch Prince William III and his wife Mary II (King James’ daughter) invaded England and forced King James II to flee to France.

⁴Mark Geddis Fredrick, “An Originalist Defense of Substantive Due Process: Magna Carta, Higher Law constitutionalism and the Fifth Amendment,” *Emory law journal* 58 no.3 (2009): 594.

⁵ Ibid.

King William III took over as the monarch and Parliament passed the Bill of Rights of 1689, which laid out the basic civil liberties of Englishmen. The Bill of Rights began with twelve specific examples of how former King James II violated the rights of Englishmen. The most egregious example was suspending and dispensing laws without consent of Parliament. Other examples are levying a tax without consent of parliament, raising a standing army in a time of peace without Parliament's consent, imposing excessive bail and fines and inflicting cruel and unusual punishment, and finally, disarming Protestants while arming and employing Catholics.⁶

It was at this time, in 1689, that the philosopher John Locke wrote his work *Two Treatises of Government*. Locke wrote this work while defending the Glorious Revolution to promote popular sovereignty as a response to the monarchist Robert Filmer. He wanted to attack the philosophy of Thomas Hobbes' *Leviathan*, written in 1651 as a defense of absolute monarchy. Hobbes defended absolutism by arguing that life is "solitary, poor, nasty, brutish and short" and saying it was necessary to have a strong monarch in order to maintain and protect property in society.⁷ He was the first philosopher to articulate the necessity of a

⁶ Micheal Barone, *Our First Revolution: The Remarkable British Upheaval that Inspired America's Founding Fathers* (New York: Crown Publishers, 2007), 1-11.

⁷ Thomas Hobbes, *Leviathan* (New York: Penguin, 1983), 253.

social contract because society is fundamentally violent. He argued that a monarch brings stability and peace and, in return, the people surrender their sovereignty to the monarch. The king becomes the absolute ruler and is obliged to protect the nation by maintaining order and peace. In response to Hobbes, Locke argued that the state of nature was one of perfect freedom and that people have a right to life, liberty and property.⁸ Locke contends that people enter into a state of civil society in order to protect their property by relying on consent as a way to justify rule. It is the preservation of property that brings people into civil society and causes them to enter into contracts to protect that property, maintain peaceful relations, and pursue common objectives. Locke's ideas greatly influenced Thomas Jefferson, especially in the Declaration of Independence.

When English colonists began to settle in America, they brought their legal traditions and their constitutional heritage with them. They assumed that they were still afforded the rights of Englishmen and felt that Parliament should not legislate on behalf of the colonies without their consent. Each colony had its own assembly house and colonial constitution, and the colonies maintained a relatively high degree of autonomy until the French and Indian War. Prior to the French and

⁸ John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 115.

Indian War, the British authorities had a policy of salutary neglect, which meant that the British government would not enforce import-export duties and restrictions on colonial commerce. After the War, though, the British began to impose taxation and other impositions on the colonies to generate revenue to pay their war debts. One of the laws imposed was the Sugar Act of 1764, which reinforced the Molasses Act of 1733. The Molasses Act taxed the production of molasses, sugar, and derivatives of those, such as rum. The Sugar Act further increased taxes of items that required the use of sugar to produce, such as many items that were already taxed under the jurisdiction of the Molasses Act. Another was the Writ of Assistance, which was passed in 1760. This law was a general search warrant that allowed British authorities to search warehouses for smuggled goods. This particular act inspired a great deal of hostility and resentment in the Americans because they felt that it was a violation of their rights as British citizens.

Lawyer James Otis Jr., credited with penning the phrase “Taxation without representation is tyranny,” wrote an influential tract called *Against Writs of Assistance* in 1761. Otis cited the English Bill of Rights and the Lockean phrase “life liberty and property” in his defense of the American colonists. Otis was the first American to argue that the British taxation policy was unconstitutional because Parliament taxed the

Americans without consent and representation in Parliament. Otis argued against the Writs of Assistance by insisting that it violated the Constitutional freedoms that Americans inherited as English citizens. He stated that the Writs of Assistance was “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book” and that “one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.”⁹ Historian Dick Howard contends that “as a lawyer Otis read deeply, especially in Coke, pursuing the avid reading habits which he had developed young. He owned a copy of the sixth edition of Magna Carta, in which the mark of a pointing finger is frequently found written in the margin of chapter 29 (‘law of the land’) and Coke’s commentary thereon.”¹⁰ Otis’s speeches greatly impressed John Adams, who said that Otis was a “Flame of Fire” and that “then and there the child of liberty was born.”¹¹ Historians regarded the speech given by Otis as the beginning of resistance to the British as

⁹ James Otis, “James Otis: Against Writs of Assistance.”
<http://www.nhinet.org/ccs/docs/wandrits.htm>.

¹⁰ Howard, 168.

¹¹ Ibid, 170.

he articulated a strong argument against British rule in the colonies by highlighting the British violation of constitutional tradition.

The degree to which the tradition of English liberty influenced the Founding Fathers and their Revolution cannot be overemphasized. “Liberty may have been the most trenchant word in the eighteenth century English language.”¹² English law equated liberty with property, so that liberty could not exist without property, therefore reinforcing and cementing Lockean doctrine into British politics. The British were extremely proud of their tradition of liberty, and in the seventeenth and eighteenth century the British viewed themselves as the freest people in the world.¹³ Essentially, liberty was central to British political life and culture and that liberty was tied to property. It was the *security* of property, and not property itself, which ensured liberty through common law constitutionalism. Since property was tied to liberty, any unjust taxation was perceived as a threat to freedom.¹⁴ This is why American patriots were incensed at the tax policy of the British government: it was not simply taxes that offended the Americans, but that they would be taxed without any consultation. The Sugar Tax offended the colonists, but the Stamp Act and the Declaratory Act enraged them. The Stamp

¹² John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988), 17.

¹³ Ibid, 20, 16.

¹⁴ Ibid, 25.

Act, passed on March 27, 1765, taxed all printed paper – everything from newspapers and legal documents to dice and playing cards. This led to the Stamp Act Congress, which was the first organized resistance to the British authorities. It was also where James Otis Jr. first spoke out against Writs of Assistance and wrote “The Rights of British colonies assisted and proved” in 1764. The Sons of Liberty formed after the passing of the Stamp Act, and became the first group to organize resistance against the British.¹⁵ They led the way in continual resistance to British authority.

There was also a large population of loyalists in America that crafted a number of arguments to challenge Britain not giving parliamentary seats to the Americans. The most common argument that British authority gave for not allowing the Americans seats in Parliament was that the Americans were “virtually represented” by the crown. “Virtual representation” meant that members of Parliament reserved the right to speak on behalf of the interests of all English people instead of specific constituencies or districts. The concept of virtual representation was used to defend the Declaratory Act of 1766. The declaration stated that Parliament's authority was the same in America as in Britain, and

¹⁵ Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1775* (New York: Vintage books, 1972), 101-106.

asserted Parliament's authority to pass laws that were binding on the American colonies. Otis argued in *Rights of the Colonies* that this was an illegitimate position because Parliamentary representation required members from each colony to represent their community, and that Parliament would not be able to represent the interests of the colonies adequately without actual representatives from the colonies.

The historian Jack P. Greene wrote that “the revolution that occurred in North America during the last quarter of the eighteenth century was an unintended consequence of a dispute of law.”¹⁶ There was never any agreement between Parliament and the colonies over the extent to which Parliamentary laws would apply to the colonies. In the eighteenth century, law throughout the British world was less coercive and more dependent on community consensus.¹⁷ There was a relaxed approach towards the colonies, with administrators giving the colonies limited autonomy and flexibility in applying English Law. The Colonies began their own legal traditions when settlements morphed into colonies; they fashioned their own charters and legislative assemblies. During the French and Indian War, the British accumulated growing debt and were desperate to pay it off. The Stamp Act and the Tea and Townshend Acts

¹⁶ Jack P. Greene, *Constitutional Origins of the American Revolution* (New York: Cambridge University Press, 2011), 1.

¹⁷ Greene, 17.

were all intended to generate revenue for the crown in order to pay off the war debt. Unfortunately, because of the nature and implementation of these taxes, there was a pernicious effect on trade and commerce in the colonies, which drove the American patriots to organize resistance. The colonial assembly stiffly resisted taxation from the crown and questioned the constitutional legitimacy of these taxes. The Crown relied on the doctrine of virtual representation to insist that these taxes were constitutional, which led to the American Revolution. The colonial assemblies interpreted the British Constitution as giving them a degree of autonomy in their local matters and obliging the Crown in Parliament to offer them seats in Parliament. Otis's rallying cry of "no taxation without representation" was inspired by the common law tradition of giving people representation in the House of Commons in return for submitting to taxation. Arbitrary and unconsented taxation was viewed a form of slavery. According to John Phillip Reid, "Historically in English constitutional law, the chief threat to liberty had come from prerogativism, and liberty's greatest constitutional triumphs had been achieved during struggles against the prerogative pretensions of Charles I and James II."¹⁸ Prerogative power gave arbitrary power to the crown which resulted in unconstrained and tyrannical power. The Declaratory

¹⁸ Reid, 79.

Act and the Stamp Act were perceived as an attempt by the crown to enslave the people in the colonies.

The founding father who best articulated America's grievances towards the British was Thomas Jefferson. The "Declaration of Independence," written by Jefferson, outlined the grievances that the colonies endured under British rule. The Declaration's most famous line, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," is inspired by John Locke's phrase "life, liberty and property."¹⁹ Jefferson gave twenty-seven examples of unjust and illegal actions by the king that violated British constitutional principles. The Declaration of Independence was modeled after the Declaration of Rights and Liberties of the Subject of 1689, written after the Glorious Revolution ousted King James II and installed King William III and Queen Mary II. The document cites thirteen examples of King James II violating the rights of Englishman which are directly analogous to the Declaration of Independence. The Glorious Revolution established the English Bill of Rights, which inspired James Madison to write America's own Bill of Rights. Americans inherited the legacy of the Glorious Revolution: a

¹⁹ C.B McPherson ed. *Second Treatise of Government* (Indianapolis: Hackett, 1980), 25.

legacy of political liberty and constitutional liberalism. Jefferson harkened back to the Glorious Revolution and “The Declaration of Rights and Liberties” in his own declaration, reinforcing the constitutional heritage of America. The Declaration is a constitutional document in that it declared to the world what the natural and historic rights of the colonists were violated by the Crown. Historian Garrett Ward Sheldon described the Constitution as deriving from “essentially Lockean principles.”²⁰ He cites eleven passages in the Declaration of Independence which coincide with and are inspired from the *Two Treatises of Government*. Locke was the intellectual inspiration of the Glorious Revolution and his writings inspired Jefferson who articulated Americans reasons for declaring independence from Great Britain.

James Madison, considered the father of the American Constitution, was also responsible for drafting the Bill of Rights in 1789. The Bill of Rights is modeled after England’s own Bill of Rights; Madison sought ways to limit the power of the federal government. Each state had its own constitution and some Americans, namely the Anti-Federalists, felt that it was unnecessary to have a national Bill of Rights. The Anti-Federalists were afraid of a strong central government and

²⁰ Garrett W. Sheldon, “*The Political Philosophy of Thomas Jefferson*” (Baltimore MD: John Hopkins University Press, 1991), 46.

insisted on having limitations on federal power in order to ensure state sovereignty. Madison proposed the Bill of Rights in order to mollify the Anti-Federalist and assure individual citizens and the separate states protection from a strong state government. His inspiration came from the English Bill of Rights and it reaffirmed the rights the Americans insisted that they inherited and fought to maintain.²¹

The American Revolution was fought largely over constitutional disputes between the Crown and the colonies over the application of the British constitution and traditional English liberties in the colonies. The American colonies gradually developed their own constitutional tradition and felt that the English liberties applied to them. The crown's taxation policy enraged the Americans because they believed it violated their inherited constitutional liberties and was a violation of the principle of no taxation without consent. The conflicting interpretation of how the British Constitution should function in the colonies and how the traditional English Rights should apply in North America gradually led to Revolution. Therefore, the American Revolution was a struggle over constitutional interpretation.

²¹ Akhil Reed Amar, *"The Bill of Rights: Creation and Reconstruction"* (New Haven CT: Yale University Press: 1998), 10.

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