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THE BRITISH CONSTITUTION AND THE AMERICAN REVOLUTION: A FAILURE OF PRECEDENT

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Parliamentary government is probably the most developed form of representative institutions now known; in advance even of the "presidential" form evolved here in America, but it has this defect of its merits, that it makes "the government of dependencies" illogical and almost impossible.¹

—Charles Howard McIlwain, *The American Revolution*

The issue was parliamentary sovereignty. By 1774 the constitutional debate between Great Britain and America boiled down to a single point: Did the British legislature have a right to extend its authority over the colonies? If there ever had been any doubt about the issue on the English side of the Atlantic, it was laid to rest in the Declaratory Act of 1766, which asserted the right of Parliament to legislate for the colonies "in all cases whatsoever."² The American position was less clear,

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1. C. McILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 57 (1923).

2. 6 Geo. 3, c. 12. The Declaratory Act of 1766, adopted concurrent with repeal of the Stamp Act, stated the basic British position on the nature of the Empire. Not until after the French alliance of 1778 did the British government give serious thought to modifying that position, and by then it was far too late to have any effect in the new United States. The important clause of the Act specifically stated that the British Parliament had unlimited authority in the colonies:

That the said Colonies and Plantations in *America* have been, are, and of Right ought to be, subordinate unto, and dependent upon the Imperial Crown and Parliament of *Great Britain*: and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons of *Great Britain*, in Parliament assembled, had, hath, and of Right ought to have, full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and people of *America*, Subjects of the Crown of *Great Britain*, in all Cases whatsoever.

There were some, in both England and America, who tried to distinguish between the right to legislate and the right to tax, but the debates in Parliament made it clear that the right of taxation was understood to be included in the terms of the Declaratory Act. See E. MORGAN & H. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* 272-79, 284-91 (1953).

but almost from the beginning the colonists had moved in the direction of denying the right of Parliament in terms as absolute as those in which the British asserted it. By the time the First Continental Congress assembled in the fall of 1774, the overwhelming majority of American spokesmen had concluded that Parliament exercised no authority by right and very little by consent.³

It is not the purpose of this Article to determine whether the colonists were right or wrong, or even to review the constitutional arguments on both sides. The purpose is rather to demonstrate that between 1764 and 1776 the British Empire confronted a political crisis for which there was no constitutional precedent. In the initial phases of this contest the colonists struggled to ground their demands in the British Constitution, an effort that led subsequent historians to describe the colonial theorists' arguments as shifting and evasive. That characterization is wrong. The apparent changes in the colonial position during that period are viewed more profitably as the development of initial assumptions that eventually would lead to conclusions the Americans originally had hoped to avoid.

The constitutional debates on the eve of the American Revolution contained repeated references, especially by the colonists, to the failure of the British Constitution to provide for the governance of colonies settled by English subjects.⁴ It was this purported omission that led the

3. So far as the records reveal, not a single member of the First Continental Congress contended that Parliament had a right to legislate for the American colonies in any instance. Some were willing to grant Parliament a superintending control over trade, but even the most determined of these wanted to base such control on consent rather than right. See D. AMMERMAN, *IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774*, at 52-61 (1974).

4. See, e.g., John Adams, writing as Novanglus, in 4 *THE WORKS OF JOHN ADAMS* 121 (C.F. Adams ed. 1865) [hereinafter cited as ADAMS]: "It has often been observed by me, and it cannot be too often repeated, that *colonization* is *casus omissus* at common law. There is no such title known in that law." See also R. BLAND, *AN INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES* 13 (1766): "It is in vain to search into the civil Constitution of *England* for Directions in fixing the proper Connexion between the Colonies and the Mother Kingdom; I mean what their reciprocal Duties to each other are, and what Obedience is due from the Children to the general Parent. The planting Colonies from *Britain* is but of recent Date, and nothing relative to such Plantation can be collected from the ancient Laws of the Kingdom." See also W. HICKS, *THE NATURE AND EXTENT OF PARLIAMENTARY POWER CONSIDERED; IN SOME REMARKS UPON MR. PITT'S SPEECH IN THE HOUSE OF COMMONS, PREVIOUS TO THE REPEAL OF THE STAMP ACT* 27 (1768); Letter from William Bradford, Jr., to James Madison, Aug. 1, 1774, in Bradford Letterbook, Historical Society of Pennsylvania, Philadelphia; Letter from James Parker to Charles Steuart, June 7, 1774, in Steuart Papers, National Library of Scotland (microfilm, ms. 5028, f. 206, Colonial Williamsburg Foundation, Williamsburg, Va.);

Americans to determine that they were in a truly revolutionary situation, at least from a constitutional point of view. Charles McIlwain has argued, in his excellent discussion of the American Revolution as a constitutional problem, that the parliamentary system of government was unsuitable to govern "dependencies."⁵ The strength of the colonial position was not that they had more accurately interpreted the British Constitution, as McIlwain contended,⁶ but that by the early 1770's they had recognized the failure of precedent and had attempted to formulate proposals that, though politically revolutionary, would have maintained the integrity of the Empire. No such proposals were forthcoming from the English leaders. Although facing a problem that was insoluble in traditional terms, they were less willing to consider new, and perhaps revolutionary, solutions. The English leaders thus have enjoyed a reputation for consistency; instead, they might as accurately be accused of inflexibility.

In simplest terms, the constitutional issue in the period from 1764 to 1776 was the authority of the British Parliament over America; in a broader sense, the problem was how to fit the various colonies into the Empire without violating the presumed rights of British subjects. This problem led the King and Parliament to claim the absolute dependency of the colonies on the British government,⁷ brought the colonists first to dismantle the supremacy of Parliament on constitutional grounds and then to rebuild it on the natural rights of compact and consent,⁸ and led men like Joseph Galloway to propose a thorough overhaul of institutions and a restructuring of the imperial form of government.⁹

Resolves intended to be offered by Joseph Galloway and seconded by James Duane, Duane Papers, New-York Historical Society, New York City, reprinted in 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 48 (W. Ford ed. 1904) [hereinafter cited as JOURNALS] (Franklin versions).

5. C. McILWAIN, *supra* note 1, at 57. McIlwain's study is a provocative and thoughtful essay on the American Revolution. The thesis of the book, that the colonists had the best of the constitutional argument, is no longer convincing and much of the reasoning seems tortured, but there are numerous insights that remain relevant and that have stimulated the development of portions of this Article. For a refutation of McIlwain's thesis, see R. SCHUYLER, *PARLIAMENT AND THE BRITISH EMPIRE* (1929).

6. C. McILWAIN, *supra* note 1, at 16-17.

7. Declaratory Act of 1766, 6 Geo. 3, c. 12, quoted *supra* note 2.

8. See text following note 63 *infra*.

9. The proposal of Joseph Galloway for the establishment of an American Parliament to deal with imperial questions often has been seen as a conservative effort to head off the impending Revolution. See, e.g., J. BOYD, *ANGLO-AMERICAN UNION: JOSEPH GALLOWAY'S PLANS TO PRESERVE THE BRITISH EMPIRE 1774-1788*, at 5-6 (1941). Insofar as Gallo-

Historians long have been aware that the British Empire functioned successfully until the middle of the 18th century because of a willingness on both sides of the Atlantic to avoid difficult constitutional issues. Too often, however, they have tried to treat the crisis that arose in the early 1760's by asking which side most accurately and authoritatively, in a legal sense, defended its position. The problem with such an approach is that it assumes a correct answer based on British constitutional history and obscures the more likely possibility that there was no clear and compelling historical precedent by which the colonists could be incorporated into the Empire.

THE SEARCH FOR PRECEDENT

It hardly is surprising, especially in the early years of the controversy, that both the colonists and the British attempted to deal with the imperial crisis in terms of precedent. Writers on both sides explored not only British history but also the city-states of Greece, the Roman Republic, and the confrontation between Anglo-Saxons and Normans in medieval England. The tracts of polemicists are filled with these efforts to relate the solutions of these earlier periods to the problems of the British Empire,¹⁰ and a number of subsequent historians have detailed such efforts.¹¹ A brief survey of the most important historical precedents clarifies the American arguments of the years from 1764 to 1776.

Scotland and Ireland were perhaps the most interesting precedents and were cited repeatedly by American writers. The attachment be-

way intended to divide the Americans in 1774, this is probably accurate, but to label a plan for radical restructuring of the British Empire "conservative" is to misunderstand the nature of the problem. That the more conservative members of the First Continental Congress should support such a plan is further evidence for the contention espoused in this Article, that the colonies and England faced a politically revolutionary situation for which precedent and the British Constitution provided no solution. For a discussion of Galloway's proposal, see notes 78-79 *infra* & accompanying text.

10. The most informative and detailed discussions are John Adams's Novanglus Letters in 4 ADAMS, *supra* note 4, at 11-171, and the debates in 1773 between Governor Thomas Hutchinson and the Massachusetts House of Representatives in MASS. H. JOUR. (1773), reprinted in H. NILES, THE PRINCIPLES AND ACTS OF REVOLUTION 79 (2d ed. 1876), excerpted in C. McILWAIN, *supra* note 1, at 123-37.

11. James H. Kettner has detailed the developing concept of citizenship in the American colonies and the gradual divergence between England and the colonies on that issue. The study relates specifically to the problems discussed in this Article, and Kettner has brought many constitutional questions into focus. J. Kettner, *The Development of American Citizenship: 1608-1780*, 1973 (dissertation in Harvard University Library, to be published in 1977 by University of North Carolina Press). McIlwain's study, *supra* note 1, is an earlier attempt to deal with such issues.

tween England and Scotland began when the Crown of England descended to James VI of Scotland, who then became James I of England and monarch of both nations. Ireland presented a more complicated story, but it generally was agreed, at least outside of Ireland, that the island had been incorporated into the British Empire by conquest. The two countries thus presented contrasting models. Scotland became attached to England, first by the rules of hereditary descent, and later by the Act of Union; Ireland was incorporated by force of arms.

Scotland often was used by American partisans as an example of a dominion of the King of England that, until the Act of Union, was not subject to the authority of Parliament.¹² Crucial to this argument was a landmark legal decision, *Calvin's Case*,¹³ decided in 1608, in which the relationship between the King's subjects in Scotland and England had been defined by the most prominent jurists of the realm. The question was whether Scottish subjects of James, born after his accession to the throne of England, the *post nati*, were entitled to inherit property and bring civil suits in England. The issue was complicated, involving broad questions of Calvin's citizenship status, and the decision, in brief, was that James's subjects were entitled to full rights and privileges in either realm despite the existence of separate Parliaments. An important aspect of the case, for the American argument, was the distinction between the "politic capacity" of the King and his "natural capacity." Allegiance, it was held, attached to the person of the King, not to the Crown of England. As John Adams wrote in his Novanglus letters, James had "three politic capacities at least, as king of England, Scotland, and Ire-

12. The Act of Union, 6 Anne, c. 6 (1707), added representative of Scotland to what became a British Parliament and thus altered the legal status of the Scots, formerly royal subjects not subordinate to the supreme legislative body. McIlwain concluded that "the status which Scotland undeniably had as a mere 'dominion of the King' and not 'of the Crown' was the same as that demanded as of right for Ireland by the Irish and for America by the Congress in 1774." C. McILWAIN, *supra* note 1, at 80.

13. 77 Eng. Rep. 377, 7 Co. Rep. 1a (Ex. 1608). Lord Chancellor Ellesmere headed a panel of 13 jurists, all of whom concurred in Chief Justice Coke's opinion. *Id.* at 410, 7 Co. Rep. at 23b. References to *Calvin's Case* appear repeatedly in the colonial considerations of British constitutional history, though seldom with much detail or any serious effort to explore the subtleties of the opinions. The casual references to the case suggest that it was familiar to colonial audiences, if only in outline. See 4 ADAMS, *supra* note 4, at 100. McIlwain dealt with the case as it related to the colonial position, see C. McILWAIN, *supra* note 1, at 92-95, and Kettner's forthcoming book, J. Kettner, *supra* note 11, has an extensive discussion of the issues in chapter 1.

land; yet the allegiance of an Englishman to him did not imply or infer subjection to his politic capacity as king of Scotland."¹⁴

Ireland presented another model. Although the Americans were not entirely willing to admit that the subordination of Ireland to the Crown and Parliament of England was just, they clearly stated that the so-called conquest model had no relevance for the colonies. Quoting from John Adams: "[T]he authority of parliament to bind Ireland at all, if it has any, is founded upon entirely a different principle from any that takes place in the case of America. It is founded on the consent and compact of the Irish by Poyning's law to be so governed, if it have any foundation at all; and this consent was given, and compact made, in consequence of a conquest."¹⁵

THEORIES OF EMPIRE

By the middle of the 18th century the examples of Scotland and Ireland seem to have been used, primarily on the American side, to disprove the existence of a precedent for exercising parliamentary authority in the colonies. The British by that time had moved to a simple assertion of authority and, insofar as they felt it necessary to justify that authority, had done so with arguments founded on two theoretical bases: the immutability of subjectship and the necessity of a single sovereignty to govern the state. The first of these two arguments assumed that persons born in England were subjects of the King and that their allegiance was perpetual and immutable.¹⁶ Thus, as the British saw it, the initial settlers

14. 4 ADAMS, *supra* note 4, at 143.

15. *Id.* at 151. It is certain, wrote Adams, that America "never was conquered by Britain. She never consented to be a state dependent upon, or subordinate to the British parliament, excepting only in the regulation of her commerce; and therefore the reasonings of British writers upon the case of Ireland are not applicable to the case of the colonies, any more than those upon the case of Wales." *Id.* at 158.

16. Although most colonists accepted this proposition, they were not uniformly willing to admit the immutability of allegiance. Thomas Jefferson was to write in his draft of instructions to the Virginia delegates to the First Continental Congress that "our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness." 1 THE PAPERS OF THOMAS JEFFERSON 121 (J.P. Boyd ed. 1950) [hereinafter cited as JEFFERSON]. Similarly, John Jay argued at the Congress that "emigrants have a right to erect what government they please." 1 LETTERS OF THE MEMBERS OF THE CONTINENTAL CONGRESS 20 (E. C. Burnett ed. 1921) [hereinafter cited as LETTERS]. Further support of this view

of America were subjects of the British King and—here the colonists disagreed—were subordinate to the British Crown. The second contention was based upon the commonsense argument, widely accepted by political theorists, that, as Lord Mansfield expressed it, “[I]n every government the legislative power must be lodged somewhere, and the executive must likewise be lodged somewhere. In Great Britain the legislative is in parliament, the executive in the crown.”¹⁷

Americans disputed both these contentions, or at least took issue with the conclusions to which they purportedly led. They attacked the argument from subjectship by citing Coke’s opinion in *Calvin’s Case*, which distinguished between the King of England and the Crown of England. The original settlers were, most of them admitted, subjects of the individual who was King at the time of their birth in England, but not subjects of the Crown; allegiance was personal.¹⁸ Moreover, they argued,

is found in Richard Bland’s statement that members of society “retain so much of their natural Freedom as to have a Right to retire from the Society, to renounce the Benefits of it, to enter into another Society, and to settle in another Country; for their Engagements to the Society, and their Submission to the publick Authority of the State, do not oblige them to continue in it longer than they find it will conduce to their Happiness, which they have a natural Right to promote.” R. BLAND, *supra* note 4, at 10. This was a minority view; until 1776 most colonists believed that their position was well grounded on the theory that emigrants owed a duty of allegiance to the sovereign but not to the British Parliament. One can see in the arguments of Jefferson, Jay, and Bland the beginnings of a new concept of citizenship that was in direct conflict with that of Britain, and that would contribute to the impressment controversy preceding the War of 1812. Again, Kettner has developed this divergence in detail, and his study is essential to understanding the background of the Anglo-American conflict. J. Kettner, *supra* note 11. He notes that Locke foreshadowed the minority view in the *Two Treatises of Government*, especially sections 116-22, but that this argument had little impact in England. See J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 116-22 (J.W. Gough ed. 1966).

17. 16 W. COBBETT, *PARLIAMENTARY HISTORY* 173 (1813).

18. The importance of this argument, based in part on the American reading of *Calvin’s Case*, was that their governments derived from the personal sovereignty of the Kings of England rather than from the institutional Crown. Consequently the colonies were, and had been, free to make whatever compact they wished with the sovereign regardless of the wishes of Parliament. Insofar as the argument derived from the early years of the 17th century it was a strong one, but it ignored the constitutional developments in England after the Puritan Revolution of the 1640’s. This is not to suggest that the colonists were completely unaware of the English constitutional revolution. Those who concerned themselves with it generally insisted, as did John Adams, that the colonies also had entered into a new compact at the time of the Glorious Revolution. “It ought to be remembered that there was a revolution here, as well as in England, and that we, as well as the people of England, made an original, express contract with King William.” 4 ADAMS, *supra* note 4, at 114. For a discussion of the constitutional

even allegiance to the Crown would not have included submission to the King's English Parliament. It was at this point that the problem became most complicated. The relationship between King and Parliament in England had been redefined by the Puritan Revolution of the 1640's and the Glorious Revolution of 1688. As the Crown increasingly was subordinated to Parliament, it became more and more difficult to envision the British colonies as both owing allegiance to the former and maintaining independence of the latter. Changes in the British Constitution, largely ignored in the colonies, made the American position anachronistic. It is one of the ironies of history that the Americans ultimately found themselves defending the very royal prerogatives that the English Whigs had fought so long and hard to subordinate to Parliament. Indeed, as Charles McIlwain has pointed out, the American position by 1774 was not only non-Whig but, in many respects, anti-Whig.¹⁹

The colonists attacked in a different way the British contention that logic required legislative authority to be vested in Parliament. Admitting that there could not be two sovereigns in a single state, they simply denied that Britain and America constituted a single state.²⁰ John

provisions for governing the colonies at the accession of William and Mary, and particularly for the debate over those provisions between Governor Thomas Hutchinson and the Massachusetts House, see C. McILWAIN, *supra* note 1, at 127-37.

19. C. McILWAIN, *supra* note 1, at 194-96. McIlwain suggested, though he did not develop, the conclusions of more recent historians about the colonial attitudes toward Parliament. The impact of the so-called Old Whig opposition to the government of Sir Robert Walpole convinced many Americans that Parliament had been corrupted and was, in the 18th century, a greater threat to the ancient constitution than the monarch. It was, in part, this conviction that allowed the colonists to attack the authority of Parliament and to assert the prerogatives of the Crown. Thomas Jefferson, for example, concluded that "it is now therefore the great office of his majesty to resume the exercise of his negative power, and to prevent the passage of laws by any one legislature of the empire which might bear injuriously on the rights and interests of another." Jefferson, *Draft of Instructions to the Virginia Delegates in the Continental Congress*, in 1 JEFFERSON, *supra* note 16, at 129. See also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); P. MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765-1776* (1972); J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); C. ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN* (1959); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); Rodger Durrell Parker, *The Gospel of Opposition: A Study in Eighteenth-Century Anglo-American Ideology*, 1975 (unpublished dissertation in Wayne State University Library).

20. By 1774 this position was stated regularly and explicitly by colonial writers, but the development is to be found much earlier. There were only two viable alternatives to this denial that the colonies were a part of the realm of Great Britain and subject to the control of Parliament: a limitation of the authority of the British legislature to

Adams, for example, agreed that two supreme authorities could not exist in one state and concluded that "our provincial legislatures are the only supreme authorities in our colonies."²¹

By the middle of the 18th century, British polemicists had abandoned many of their previous arguments and had combined the fact of colonial subjectship with the concept of consent to explain American dependence on Parliament. James Kettner has concluded:

[B]y focusing on the idea of consent, British theorists brought the argument from subjectship to its complete form. The concept of subjectship had become firmly linked to the notion of the fundamental compact by which men joined together to form a community under one government. Whether Americans were subjects by birthright or by conquest, whether they inherited the common law or not, they were bound by their own consent to obey Parliament. All Englishmen shared in this compact, including those who left the mother country to settle in America.²²

This argument reflected the growing influence of John Locke but also placed a special emphasis on the continuity of the social contract. It permitted the incorporation, within the contract theory, of Coke's argument in *Calvin's Case* that subjectship was perpetual and immutable. In essence, the contention was that as long as there was no dissolution of the community itself there was a continued obligation of each individual to the society.²³ The British found unacceptable the Americans'

specific functions, or the development of a mode of colonial representation in Parliament. The former was given serious consideration in the colonies up to 1776, see notes 47-54 *infra* & accompanying text, but the latter seems never to have been a real possibility. The brief British flirtation with the idea of "virtual representation" was rejected immediately in the colonies and by 1765 had been laid to rest. In addition to the more famous pamphlet of Daniel Dulany, *Considerations on the Propriety of imposing Taxes in the British Colonies, for the Purpose of raising a Revenue, by Act of Parliament* (1765), reprinted in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 598 (B. Bailyn ed. 1965) [hereinafter cited as PAMPHLETS], there was a flurry of articles and pamphlets rejecting the concept. One pamphleteer wrote that "it cannot surely be consistent with British liberty, that any set of men should represent another, detached from them in situation and interest, without the privity and consent of the represented." M. MOORE, *THE JUSTICE AND POLICY OF TAXING THE AMERICAN COLONIES IN GREAT BRITAIN CONSIDERED* 7 (1765).

21. 4 ADAMS, *supra* note 4, at 105.

22. J. Kettner, *supra* note 11.

23. See generally *id.* The tendency to incorporate the newer ideas of contract and compact within older, medieval ideas of perpetual and immutable allegiance led to

counterargument, that they had settled in America under allegiance to the King alone (or had a right to establish whatever government they chose in the New World). Because there was no dissolution of the colonists' ties to the society they had left in England, British theorists maintained that there resulted a continuity in their subordination to the government of the parent state. Consequently, in Kettner's words:

[T]he conflation of the established rule against expatriation . . . with the newer idea of an original contract led to the conclusion that emigrant British subjects remained within the allegiance and the jurisdiction of the government erected by the original community. The Americans were subject to the authority of Parliament until the community as a whole decided otherwise, or until society itself dissolved. This notion that the community of allegiance formed a single political unit was essential to the argument from sovereignty used by British writers to counter American claims to exemptions from parliamentary acts.²⁴

The Americans disagreed. Those who adhered to a strict constitutional position developed the traditional Whig argument that those who owned land could be bound only by their consent or by the consent of their representatives. Joseph Galloway concluded that the "essence" of the British Constitution was "that no laws shall be binding, but such as are made by the consent of the proprietors in England. How then, did it stand with our ancestors when they came over here? They could not be bound by any laws made by the British Parliament . . . since the emigration of our ancestors. It follows, therefore, that all the acts of Parliament made since, are violations of our rights."²⁵ Other Americans took a less traditional path to the same conclusion. Samuel Ward of Rhode Island based his rejection of parliamentary authority on natural

interesting results. Whereas the Americans were ultimately to conclude that if an individual was governed by his consent he was free to leave one government and join another, the prevailing opinion in 18th century England was that only a complete dissolution of society would free a subject from his allegiance. Even at the time of the Glorious Revolution individuals in England were not freed from the compact, because there was no dissolution of society, only a change in the apparatus of government. Thad W. Tate has pointed out that the Americans often failed to distinguish between the separate contracts of society and of government. "Their sole actual concern was the contract of government." Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 376 (3d Ser. 1965).

24. J. Kettner, *supra* note 11.

25. 1 LETTERS, *supra* note 16, at 20-22.

law, concluding that "[e]very man is born free and may chuse his own form of Government."²⁶ Although both Ward and Galloway were speaking in 1774, and their opinions were the culmination of several years of thinking about the nature of the imperial tie, it is notable that they reached similar conclusions by different routes.

In the long run, such arguments, like similar forays into the mists of a supposed Anglo-Saxon Constitution or into the examples of ancient Greece and Rome, were inconclusive, not simply because, as Jonathan Swift put it, "eleven men well armed will certainly subdue one single man in his shirt,"²⁷ but because the problems were unprecedented. If Galloway could cite common law to demonstrate that the "essence" of the British Constitution was that no man could be taxed without his consent, the advocates of empire could cite it to show the supremacy of Parliament in the English system. Whereas the colonists recalled the opinion in *Calvin's Case* to prove that subjects of the English King were not necessarily subjects of the English Parliament, their opponents used the same case to indicate that allegiance was perpetual and immutable. If Ward interpreted natural law to justify choosing whatever form of government one wanted, others read Locke and concluded that society had not been dissolved at the time the colonies were settled, and was not yet dissolved in 1774.

For many years historians condemned the colonies, at least by implication, for the inconsistency of their position²⁸; such condemnation, however, did not go unchallenged. Charles McIlwain wrote his study of the American Revolution, at least in part, to refute the prevailing opinion that the British had the best of the constitutional argument. He was particularly critical of Arthur M. Schlesinger's contention that the colonists "retreated" from one legal position to another as they slowly grasped the inadequacies of their several defenses.²⁹ Nevertheless, until

26. *Id.* at 71.

27. J. SWIFT, *THE DRAPIER'S LETTERS* 115 (1724), quoted in C. McILWAIN, *supra* note 1, at 48.

28. See, e.g., R. ADAMS, *POLITICAL IDEAS OF THE AMERICAN REVOLUTION* (1922); C. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1922); A. SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* (1923). The argument of these and other historians was that the colonists manufactured their constitutional positions to fit immediate practical necessities. Schlesinger, for example, concluded that "the colonists would have lost their case if the decision had turned upon an impartial consideration of the legal principles involved." *Id.* at 179.

29. C. McILWAIN, *supra* note 1, at 17, criticizing A. SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* 179 (1923).

Helen and Edmund Morgan published *The Stamp Act Crisis* in 1953,³⁰ it was the conventional wisdom that the Americans had no consistent constitutional position and that they repeatedly had redefined their arguments to meet the practical necessities of each new situation.

The Morgans took issue with this argument, especially as it related to the right of Parliament to tax the colonies. Previous historians had concluded that when the Stamp Act³¹ was passed in 1765, the colonists had "invented" the distinction between internal and external taxation in order to condemn the Stamp Act without denying the right of Parliament to levy taxes on trade. When the Townshend Duties³² were adopted in 1767, so the pre-Morgan argument ran, the colonists realized that they also could be taxed by duties on trade and therefore shifted their stance. The new distinction was that taxes for the regulation of trade should be distinguished from taxes on trade for the raising of a revenue. Thus, according to pre-Morgan historians, the fickle colonists concluded that the internal-external distinction drawn in 1765 no longer was viable, and that the new test should be whether taxes on trade were levied for regulation or for revenue. Finally, between 1774 and 1776 the colonists decided that they still were not satisfied and therefore they denied the authority of Parliament altogether.

The Morgans, with persuasive evidence, concluded that there had been no such alteration in the colonial position between 1765 and 1767.³³ They cited the resolves of the Stamp Act Congress, as well as the private correspondence of individual Americans, to demonstrate that the argument against taxation for revenue was well developed by 1765. The implication was that the colonists were far more consistent in their arguments than previous historians had been willing to admit, and that if this were the case, it was quite possible that the Americans actually believed what they published. In effect, the Morgans presaged the work of Bernard Bailyn by suggesting that historians look to the writings of the colonists for a key to their actual beliefs, rather than assume that

30. E. MORGAN & H. MORGAN, *supra* note 2, at 114-15.

31. The Stamp Act, 5 Geo. 3, c. 12 (1765), imposed duties on all legal documents, newspapers, pamphlets, almanacs, playing cards, and dice; it was a direct, internal tax, unassociated with any trade regulation.

32. The Townshend Acts, 7 Geo. 3, c. 41, 46, 56; 8 Geo. 3, c. 22 (1767), were enacted to raise revenue through customs duties on certain British manufactures and on tea entering the colonies.

33. E. MORGAN & H. MORGAN, *supra* note 2, at 114-15.

constitutional arguments were put forth to mask more mundane economic and social motives.³⁴

In a general sense the Morgans were correct, but the picture they presented was overly simplified. The colonists were more confused in 1765 than *The Stamp Act Crisis* suggests, and they were able only gradually to work out the ramifications of a position that they were forced to adopt on short notice. Such confusion is neither crucial nor surprising. As Jefferson noted, the early colonists were farmers, not lawyers, and hardly could be held responsible for all the legal implications of a position adopted in haste.³⁵

AMERICAN RESPONSES: 1764 TO 1774

When, in 1764, Parliament confronted the colonists with the Revenue Act³⁶ and raised the possibility of enacting the Stamp Act the following year, Americans were unexpectedly brought to prepare their defenses against such measures. From the pens of pamphleteers, from certain of the legislative bodies in the colonies, and finally from the Stamp Act Congress, came a series of statements opposing this apparently innovative British policy. At first the attacks tended to focus on financial considerations and on the inexpediency of adopting taxation measures. Gradually the writers moved to constitutional issues. In all cases the objective was similar: the colonists did not think they should be taxed by Parliament. Their reasons, however, were diverse and sometimes contradictory.

It hardly is surprising to find that the colonists were neither unanimous nor always coherent in formulating a constitutional position on the eve of the Stamp Act. Most were forced to admit that Parliament sometimes had exercised authority in the colonies since the middle of the 17th century. Arguments that Massachusetts Bay had contested the attempt, that Virginia had insisted on protections before submitting to the Commonwealth in the 1650's, and that the Hat Act, Woolens Act, and Iron Act had been ignored, were to come later.³⁷ For the moment, confusion

34. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* (1968).

35. 1 JEFFERSON, *supra* note 16, at 133.

36. The Revenue Act, 4 Geo. 3, c. 15 (1764), also called the Sugar Act and the Grenville Act, taxed the colonists for the support of English garrisons in the colonies and provided for more stringent enforcement of the Navigation Acts.

37. See sources cited note 10 *supra*.

reigned, and the various pamphleteers veered in several directions in an effort to confute the impending Parliamentary taxation.³⁸

Ten years later, when the First Continental Congress assembled in Philadelphia, some of the delegates were willing to admit that the colonial position had not been so clearly defined from the beginning. John Adams, writing as Novanglus, admitted that the Massachusetts House twice had acknowledged the supreme authority of Parliament, but, he noted, "this was directly repugnant to a multitude of other votes, by which it was denied. This was in conformity to the distinction between taxation and legislation, which has since been found to be a distinction without a difference."³⁹ James Duane made a similar point in his statements before Congress when he noted that "[d]uring the Disputes, which arose from the Stamp Act, an Exemption from Internal Taxes seemed to give general Content. The Regulation of Commerce was submitted to Parliament. . . . A despotic Minister soon discovered that under the Idea of a commercial Regulation our Property might still be invaded, and that by a guileful Change of a name we might still be oppressed at his Pleasure."⁴⁰

If the American position in 1764 was ambiguous, it was not necessarily insincere. As John Adams concluded, "When a great question is first started, there are very few, even of the greatest minds, which suddenly and intuitively comprehend it, in all its consequences."⁴¹ But to concede that there were changes in the colonial constitutional argument between

38. A number of pamphlets from the period 1750 to 1765 are reprinted in PAMPHLETS, *supra* note 20. Volume 1 of the series, the only volume published so far, includes a list of pamphlets to be edited in future volumes. In addition, many pamphlets of the era can be located by consulting Charles Evans's *American Bibliography*, published on micro-cards by Readex in association with the American Antiquarian Society. Among the pamphlets available therein are R. BLAND, *supra* note 4, Evans no. 10244; W. HICKS, *supra* note 4, Evans no. 10985; M. MOORE, *supra* note 20, Evans no. 10076.

39. 4 ADAMS, *supra* note 4, at 113.

40. 1 LETTERS, *supra* note 16, at 23. Duane further argued that the time had come to formulate a broad constitutional position rather than to rely on stopgap measures such as those advanced in the past. "It is now . . . essential to place our Rights on a broader and firmer Basis, to advance and adhere to some solid and Constitutional Principle which will preserve us from future Violations—a principle clear and explicit and which is above the Reach of Cunning and the arts of oppression." *Id.* at 23-24. Neither Adams nor Duane seems to have been particularly disturbed by the apparent inconsistencies of previous American arguments, attributing them, as this Article has attempted to do, more to the novelty of the situation confronting the colonies between 1764 and 1774 than to a shifting constitutional position.

41. 4 ADAMS, *supra* note 4, at 113.

1764 and 1774 is not to condemn the colonists for their inconsistencies, as historians writing before the Morgans were inclined to do. It was not that the Americans altered or "retreated" from one constitutional position to another but simply that, when forced to confront a crisis to which there was no historical answer, they only gradually came to recognize the revolutionary nature of the problem they confronted.

Almost any of the pamphlets written in 1764 and 1765 provide evidence of this confusion and of the halting steps by which the colonists moved toward their final denial of parliamentary authority in the early 1770's. Most writers during these years specifically stated that the colonists could not be taxed by Parliament, but the pamphleteers were not so clear on the ramifications of that position. Stephen Hopkins, in *The Rights of Colonies Examined*,⁴² admitted that there were general matters over which Parliament should exercise authority, though, with the exception of imperial trade, he was not so certain what they were. He argued that Americans had retained the full rights of British subjects and could not be taxed, but admitted that if they were taxed, they must "cheerfully" obey. Hopkins apparently had not given much thought to the distinction between external and internal taxation, but he implied that there was a distinction, and that Parliament had a right to tax externally, by his statement that the British legislature had full power to regulate trade and so to "draw all the money and all the wealth of the colonies into the mother country at pleasure."⁴³

Thomas Fitch, in *Reasons Why the British Colonies in America Should Not Be Charged with Internal Taxes*, was in theory as adamant as the Continental Congress would be in 1774. He stated that "*no laws can be made or abrogated without their [British subjects'] consent by their representatives in Parliament*,"⁴⁴ and contended that the Crown should govern colonies "by and with the Consent of the People represented in Assemblies or legislative Bodies."⁴⁵ Fitch was not, however,

42. In 1 PAMPHLETS, *supra* note 20, at 507-22.

43. *Id.* at 521.

44. T. FITCH, REASONS WHY THE BRITISH COLONIES, IN AMERICA, SHOULD NOT BE CHARGED WITH INTERNAL TAXES 3 (1764), reprinted in 1 PAMPHLETS, *supra* note 20, at 378. Fitch's arguments are impossibly inconsistent. What is interesting about the document, from the perspective of this Article, is that his initial assumptions could and should have led to a denial of parliamentary authority but he refused to take that step. His theory of the Empire varied in no significant detail from that proposed by the First Continental Congress in 1774 or the Declaration of Independence in 1776, but he could not bring himself to deny the superintending authority of Parliament.

45. T. FITCH, *supra* note 44, at 12.

ready to deny the authority of Parliament; he contented himself with pointing out that taxation was the most important of such legislative rights and with expressing the hope that "the supreme Guardians of the Liberties of the Subjects" would act with restraint when they found it necessary to legislate for the colonies.⁴⁶ Indeed Fitch specifically admitted the legislative supremacy of Parliament, on the grounds of expediency and national interest, but his admission does not square with his imperial theory. Like most other colonists Fitch wrote to oppose the immediate threat of taxation, not to construct a theory of imperial relations.⁴⁷

There were those who immediately recognized the implications of the controversy and who anticipated the total rejection of parliamentary authority as early as the Stamp Act Crisis. The most outstanding of these were William Hicks, whose tract was published in 1768 but written two years earlier,⁴⁸ and Richard Bland, who issued his publication in 1766.⁴⁹ Bland departed from the prevailing English, and probably from the colonial, position on the immutability of subject status to argue that "the Subjects of *England* have a natural Right to relinquish their Country, and by retiring from it, and associating together, to form a new political Society and independent State."⁵⁰ He denied that the English Constitution fixed "the proper Connexion between the Colonies and the Mother Kingdom," because the planting of the colonies was recent and "nothing relative to such Plantation can be collected from the ancient Laws of the Kingdom."⁵¹ Bland concluded, in terms similar to those used a decade later, that the colonies had entered into a compact with their sovereign at the time of settlement and that such contract "must be obligatory and binding upon the Parties; they must be the Magna Charta."⁵²

William Hicks took a similar position, to some extent moving even closer to the theory adopted in 1774 by the First Continental Congress. "I am not," Hicks wrote, "so great a stickler for the independence of

46. *Id.* at 11.

47. *Id.* at 17-18.

48. W. HICKS, *supra* note 4, at 1.

49. R. BLAND, *supra* note 4. Both this pamphlet and Hicks's merit reading in full. The authors had deliberated the American position in detail, and the precision and ability with which they approached the problem are remarkable.

50. *Id.* at 14.

51. *Id.* at 13.

52. *Id.* at 14.

the colonies, but I am ready to acknowledge the *necessity* of lodging in some part of the community a *restraining power*, for the regulating and limiting the trade and manufactures . . ." of the various colonies. Recent measures, however, had persuaded Hicks that "every concession which might at this time be made from a *principle of necessity*, and a regard to the public utility, would be immediately considered as an acknowledgement of such a *subordination*, as is totally inconsistent with the nature of our constitution."⁵³ He feared that the colonists erred in confining their demands to immediate necessity and decried "modest requisitions" reaching "no further than to the preservation of those privileges most immediately necessary to our welfare." The patriots were afraid of "urging all their pretensions to liberty, lest the hand of power should impose some more rigid restraint. They are even industrious in framing reasons to support that branch of parliamentary power, which they very reasonably believe too firmly established to be shaken by any opposition. This is the conduct of an artful politician, not of a steady patriot."⁵⁴ Like Bland, Hicks contended that the situation of the colonies was "of the *first impression* and our conduct must therefore necessarily be regulated by *general constitutional principles*."⁵⁵

Hicks and Bland are of interest because, unlike most early writers on the subject, they pursued the argument against taxation to its logical conclusions and because they attempted to foresee future difficulties rather than to confine themselves to immediate problems. Their agreement that the crisis of 1765 was one of "first impression," not to be solved by precedent or history, was in accord with the sentiments of a majority of the writers of 1773 to 1774. The same is true of their insistence that the power of Parliament could not be admitted in one instance and denied in another. That other writers of the earlier period did not often reach similar conclusions was in large part because they did not concern themselves with such broad problems.

It was not the Stamp Act but rather subsequent measures that first led the colonists to extend their reasoning beyond the question of taxation. Until the Declaratory Act and the Townshend Duties were passed, the imperial system had worked because it had not been defined clearly.⁵⁶ Forest McDonald wrote in 1962 that: "The Stamp Act had been easy for

53. W. HICKS, *supra* note 4, at xii.

54. *Id.* at 26.

55. *Id.* at 27.

56. See McDonald, *Introduction* to J. DICKENSON & R. LEE, *EMPIRE AND NATION* (1962).

the colonists to react to, for it was gross, and resisting it necessitated no final commitment on the nature of the imperial system. The Declaratory and Townshend Acts were the opposite: the taxes imposed were subtle, being small and painlessly collected, but resisting them was an irreversible step. In 1765, the tax issue had been clear and the imperial issue muddled; in 1767, it was the other way around. Small wonder that the colonists hesitated before taking their stand."⁵⁷

Small wonder, too, that the colonists should not have arrived at a comprehensive position on the nature of the British Empire when first confronted with the problem. Further evidence of their confusion is to be found in the pamphlets, debates, and even in the official statements of various colonial legislatures over the decade between 1764 and 1774. Even as Hicks and Bland took the first steps toward denying the authority of Parliament, the Massachusetts House of Representatives admitted that the "High Court of Parliament is the supreme legislative Power over the whole Empire."⁵⁸ James Wilson, writing in 1770, contended that he had begun his study "with a view and expectation of being able to trace some constitutional line between those cases in which we ought, and those in which we ought not, to acknowledge the power of Parliament over us." But, Wilson wrote, in the end he "became fully convinced that such a line does not exist; and that there can be no medium between acknowledging and denying that power in all cases."⁵⁹

57. *Id.* at xii.

58. This statement is taken from the so-called Circular Letter written in February 1768 and addressed to Speakers of the several colonial assemblies in North America. Letter from Massachusetts House of Representatives to the Speaker of the Connecticut House of Representatives, February, 1768, in 19 CONNECTICUT HISTORICAL SOCIETY, COLLECTIONS 108-12 (1921). The reference was made in the course of developing an argument that Parliament could not overstep the bounds of its constitutional authority without "destroying its own Foundation." *Id.* at 109. It is clear, however, that the Massachusetts House was concerned primarily with the issue of taxation and that no effort was made to determine those matters over which Parliament should exercise its authority. An interesting aspect of the letter is a paragraph describing the impossibility of the colonies being represented in Parliament; this passage concludes with the statement that as grievous as taxation by Parliament is, it "would be preferable to any Representation that could be admitted for [the colonies in England]." *Id.* at 110.

59. Wilson, *Considerations on the Authority of Parliament*, in SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 104-05 (S. Morrison ed. 1923). Wilson's argument was developed not from natural law but from his conclusion that the colonies were settled under the authority of the King rather than that of Parliament. "Those who launched into the unknown deep, in quest of new countries and habitations, still considered themselves as subjects of the English monarchs, and behaved suitably to that character, but it nowhere appears that they still considered themselves as represented

From these examples it seems impossible not to conclude that the Americans hoped from the beginning to protect their liberties, and especially their right not to be taxed by Parliament, with minimal demands. That they gradually were forced by British policy to extend those demands proves not that they "retreated" from one constitutional position to another but that they were sincere in their efforts to avoid the final denial of parliamentary authority. When in 1773 Governor Hutchinson forced the Massachusetts House of Representatives to debate with him the constitutional basis of the Empire, he brought from them the admission that "these are great and profound Questions. It is the Grief of this House, that by the ill Policy of a late injudicious Administration, America has been driven into the Contemplation of them."⁶⁰

THE FIRST CONTINENTAL CONGRESS

In 1774 the elected spokesmen of the American colonies carried on the most thorough discussion of the proper relationship between the constituent parts of the British Empire that ever was to take place in the colonies. Meeting in Philadelphia in September, the First Continental Congress devoted a major portion of its 2 month session to efforts to fix upon an acceptable definition of parliamentary authority in America. No other constitutional issue was given serious consideration, and it is clear from the notes of the delegates, both official and unofficial, that the question of the authority of Parliament to regulate trade was the single constitutional issue in contention.⁶¹ In fact, the right of Parliament was not in dispute; by 1774 there was virtually no support in the colonies for admitting that Parliament had any constitutional authority for exercising control even over colonial trade. Delegates as diverse in opinion as Galloway, Duane, Chase, and Adams denied any basis in British constitutional law for asserting the right of Parliament to legislate for the colonies. Instead, the question was whether the Congress should grant to Parliament a supervisory authority over imperial trade.

in an English Parliament or that they thought the authority of the English Parliament extended over them." *Id.* at 112. Wilson specifically denied the right of Parliament even to regulate colonial trade and concluded that the harmony and prosperity of the Empire would be "better preserved by the operation of the legal prerogatives of the Crown, than by the exertion of an unlimited authority by Parliament." *Id.* at 115.

60. Letter from Massachusetts House of Representatives to Governor Thomas Hutchinson, in MASS. H. JOUR. 190 (1773).

61. See D. AMMERMAN, *supra* note 3, at 53-61.

So far as the records indicate, no further admission of authority even was considered, and the overwhelming majority of the delegates agreed that any control Parliament did exercise must be by consent of the colonies rather than as an assertion of right.⁶²

By 1774, the colonists had come to realize, as they had not in 1764, that their predicament within the Empire demanded a revolutionary answer. They were still to search among English legal and constitutional precedents to buttress their argument that they could not be taxed by England, but they had to come to admit that, in defining the relationship between Great Britain and America, the vaunted British Constitution was defective. As James Duane and Joseph Galloway explained to the Congress, there was a "manifest defect in the Constitution of the British Empire with respect to the Government of the Colonies," a defect that had "arisen from the Circumstances of Colonization which was not included in the System of the English Government at the time of its Institution nor has been provided for since."⁶³ What Galloway and Duane, and others in Congress, were proposing was that the colonists first deny the right of Parliament to exercise its authority in America and then provide a constitutional basis for the regulation of trade based on consent. Whereas the British polemicists argued that the colonies had accepted the previously admitted authority of Parliament, the delegates to Congress were suggesting that the colonies do so in 1774, but only with respect to the rather limited question of regulating trade.

It is clear in the organization of their meeting that Congress set out to propose a plan for uniting the colonies to Great Britain.⁶⁴ One of the first pieces of business was the appointment of a Grand Committee

62. "It is too often forgotten that America claimed nothing less than a *total* exemption as a matter of constitutional right." C. McILWAIN, *supra* note 1, at 148.

63. Resolves intended to be offered by Galloway and seconded by Duane, New-York Historical Society, New York City, reprinted in 1 JOURNALS, *supra* note 4, at 48. See 1 LETTERS, *supra* note 16, at 51 n.2; 1 JOURNALS at 43-44.

64. A number of the instructions sent from the several colonies specifically instructed their delegates to work out a plan of accommodation between England and America. See, e.g., the instructions to the Pennsylvania delegates:

That there is an absolute necessity that a Congress of Deputies from the several Colonies, be held as soon as conveniently may be, to consult together upon the present unhappy State of the Colonies, and to form and adopt a plan for the purposes of obtaining redress of American grievances, ascertaining American rights upon the most solid and constitutional principles, and for establishing that Union & harmony between Great Britain and the Colonies, which is indispensably necessary to the welfare and happiness of both.

1 JOURNALS, *supra* note 4, at 20.

charged to formulate a statement of American rights, draw up a list of grievances, and propose a "mode of redress." Most members knew what the grievances were to be and anticipated that the mode of redress would incorporate some sort of trade embargo, but the Statement of Rights was to plague the delegates throughout their meetings. In proposing to adopt such a statement, Congress was, in effect, attempting to articulate specifically the colonies' status within the British Empire. They were attempting to do what no individual or group had done before successfully, and what Americans of 1764 had not even recognized as a necessity: to propose a redrafting of the British Constitution. Because the Grand Committee devoted so significant a portion of its time to discussing the Statement of Rights, and because the members of that Committee attempted to comprehend the British Constitution in their discussions, the debates were perhaps the most significant of their nature ever to take place in the colonies. It was a last, and grand, effort to propose a constitutional remedy to the Anglo-American dispute.

The Committee opened its deliberations with a lengthy discussion of American rights, and various members voiced opinions about how those rights might best be protected. The initial question was whether the colonists should base their demands on the English Constitution, on the law of nature, or on their various charters.⁶⁵ The more extreme position was to cite the law of nature, and several members argued in favor of so doing. John Jay insisted that the original settlers did not owe allegiance to England, because "there is no allegiance without protection." He maintained that "emigrants have a right to erect what government they please." Richard Henry Lee took an identical position, contending that the colonists had every right to recur to the law of nature and to establish whatever government they pleased, because "[o]ur ancestors found here no government."

More conservative delegates, probably a majority on this point, were reluctant to go beyond the British Constitution as a basis for defending the colonial position. John Rutledge denied the contention of Jay and Lee that the original colonists could have set up what government they pleased, and insisted that "[a] subject could not alienate his allegiance." He found it difficult to believe that the first settlers had had the right

65. John Adams, a member of the Committee, recounted its deliberations on this point in his *Notes of Debates* in 1 LETTERS, *supra* note 16, at 20-22. Statements of the members quoted here are taken from Adams's account.

to elect a new King. Galloway and Duane supported Rutledge, while William Livingston and Roger Sherman joined Lee and Jay.

The Committee's final decision to ground the rights of America upon all three bases is less surprising than the essential agreement the delegates reached as to what the rights of the colonists were, regardless of the justification. The most rabid advocate of natural law hardly could have reached a more radical conclusion than that of Joseph Galloway, who confined his argument to the British Constitution. "I have ever thought we might reduce our rights to one—an exemption from all laws made by British Parliament since the emigration of our ancestors. It follows, therefore, that all the acts of Parliament made since, are violations of our rights I am well aware that my arguments tend to an independency of the Colonies, and militate against the maxims that there must be some absolute power to draw together all the wills and strength of the empire."⁶⁶

Thus, both the advocates of natural right and the proponents of the British Constitution reached the conclusion that the British Parliament had no right to exercise authority over the colonies. They also proposed the same solution. Since the colonies certainly could be bound by consent, it was reasonable to propose that the First Continental Congress take upon itself the responsibility for formulating a statement of consent. This statement was, of course, to concern only the authority of Parliament, since the delegates scantily debated and generally admitted the prerogatives of the King. Such a course may have been, as certain of the advocates of parliamentary authority insisted, fraught with peril for the future, but for the time being the colonists were convinced that they were threatened not by the monarch but by the British legislature.⁶⁷

The ease with which the delegates to Congress agreed that Parliament had no constitutional right to legislate for the colonies, and the apparent unanimity with which they undertook to draw up a statement of consent, did not extend to the details of the statement. The problem was the authority of Parliament over the regulation of trade. Many delegates feared that to accept any particular assertion of parliamentary authority would leave the door open to other assertions of that authority. John Adams quoted Christopher Gadsden of South Carolina in opposition to Parliament having "any thing to do with us. 'Power of regulating trade,' he says, 'is power of ruining us; as bad as acknowledging them

66. *Id.* at 22.

67. See note 19 *supra*.

a supreme legislative in all cases whatsoever; a right of regulating trade is a right of legislation, and a right of legislation in one case is a right in all; this I deny.' ”⁶⁸

The most divisive single point facing the delegates seems to have been whether Congress should agree to allow Parliament the use of the taxation power in its regulation of colonial trade. It was feared, as expressed by Gadsden, that it would be impossible to draw the line between a right in one case and, as the Declaratory Act of 1766 would have it, “in all cases whatsoever.” Duane presented the most thorough and persistent argument in support of the parliamentary power of taxation. Some of the colonies had been founded after the system of Navigation Acts⁶⁹ was adopted, and thus were brought clearly under its terms; others had adopted it by positive law; and “[a]ll have submitted to and acquiesced in its Authority for more than a Century. By all therefore the Regulation of Trade may be yielded to Parliament upon the Footing of a Compact, reasonable in itself, and essential to the well-being of the whole Empire as a Commercial People.”⁷⁰ There were those in Congress who wanted to reject not only the future regulation of trade by Parliament but also to throw off the Navigation Acts themselves. Richard Henry Lee thought the Navigation Acts were “a capital violation” of the rights of the colonies.⁷¹ Although by implication the Congress admitted the validity of the Navigation Acts, as no doubt most delegates favored doing, no specific confirmation of those Acts ever was voiced.⁷²

68. 1 LETTERS, *supra* note 16, at 30.

69. The Acts of Trade and Navigation, first enacted in the reign of Charles II, 12 Car. 2, c. 18 (1660), were a series of laws regulating colonial trade on mercantile principles, spanning over a century. Parliament modified the system periodically to meet changing commercial conditions. Those regulations in force in 1769 are cited and explained in *Instructions by the Commissioners of Customs in America* in SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 74-82 (S. Morison ed. 1923). See also *The Taxation Question, 1764-1770*, in *id.* at xi.

70. 1 LETTERS, *supra* note 16, at 39.

71. *Id.* at 20.

72. Congress at no time denied the operation of previous parliamentary acts regulating trade and, in fact, took great pains to avoid adopting any resolutions that might have been so construed. There were, at the same time, delegates who clearly opposed such regulations, and it seems highly probable that a few categorically refused to vote to recognize any parliamentary authority. The general tone of the debate was clearly conciliatory on this issue, and a careful reading of the debates, letters, and resolutions of the delegates indicates a sincere willingness to effect some sort of compromise that would be acceptable in England. The effort was useless. While Parliament insisted not only on the right to regulate trade and levy taxes but on the authority to legislate for

In fact, the delegates carefully skirted that issue by voting not to debate the validity of any British legislation passed prior to 1763.⁷³ That the decision to restrict their discussions in this fashion did not constitute an approval of all parliamentary acts passed before 1763 became clear when Congress refused Isaac Low's proposal to do just that.⁷⁴ John Adams reminded the delegates that the failure to demand repeal of a particular act did not foreclose the possibility of taking it up at some future time,⁷⁵ and the Statement of Rights and Grievances specifically referred to "many infringements and violations of the foregoing rights, which, from an ardent desire, that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present."⁷⁶

As the debates over the right of Parliament to regulate trade lengthened, the delegates began to fear that they would never get beyond their discussion of the Imperial constitution. Consequently, the Grand Committee was dissolved, and the delegates postponed further discussion of the Statement of Rights and Grievances, turning instead to the so-called "mode of redress." This problem proved much less divisive, and within a few days the delegates had decided to invoke a nonimportation of British goods⁷⁷ in an effort to gain British approval of the Statement of Rights and redress for the list of grievances, if Congress could agree on either.

The apparent hesitancy of the delegates to approve parliamentary regulation of trade led some of the more conservative members of Congress to consider alternative proposals.⁷⁸ On September 28, just one day after the delegates had approved the nonimportation of British goods, Joseph Galloway presented his now famous Plan of Union as an alternative to the apparently stalled statement of consent to parliamentary authority over trade.⁷⁹ It is notable that Galloway, almost certainly the most conservative member of Congress and the only delegate who left

the colonies "in all cases whatsoever," the First Continental Congress was debating whether or not to replace the imperial postal system with one of its own.

73. 1 JOURNALS, *supra* note 4, at 42.

74. Collier (ed.), *Silas Deane Reports on the Continental Congress*, 29 CONN. HIST. SOC'Y. BULL. 1, 5-6 (1964).

75. *Id.*

76. 1 JOURNALS, *supra* note 4, at 71.

77. *Id.* at 43.

78. *Id.* at 43-51. See generally J. BOYD, *ANGLO-AMERICAN UNION: JOSEPH GALLOWAY'S PLANS TO PRESERVE THE BRITISH EMPIRE, 1774-1788* (1941).

Philadelphia to oppose what had been determined there, was suggesting a radical reorganization of the British Empire. The proposal indicates that even those who most firmly supported the maintenance of ties with Great Britain were aware that a political revolution was at hand. Gal-
loway's proposal was not adopted, but it seems quite likely that its recommendation by Congress would have seemed as unappealing—and as radical—to the leaders of Britain as the plan actually adopted.⁷⁹

The First Continental Congress ultimately adopted a statement of the right of Parliament to regulate colonial trade that was ambiguous but that granted more authority to the British legislature than most historians have been willing to admit. Article 4 of the Statement of Rights and Grievances contained the crux of the colonial position and represented the final American offering to Parliament:

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising revenue on the subjects in America, without their consent.⁸⁰

The first sentence set out the basis on which the colonists denied the authority of Parliament, yet the article then went on to spell out the particular situations in which they would “cheerfully consent” to that authority. Although the power of Parliament was carefully hedged, it remained a power. There was no specific prohibition against the use of a tax for the regulation of trade; only taxes levied for raising revenue

79. See note 9 *supra*.

80. 1 JOURNALS, *supra* note 4, at 68-69.

without the colonists' consent were prohibited. The article did not please those who, like Duane, had been prepared to admit the authority of Parliament in this area,⁸¹ but it seems unlikely that the final statement was much more satisfactory to those who took a firm stand on the opposite side. John Adams later recalled that not a single member was entirely pleased with the article but that the delegates found themselves unable to agree upon anything else.⁸²

Although article 4 of the Statement of Rights referred to both English liberty and "all free government," other passages were more exclusive in their reference to the English Constitution. Article 2, for example, asserted that the original settlers were "at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England." The third article built on the second, insisting that by their emigration the colonial ancestors "by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy." Article 5 asserted that the colonies were entitled to the common law of England, and article 6 maintained that they were "entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances." Other articles confirmed the colonists' right to the protections of their charters and "several codes of provincial laws," asserted the right to assemble and petition the King, and denied the legality of keeping a standing army in the colonies without the consent of their respective legislatures.⁸³

The first Continental Congress generally seems to have agreed that the colonies were independent of Parliament on the grounds of English constitutional law. Many of the delegates were unwilling to forgo the appeal to natural law, and a few, like Roger Sherman, were heard to insist that even the common law was accepted "not as the common law, but as the highest reason."⁸⁴ John Adams later said that he had

81. *Id.* at 63 n.1.

82. 2 ADAMS, *supra* note 4, at 375.

83. The full text of the Statement of Rights is contained in 1 JOURNALS, *supra* note 4, at 63-73.

84. 1 LETTERS, *supra* note 16, at 20-22. Samuel Ward of Rhode Island was another delegate who objected to recognizing any constitutional ties with Great Britain. It was al-

insisted on references to the law of nature "as a resource to which we might be driven by Parliament much sooner than we were aware."⁸⁵ But even in Adams's statement there is a recognition that as of 1774, and perhaps until the colonies were driven to revolution, the rights of British subjects were an adequate ground on which to erect the denial of parliamentary authority. Certainly that was the ground occupied by Galloway and Duane.

Commentators who have paid scant attention to the debates of the First Continental Congress and to the writings of the colonists during 1773 and 1774 often have contended that the Americans shifted their position once again before 1776. That is not the case. It is true that the Declaration of Independence makes only passing reference to the British Parliament, and that the reason for so doing is that the colonists denied the necessity for declaring their independence from a body on which they had never been dependent.⁸⁶ But that was precisely the same position taken by the First Continental Congress in 1774 as well as by such commentators in that year as James Wilson, John Adams, and Thomas Jefferson. Only one difference existed between the philosophy of the Declaration of Independence and the position adopted in 1774: the Americans had been pushed beyond expounding their rights as subjects of the King to a justification of their decision to declare independence. As Charles McIlwain explained: "They have perforce become revolutionaries and are no longer constitutionalists. Their many constitutional appeals have fallen upon deaf ears. They turn now to another audience and with another appeal. The Declaration of Independence is a totally different kind of document from any of its predecessors. For the first time the grievances it voices are grievances against the King and not

most certainly because of this objection that he voted against those articles in the Statement of Rights that mentioned the colonists having enjoyed "at the time of their emigration from the mother country" the privileges and immunities of "natural-born subjects." *Id.* at 71.

85. *Id.* at 46. John Adams's comments on the adoption of the statement are found in 2 ADAMS, *supra* note 4, at 374.

86. The Declaration of Independence is, as often had been noted, an explanation of the American reasons for declaring the separation of the colonies from George III. See, e.g., C. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 5, 18-22 (1922). Since the colonists had long denied their subordination to Parliament, there was no reason for them to deal with that body in their declaration. The single reference to the British legislature occurs in the catalog of grievances against the King when he is accused of having "combined with others to subject us to a jurisdiction foreign to our constitution, and-unacknowledged by our laws; giving his assent

against Parliament [I]t will be based on the law of nature instead of the constitution of the British Empire."⁸⁷

CONCLUSION

Whether the Americans were right or wrong in the constitutional position they adopted on the eve of independence is not only irrelevant but unanswerable. The debates, in both England and America, revealed not a coherent historical precedent upon which one could base a particular theory of empire but rather an unprecedented problem that demanded a new solution. The situations of Ireland and Scotland were singular; the admission of parliamentary authority by Massachusetts in the 18th century was balanced by a denial of that same authority in the 17th century; the sentiments of such jurists as Coke were taken from another time and were, in most instances, obiter dicta.

Neither the colonists nor the British wanted to admit that they were in a revolutionary political situation, but the decision to extend parliamentary authority in 1764 and 1765 indeed had created such a situation. The British responded by adopting a naked assertion of power similar to that which they had used against Ireland,⁸⁸ and the colonists gradually and reluctantly came to the conclusion that if the constitutional basis of the British Empire had to be defined, it had to be done in entirely new terms.

It is this imperfection, this "manifest defect" in the British Constitution, that excuses the British for their apparent bullheadedness and the colonists for their sometimes shifting constitutional argument. If the colonists ignored the dangers of asserting the prerogatives of the King against the "incursions" of Parliament, the British leaders overlooked the patent absurdity of asserting an unlimited authority over a politically mature people who long had been accustomed to believing that their fundamental liberties were protected by their rights as British subjects. The constitutional impasse of 1774 to 1776 was precisely that, an impasse, and so long as both sides attempted to solve it by recourse to

to their acts of pretended legislation" and then listing the objectionable acts. SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 159 (S. Morison ed. 1923).

87. C. McLWAIN, *supra* note 1, at 192.

88. The Declaratory Act of 1719, 6 Geo. 1, c. 5, which asserted the absolute power of Parliament over Ireland, is nearly identical to the assertion of power over the American colonies in the Declaratory Act of 1766, 6 Geo. 3, c. 12. The statutes are reprinted in full in parallel columns in C. McLWAIN, *supra* note 1, at 50 n.2.

precedent, they were doomed to failure. In a real sense the colonists had the best of the argument, not because their constitutional interpretations were more sound but because, in the end, they were able to admit that new problems sometimes demand new solutions and were prepared to take some halting steps in the direction of finding those solutions. That willingness to experiment would serve the new nation admirably when, after 1776, the problems of imperial organization were to shift from London to Philadelphia.