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## In Accordance With Usage: The Authority of Custom, the Stamp Act Debate, and the Coming of the American Revolution

### Cover Page Footnote

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# IN ACCORDANCE WITH USAGE: THE AUTHORITY OF CUSTOM, THE STAMP ACT DEBATE, AND THE COMING OF THE AMERICAN REVOLUTION

JOHN PHILLIP REID\*

## I. INTRODUCTION

As we mark the bicentennial of the American Revolution, it is time for lawyers to defend their own and demand their due. If jingoism in the writing of legal history is now under attack,<sup>1</sup> surely professional pride remains in fashion. That the founding fathers were generally lawyers is a fact often acknowledged by historians but seldom examined. Only one illustration need be mentioned. It rests upon a point with which most can agree—that the colonial rebels of 1775 were not a politically oppressed or economically exploited people.<sup>2</sup> For some reason, that reality has been cited to downgrade the role of law as a cause for American discontent during the prerevolutionary era. We may concede the fact while debating the conclusion.

“The popular view of the Revolution as a great forensic controversy over abstract governmental rights will not bear close scrutiny,”<sup>3</sup> Arthur M. Schlesinger has argued, ignoring that what seems dull and legalistic to the political theorist may be intriguing and even exciting to the lawyer.<sup>4</sup> “How could a people, who for ten years were not in

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1. For an excellent critique see Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 *Am. J. Legal Hist.* 275 (1973).

2. “There was none of the legendary tyranny of history that had so often driven desperate people into rebellion. The Americans were not an oppressed people; they had no crushing imperial shackles to throw off. In fact, the Americans knew they were probably freer and less burdened with cumbersome feudal and hierarchical restraints than any part of mankind in the eighteenth century.” G. Wood, *The Creation of the American Republic 1776-1787*, at 3 (1969). See also J. Main, *The Social Structure of Revolutionary America* (1965), reviewed, *Brown*, 23 *Wm. & Mary Q.* 479-81 (1966); 1 R. Palmer, *The Age of the Democratic Revolution 190-91* (1959); Zuckerman, *The Social Context of Democracy in Massachusetts*, 25 *Wm. & Mary Q.* 523 (1968).

3. Schlesinger, *The American Revolution Reconsidered*, 34 *Pol. Sci. Q.* 61, 76 (1919) [hereinafter cited as Schlesinger].

4. “The student who comes for the first time to the literature of our Revolution is liable to be disappointed by the dull and legalistic flavor of what he has to read. Although the American Revolution occurred in an age which throughout Europe was laden with philosophic reflection and important treatises, our Revolution was neither particularly rich nor particularly original in its intellectual apparatus.” Boorstin, *Revolution Without Dogma*, in *The American Revolution—How Revolutionary Was It?* 98, 102 (G. Billias ed. 1965).

agreement . . . as to their aims and aspirations, be said to possess a common political philosophy?"<sup>5</sup> There is no answer because Schlesinger posed a spurious question. He was asking why a "political" philosophy did not emerge from a controversy he acknowledges was "forensic"—legal—in nature. Americans of the revolutionary generation would not have mistaken law for politics. They may not have agreed on what Schlesinger called "aims and aspirations," but they valued certain legal rights and cherished a common constitutional tradition. They did not possess a common political philosophy because it was not political theory but legal theory that commanded their attention.

In characterizing our Revolution, some conclusions have been too easily assumed. To acknowledge that Americans had no social or economic quarrels with the mother country may be the same as recognizing that they had no quarrel with positive law. It is not the same as saying they had no legal grievances. To take a stand on legal principles they did not have to rebel against oppression and demand rights previously denied. They could have valued what they already possessed and been fighting to maintain the status quo.

The role of law and lawyers during the prerevolutionary debate conducted by American Whigs with both the ministry and the Parliament of Great Britain may not have been ignored by historians, but it has been largely misunderstood. Too many American historians have come to perceive the colonists' acts of resistance as essentially illegal acts, and their leaders' arguments as moral arguments or as mere rhetoric. In this view, the colonists' activities were wholly extralegal, even though they might be justified by reference to various moral, political, or social ideals. After all, the theory runs, the Americans acted in clear opposition to the sovereign. But in adopting the Austinian view,<sup>6</sup> that "law" is merely the command of the sovereign, these historians fail to take account of the various legal justifications for the colonists' position under the British constitution. Further, these writers seem to think of "constitution" in terms of the twentieth-century United States, not of the eighteenth-century British Empire. The fact

5. Schlesinger, *supra* note 3, at 76. For a similar appraisal, equating the insistence upon rights with "political" rather than "legal" or "constitutional" argument, see J. Greene, *The Reappraisal of the American Revolution in Recent Historical Literature* 24-25 (1967).

6. "Every positive law . . . is set by a sovereign person or body . . . It follows that the power . . . of a sovereign . . . is incapable of *legal* limitation. . . . [A]gainst a sovereign . . . constitutional law is positive morality merely [although the sovereign] may have expressly . . . promised to observe it. . . . [Until customs] are clothed with legal sanctions by the sovereign[, they] are merely rules set by opinions of the governed, and . . . enforced morally . . . ." Austin, *Lectures on Jurisprudence*, in D. Lloyd, *Introduction to Jurisprudence* 143, 149-50 (1959). See generally *id.* at 114-121.

that the unwritten British constitution, without a supreme tribunal to adjudicate disputes, might be less precise, and more flexible, than our kind of constitution is seldom taken into consideration.

Historians have told us that prerevolutionary American Whigs were trapped by legal realities. On one hand unable to answer British rights to sovereignty, they could not on the other ignore the implications of the Declaratory Act.<sup>7</sup> As a result of this legal dilemma, it is said that they abandoned their original constitutional defense—that they were entitled to all rights enjoyed by fellow citizens living in the mother country—and had to “resort instead to the natural rights of man rather than those peculiar to Englishmen.”<sup>8</sup> The historical conclusion has been that colonial Whigs, uncertain what political rights they possessed,<sup>9</sup> failed to certify the theoretical foundations of their institutions. Proof is furnished by noting that the English rights to which Americans laid claim were imprecisely defined. Rather than agreeing on definitions suitable for a political debate, colonial Whigs are said to have worked in legal poverty. Instead of identifying specific rights to which Americans were entitled, the Whigs allegedly made a vague, reckless claim to rights enjoyed by earlier generations, rights bequeathed them by their ancestors, the first settlers in North America.<sup>10</sup> What is misunderstood by the student who reaches such conclusions is that rights established by custom and proven by time are legal rights; to contend that uninterrupted enjoyment creates prescriptive title is a legal argument. Most historians admit that the prerevolutionary debate was constitutional rather than theoretical, turning on legal rather than

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7. 6 Geo. 3, c. 12 (1765), which declared that the American colonies were subordinate to and dependent upon Great Britain and that the legislative authority of Great Britain was supreme. The Act also declared null and void all resolutions of the colonies denying Great Britain's power.

8. L. Leder, *Liberty and Authority: Early American Political Ideology 1689-1763*, at 146 (1968).

9. *Id.* at 125-27. Thus the author says the Americans had to turn to “natural” rights. “This was finally and fully accomplished by the Declaration of Independence in 1776, a document which essentially repudiated concepts that had been developed and elaborated upon for three-quarters of a century.” *Id.* at 146. This assertion has been made so often in popular mythology that it is accepted without question by scholars. However, except for the preamble, what “natural rights” are mentioned in the Declaration? Once beyond the rhetoric, the document is a common-law indictment charging violation of English “rights.” No citizen of a French or Spanish colony could claim a “natural right” to trial by jury, legislative representation, judicial tenure during good behavior, taxation by consent, freedom from standing armies, and all the other rights asserted in the indictment. They all were based on English and British constitutional principles. The myth that American Whigs rested their argument on natural law has grown primarily because historians have not understood or cared to consider English constitutional history. When a claim of right has been encountered, the assumption has been made that it came from natural law.

10. *Id.* at 125-26.

political issues. It should therefore be judged by the legal, not the political, validity of its arguments.<sup>11</sup>

Austinian assumptions dominate the historical literature and have distorted judgments. Consider the following statement, which its author believed to be a conclusion of fact but which was an incorrect conclusion of law.

From the legal standpoint, this view [that Parliament possessed constitutional authority to tax the American colonies] was unassailable. It was . . . vulnerable from the historical standpoint, as Parliament had hitherto not exercised all its legal powers, notably that of taxation.<sup>12</sup>

Lawyers may complain, but it would be well to state the right complaint. This Austinian perspective of lay historians is not at fault in assuming the legality of British legislation and the illegality of American resistance.<sup>13</sup> Good lawyers endorsed that view. Lord Mansfield was one who did,<sup>14</sup> and he was the greatest lord chief justice England had known since Sir Matthew Hale, perhaps the greatest since Sir Edward Coke. The law of Mansfield demands respect, but does not solve issues of right and wrong. The mistake has been to assume that Mansfield's definition of law as the sovereign's command leads to the inescapable conclusion that American constitutional arguments had no legal validity.<sup>15</sup> Other Britons, including the era's leading statesman, William Pitt, and the head of the common-law bar, Lord Chancellor Camden,<sup>16</sup> believed that the colonial assertions were legally tenable, even though agreeing with Mansfield that, under the current British constitution, Parliament was supreme and Parliament alone was sovereign.

It is amazing how the constitutional theories of Lord Mansfield,

11. The fact that very little of the theoretical discussions of the earlier English-Scottish revolution (1640-1660) played a part in the political thought that shaped prerevolutionary American arguments suggests that English history may not tell us very much about the American Revolution. Beloff, Introduction, in *The Debate On The American Revolution 1761-1783*, at 8 (M. Beloff ed., 2d ed. 1960) [hereinafter cited as *Debate*]. What is overlooked is that the prerevolutionary debate was a repetition not of the politics but of the constitutional arguments of the 1630s and 1640s that led to the Puritan Revolution and to the Glorious Revolution of 1688.

12. G. Beer, *British Colonial Policy 1754-1765*, at 311 (1933).

13. A fault, however, is for historians to violate the canons of their own profession and judge validity in terms of the British constitution of the 1830s or 1920s rather than in terms of the British constitution as it existed during the 1770s. See note 23 *infra*.

14. C. McIlwain, *The American Revolution: A Constitutional Interpretation* 117-19 (1923).

15. Even such legal principles as "sovereignty" and "command" are open to factual dispute. See Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 *N.Y.U.L. Rev.* 1043, 1090 (1974).

16. 1 J. Almon, *Anecdotes of the Life of William Pitt, Earl of Chatham* 338 (1792); *Debate on the Conway Resolutions, House of Lords*, Feb. 10, 1766, in *Debate*, *supra* note 11, at 111.

George Grenville, Lord North, and George III have been embraced by American historians while those of Camden, John Adams, William Livingston, and John Dickinson have been rejected. Some writers have even cast the Whig legal argument in a discrepant, if not an intellectually dishonest, light, calling it

not sound at all, but full of flaws. An examination of the legal status of the colonies as it actually was, instead of an unthinking acceptance of what [Samuel] Adams and the other radicals, for revolutionary purposes, said that it was, makes this plain.<sup>17</sup>

After all, they have said, "[i]t does not take a very deep knowledge of colonial history to show that legally the colonists were subject to Parliament."<sup>18</sup> Thus, we "should not be surprised that Americans defended their position in terms of 'British liberties,' for they would have gotten nowhere by insisting on 'American liberties.'"<sup>19</sup>

We should not only be surprised, we should be amazed. Can law really be such a mystery to nonlawyers? Of course American Whigs insisted on "American liberties." They may originally have gotten nowhere by insisting upon them, but "American liberties" were what the Revolution was about.

## II. THE CONSTITUTIONAL DEFENSES

Just as American Whigs consistently maintained throughout the entire prerevolutionary debate that they were entitled to all the privileges of Englishmen,<sup>20</sup> so they insisted upon American liberties and insisted upon them as a constitutional right. That they pressed the argument more confidently during the early stages of the controversy—during the Stamp Act crisis<sup>21</sup>—and referred to it less as time went on, was due to the dynamics of the constitutional debates rather than the sincerity of their belief or the validity of the contention. The legal reality that must be kept in mind is that the British imperial constitution of 1765 was quite different in theory and definition from the constitution that we have known since 1789. It was not only unwritten, it was flexible, changing, and subject to wide interpretation without a supreme tribunal to settle legitimate disputes. The British constitution was a composite of whatever views could be plausibly

17. R.V. Harlow, *Samuel Adams, Promoter of the American Revolution* 85 (1923).

18. *Id.* at 61 (*italics omitted*).

19. Brown, *Book Review*, 74 *Am. Hist. Rev.* 1357, 1359 (1969) (reviewing A. Schlesinger, *The Birth of a Nation: A Portrait of the American People on the Eve of Independence* (1968)).

20. See Reid, *In an Inherited Way: English Constitutional Rights, the Stamp Act Debates, and the Coming of the American Revolution*, 49 *So. Calif. L. Rev.* 1109 (1976).

21. 5 *Geo.* 3, c. 12 (1765).

argued and forcibly maintained.<sup>22</sup> Its meaning was not only found in English and British history and in the current understanding of the legal profession, it was the arrangement of governmental institutions then existing, along with the customs and procedures that had grown up around them.<sup>23</sup>

When American Whigs resolved that the Stamp Act was unconstitutional,<sup>24</sup> they could not take their case to a court of law. They had to argue it through petitions, remonstrations, pamphlets, and newspaper articles, seeking to persuade not an impartial body of judges but the very legislators who had enacted the tax: the members of Parliament.

There were a number of grounds, in varying degrees constitutionally valid, upon which colonial Whigs opposing the Stamp Act could base a legal argument claiming constitutional immunity from parliamentary taxation: natural law;<sup>25</sup> their rights as Englishmen;<sup>26</sup> a supposed contract under which the first settlers were promised the privilege of home rule in return for winning the Crown new dominions;<sup>27</sup> equality with other British subjects, especially those in Great Britain and

22. "If there could exist differences of opinion about the state of the British constitution at any period, we must remember that at a given date—at the year 1760, for example—the constitution is not to be regarded as a rigid and static thing. And, certainly, we today, who can see how it developed through the centuries, must not imagine it in 1760 as finished and fully formed, with no openings for new conflict, no occasion for further quarrel about the direction in which it ought to be moving. Nor should one be rigid and academic about the kind of conduct which could be regarded as unconstitutional. . . . We must not rule out the possibility that either the ministry or the opposition would raise indeed a new constitutional issue or set out to establish a new constitutional principle." H. Butterfield, *George III and the Historians* 258 (rev. ed. 1959).

23. 1 Pamphlets of the American Revolution 1750-1776, at 99-115 (B. Bailyn ed. 1965). American historians have placed too much reliance upon Professor Schuyler's conclusion concerning the constitutionality of the American cause. By depending upon evidence from the West Indies during the 1830s to show that Parliament was supreme over colonial assemblies, he ignored the fact that it was the 1765 constitution that had been in dispute, and that that constitution rested upon current conventions and institutions, their history and practices, not on future developments. See R.L. Schuyler, *Parliament and the British Empire: Some Constitutional Controversies Concerning Imperial Legislative Jurisdiction* (1929).

24. They did so in their colonial legislatures, in grand-jury sessions, in town meetings, and at mass gatherings. For example: "[H]is Majesty's liege people, the inhabitants of this Colony, are not bound to yield obedience to any law or ordinance, designed to impose any internal taxation whatsoever upon them, other than the laws and ordinances of the General Assembly aforesaid." Instructions of the town of Providence, Aug. 13, 1765, *Boston Evening-Post*, Aug. 19, 1765, at 2, col. 3.

25. This was the weakest ground, referred to occasionally but seldom depended upon.

26. See, e.g., Instructions of the town of Norton, Mass., Oct. 25, 1765, *Boston Evening-Post*, Nov. 4, 1765, at 2, col. 3.

27. For a clear, concise statement of the "contract" theory see *Boston Evening-Post*, July 1, 1765, at 1, col. 2. For a detailed discussion see Reid, "In Our Contracted Sphere": The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution, 76 *Colum. L. Rev.* 21 (1976).



Ireland who were Protestants;<sup>28</sup> and the principles of the British constitution.<sup>29</sup>

Each of these arguments was advanced. Each was seriously supported and sincerely held, but none was intended as an exclusive argument. They were alternative claims, all tenable though perhaps not all equally persuasive. Along with them was another vital point made early in the controversy and never abandoned. This was the constitutional argument that direct parliamentary taxation violated colonial constitutional rights because it was contrary to the principles of the contemporary American constitution, as that constitution had been established by long custom and as it was currently sanctioned by accepted usage.

To judge these arguments we must be historians as well as lawyers. It does not do to see yesterday's law by today's legal theory. These claims stated the colonial case against the Stamp Act and each must be judged by the same standard. The test of whether an argument was then legally sound is whether that argument was not only one that enjoyed substantial public support but also one that a lawyer could seriously defend.

### III. THE DEFENSE OF CUSTOM

If we are interested in popular colonial notions concerning the definition of rights during the prerevolutionary era, we can do no better than study the resolutions of New England town meetings. Perhaps at no other time in American history did ordinary citizens vote so frequently and so directly on fundamental constitutional issues. Surely of those who claimed that there was an immutable colonial constitution, none voiced the assertion more simply or more forcefully

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28. Instructions of Portsmouth, N.H., Dec. 23, 1765, Boston Evening-Post, Jan. 6, 1766, at 2, col. 3.

29. Frequently cited was the principle from English constitutionalism that no citizen was to be taxed except "by his own Consent, or that of his legal Representatives." Pennsylvania Resolves, Sept. 21, 1765, in *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766*, at 51 (E. Morgan ed. 1959) [hereinafter cited as *Prologue*]. As Americans "from their local Circumstances [could] not be Represented in the House of Commons in Great-Britain," Declarations of the Stamp Act Congress, Oct. 1765, *id.* at 63 (italics omitted), it followed from the spirit of the British constitution that they were to be taxed only by those bodies in which they were represented. "That the several subordinate Provincial Legislatures have been moulded into Forms, as nearly resembling that of their Mother Country, as by his Majesty's Royal Predecessors was thought convenient; and their Legislatures seem to have been wisely and graciously established, that the Subjects in the Colonies might, under the due Administration thereof, enjoy the happy Fruits of the British Government, which in their present Circumstances, they cannot be so fully and clearly availed of [in] any other Way . . ." Petition of the Stamp Act Congress to the House of Commons, *id.* at 68 (italics omitted).

than did the people of Marblehead, Massachusetts, in October, 1765. A town meeting had been called to instruct Marblehead's representatives to the lower house of the provincial General Court on how the inhabitants of that small fishing village expected them to deal with the Stamp Act. Professing "our sincere Regard and profound Reverence for the British Parliament as the most powerful and respectable Body of Men on Earth," the freeholders of Marblehead nevertheless resolved that they were troubled by "that august Assembly's Exertion of their Power, in and by the Stamp Act." In order that there be no misunderstanding that by silence they acquiesced in Parliament's exercise of questionable authority, the voters instructed their representatives not to support legislation "that shall imply the Willingness of your Constituents, to submit to any internal Taxes, that are imposed otherwise than by the Great and General Court of this Province, according to the Constitution of this Government."<sup>30</sup>

During the prerevolutionary constitutional debate words were chosen with care and it would be well for us to mark them as carefully. The inhabitants of Marblehead spoke of "the Constitution of this Government." Our first thought is that they were referring to the colony's charter, but surely that cannot be right. We need not read that document to be certain it does not say that Parliament cannot tax Massachusetts Bay.<sup>31</sup> The Marbleheaders were making a more fundamental claim: that Massachusetts possessed a constitution and that Parliament had violated that constitution when it passed the Stamp Act.

What the freeholders of Marblehead asserted, the voters of Providence, Rhode Island, defined. In addition to instructing its representatives to ignore the Stamp Act, Providence urged the provincial assembly "to procure our essential rights" on the twin grounds of American practice and British acquiescence. In other words, they claimed that constitutional rights were "precisely known and ascertained, by uninterrupted Practice and Usage":

. . . His Majestys Liege People of this Colony have enjoyed the Right of being governed by their own Assembly, in the Article of Taxes and internal Police; and that the same hath never been forfeited or any other Way yielded up, but hath been constantly recognized by the King and People of Britain.<sup>32</sup>

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30. Instructions of the town of Marblehead, Sept. 24, 1765, *Mass. Gazette and Boston News-Letter*, Oct. 10, 1765, at 2, col. 2; *Boston Evening-Post*, Oct. 14, 1765, at 3, col. 1.

31. See discussion in Reid, *In the First Line of Defense: the Colonial Charters, the Stamp Act Debate and the Coming of the American Revolution*, 51 *N.Y.U.L. Rev.* 177 (1976).

32. The instructions of the town of Providence, Aug. 13, 1765, *Boston Post-Boy*, Aug. 19, 1765, at 3, col. 1 (italics omitted); *Boston Evening-Post*, Aug. 19, 1765, at 2, col. 3 (italics omitted), were adopted by the General Assembly. See *Rhode Island Resolves*, Sept. 1765, in *Prologue*, *supra* note 29, at 50-51.

To understand what was being said it is necessary to recall that to the colonists the Stamp Act was an unprecedented tax and a constitutional innovation. While Parliament had for more than a century regulated colonial trade and, for that purpose, had levied imposts and tariffs, it had never before laid on North America an internal or external tax solely to obtain revenue.

The grievance raised by the Stamp Act was three-sided: first, that Parliament was usurping power;<sup>33</sup> second, that the usurpation was at the expense of a customary governmental arrangement that had functioned satisfactorily in the past;<sup>34</sup> and third, that unilateral parliamentary action by its very nature threatened not merely established rights but social stability and civic well-being.

[N]o such extraordinary power [as direct taxation for purposes of raising revenue] has been claimed or exerted by the British parliament, for more than half a century past—but the rights taken away by [the Stamp Act] have been exercised by the British Colonies, and recognized (as rightfully their's) by the British King and parliament for several generations; and yet the foundation of government, all the time, has stood firm, here, and in Great Britain; and the great ends of it have been very well attain'd in both, and certainly much better than they are like to be under the new claims and exertions, which threaten anarchy, confusion and destruction to the colonies, more than anything which has happened to them since their first existence.<sup>35</sup>

33. Few aside from Americans took this position. One of the exceptions in the House of Commons was William Pitt. He thought Parliament sovereign over the colonies in all respects but taxation. *Mass. Gazette*, Mar. 27, 1766, at 3, col. 2.

34. Edmund Burke stressed this consideration when he condemned the Stamp Act for departing from legislative tradition and from legal customs upon which American commerce had come to depend. Formerly, Parliament's policy had been "purely commercial; and the commercial system was wholly restrictive. It was the system of a monopoly. No trade was let loose from that constraint, but merely to enable the colonists to dispose of what, in the course of your trade, you could not take . . . Hence all your specific and detailed enumerations; hence the innumerable checks and counterchecks; hence that infinite variety of paper chains by which you bind together this complicated system of the colonies. This principle of commercial monopoly runs through no less than twenty-nine acts of Parliament, from the year 1660 to the unfortunate period of 1764.

"In all those acts the system of commerce is established as that from whence alone you propose to make the colonies contribute (I mean directly and by the operation of your superintending legislative power) to the strength of the empire. I venture to say, that, during that whole period, a Parliamentary revenue from thence was never once in contemplation." E. Burke, *Speech on American Taxation*, Apr. 29, 1774, 2 *Writings & Speeches of Edmund Burke* 30-31 (1901).

35. *Boston Evening-Post*, Nov. 4, 1765, at 1, col. 3. Burke believed the Stamp Act resulted from too great a reliance on positive law and not enough respect for customary law. The author of the Stamp Act had been "bred to the law, which is, in my opinion, one of the first and noblest of human sciences,—a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and to liberalize the mind exactly in the same proportion. Passing from that study, he did not go very largely into the world, but plunged into business,—I mean into the business of office, and the limited and fixed methods and forms established there. . . . Mr. [George] Grenville thought better of the wisdom and power of human legislation than in truth it deserves. He conceived, and many conceived along with him, that the flourishing trade of this country was

As the lower house of the Pennsylvania assembly was to argue three years later,<sup>36</sup> Great Britain had never raised money in the colony except by requisitions to it, the legislature. Parliament had not directly taxed Pennsylvanians. That practice or forbearance had created a "Right"—a right not only "established on the Principles of English Liberty, on the settled Form of their own Government," but also proven by "the uninterrupted Usage and Custom so often recognized and confirmed by the Sovereigns of the Mother State, and even by the Parliament itself."<sup>37</sup>

#### IV. THE AUTHORITY OF CUSTOM

A point must be stressed and it must be understood. We should not think of custom as a source of or authority for "law" that in fact is not law, or is something less than law. Some historians warn us not to be misled by Whig propagandists who, seeking to manipulate public opinion and persuade people that American liberties were being violated, confused custom with law.<sup>38</sup> But it is those historians, not the Whigs, who have misled. As Blackstone implied during the very year the stamp tax was enacted,<sup>39</sup> custom could not be confused with law because custom was law.

Perhaps it is not argument but silence that misleads. The American Whigs did not have to prove the authority of custom and so they seldom discussed it. What was part of the contemporary legal system was taken for granted. Usage was a source of much of the common law,<sup>40</sup> and in the area of constitutional law it defined what today are called human rights or civil liberties.<sup>41</sup> Whether usage was also the authority for the constitution itself was the issue dividing American Whigs from their fellow subjects in Great Britain.

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greatly owing to law and institution, and not quite so much to liberty; for but too many are apt to believe regulation to be commerce, and taxes to be revenue." E. Burke, *Speech on American Taxation*, Apr. 29, 1774, 2 *Writings & Speeches of Edmund Burke* 37-38 (1901).

36. The occasion was the controversy over the constitutionality of the Townshend duties, 7 *Geo. 3*, c. 46 (1766).

37. Petition from the Pennsylvania House of Representatives to the House of Commons, Sept. 22, 1768, *Boston Gazette and Country Journal*, Feb. 20, 1769, at 1, col. 1.

38. Thus it has been argued that even though Samuel Adams "could find no legal precedents for [his] contention" that the American assemblies alone had the power to tax in the colonies, he "could find ample justification for it in the facts of colonial history. For decades, the Americans had enjoyed self-government not by virtue of any formal grant of power, but by prescriptive right, and nothing is easier for the emotional enthusiast than to confuse custom with law." R. V. Harlow, *Samuel Adams, Promoter of the American Revolution* 36 (1923).

39. 1 W. Blackstone, *Commentaries* 76-77 (1765).

40. M. Hale, *The History of the Common Law of England* 22 (2d corr. ed. 1716).

41. F. McDonald, *E Pluribus Unum: The Formation of the American Republic 1776-1790*, at 5 (1965).

The Americans stood on solid ground historically, though from the viewpoint of English lawyers less so legally.<sup>42</sup> There had been a time when constitutional law was based primarily on custom and usage. During the seventeenth-century controversy between the common lawyers and the Crown leading up to the Puritan Revolution and the beheading of Charles I, both sides based their respective positions on customs—the royalists in large part, the parliamentarians almost exclusively. “In all ages, beyond record, the Lawes and Customes of the Kingdome have been the Rule of Government,” argued Philip Hunton, author of *A Treatise on Monarchie*, in 1643.<sup>43</sup> Custom and not the royal prerogative was supreme. While Crown lawyers in the eighteenth century agreed, they did so with an important exception: the King, not the common-law courts, interpreted as well as defended that law. “The Lawe,” David Jenkins, a royalist judge, had written in 1647, “is not knowne but by Usage, and Usage proves the Law, and how Usage hath beene is notoriously knowne.”<sup>44</sup> American Whigs were echoing the leading English lawyers of the seventeenth century when they used custom to defend their eighteenth-century constitution.

The forensic technique and constitutional theory are best illustrated by quoting from an argument written by John Adams defending what he said were American rights. Contending in the *Boston Gazette* with a Tory lawyer, William Brattle, on the issue of judicial tenure,<sup>45</sup> Adams took his stand on English precedents and the authority of custom.

Sergeant Levinz says, “If any judicial or ministerial office be granted to any man to hold, so long as he behaves himself well in the office, that is an estate for life, unless he lose it for misbehavior. So was Sir John Waller’s case, as to the office of chief baron of the exchequer.” To all this I agree, provided it is an office that by custom, that is, immemorial usage, or common law, (as that of the chief baron of the exchequer was,) or by an express act of parliament, (as that of clerk of the peace, in the case of Harcourt against Fox, was,) has been granted in that manner, but not otherwise; and therefore these words have no operation at all against me.<sup>46</sup>

And again:

General customs, which are the universal rule of the whole kingdom, form the common law in its stricter and more usual signification. This is that law which determines that there shall be four superior courts of record, the chancery, the king’s

42. See pt. V *infra*.

43. M. Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645*, at 399 & n.44 (1949).

44. Quoted in S. Prall, *The Agitation for Law Reform During the Puritan Revolution 1640-1660*, at 26 (1966). “The Royalists were now arguing from very solid ground indeed, and from a position that would be hard for any English lawyer to oppose.” *Id.*

45. J. Adams, *Diary Entry*, Mar. 4, 1773, in 2 *Works of John Adams* 315 (1850).

46. J. Adams, [From the *Boston Gazette*, 1 February 1773], in 3 *Works of John Adams* 546 (1851).

bench, the common pleas, and the exchequer, among a multitude of other doctrines, that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support. Judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.<sup>47</sup>

Usage, therefore, was associated in lawyers' minds with the common law and was found much as common law was found.<sup>48</sup> It was evidence of law<sup>49</sup> as well as law itself,<sup>50</sup> and had the additional strength of being law formulated as much by the common people as by the sovereign,<sup>51</sup> a concept well suited to the political as well as the legal realities of prerevolutionary America.<sup>52</sup> So strong, in fact, was the notion that custom was law that some colonists apparently believed that a custom of short duration could nullify acts of Parliament. At least the collector of the port of Charles Town thought they did when he warned South Carolina merchants not to rely on the fact that his predecessor, "entirely borne down by the weight of old age and

47. *Id.* at 540-41.

48. The words of John Adams were quoted because he was speaking of constitutional law; in the eighteenth century judicial tenure was in that category. The ease with which he shifted his comments from the constitution to common law is an excellent demonstration of the tendency of people at that time to equate common law, custom, and constitutional law. See Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in *5 Perspectives in American History* 287, 296-97 (D. Fleming & B. Bailyn eds. 1971). In fact, Benjamin Franklin apparently believed that custom was not only the source of common law but part of the authority for determining when common law operated. Thus, when Thomas Pownall, former governor of Massachusetts, argued that the colonies had received as their law all "[t]he common Law of England and all such statutes as were enacted and in force at the time such settlers went forth," Franklin disagreed. They received that body of law, he noted, only "[s]o far as they have accepted it by express laws or by practice." C. Pownall, *Thomas Pownall M.P., F.R.S. Governor of Massachusetts Bay* 225 (1901).

49. "Usage is said to be one of the best expounders of a law." Opinion of James Hollyday, G. Chalmers, *Opinions of Eminent Lawyers* 305 (1858).

50. See John Adams' list of the "diverse Laws within the Realm of England," Student Notes, in *1 Legal Papers of John Adams* 2-3 (L. Wroth & H. Zobel eds. 1965).

51. Thus Hale argued: "By longe custome and usage w[h]ich carries in it Selfe a facile Consent of the Govern[o]rs and Governed, or is att least an Evidence or Interpretation of the Originall Institution of the nature of the Governm[en]t or of the initall part between the Govern[o]rs & Governm[en]t." Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe, in *5 W. Holdsworth, A History of English Law* 507 (1927).

52. This was especially so in Massachusetts Bay where lawyers relied on "the custom of the town" as authority and spoke of commercial customs as "certain Regulations dictated by observation, Experience, [and] Common Sense among Whalem[en]." Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760-1775*, *18 Am. J. Legal Hist.* 1, 25 (1974), quoting *2 Legal Papers of John Adams* 76 (L. Wroth & H. Zobel eds. 1965). See also W. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, at 29-30, 49-50 (1975).

infirmity," had failed to enforce two recently enacted revenue statutes:<sup>53</sup>

[A] nonuser of these sufferances, cannot, by any means, be claim'd as a customary privilege: And I am persua[d]ed, that no gentleman can say, with any degree of propriety, that he claims an uninterrupted and customary right against laws relative to the revenue, to which an obedience ought ever to be paid, as often as the parliament of Great Britain thinks it expedient to make any alteration . . . .<sup>54</sup>

## V. THE OTHER SIDE OF CUSTOM

What Parliament thought expedient was precisely the point in controversy. Custom might be valid positive law in England as well as in the colonies, but it no longer enjoyed the force possessed a century earlier as the primary source and most accepted proof of the English constitution. Legal premises were now markedly altered, but the change cannot be attributed to the acceptance of Hobbesian legal theory,<sup>55</sup> for usage remained a good test of constitutionalism, especially colonial constitutionalism.<sup>56</sup> Contemporary British lawyers maintained that custom, while still valid, could now be modified, altered, or abrogated by Parliament. American denial of that doctrine was one of the causes of the conflict between the colonies and the mother country.<sup>57</sup>

Legal doctrine must be placed in chronological perspective. Amer-

53. The statutes referred to, in 4 & 5 Geo. 3, were enacted in 1764 and 1765, which left a remarkably short time for a custom to grow up, as the collector issued his warning in 1766.

54. Advertisement of Edwards Davis, Sept. 19, 1766, *South Carolina Gazette*, Sept. 29, 1766, at 1, col. 3.

55. "Now as to the authority you ascribe to custom, I deny that any custom of its own nature can amount to the authority of a law. For if the custom be unreasonable, you must, with all other lawyers, confess that it is no law, but ought to be abolished; and if the custom be reasonable, it is not the custom, but the equity that makes it law." T. Hobbes, *A Dialogue*, in 6 *The English Works of Thomas Hobbes* 3, 62-63 (W. Molesworth ed. 1840).

56. Opinion of Attorney General William Murray & Solicitor General Richard Lloyd, G. Chalmers, *Opinions of Eminent Lawyers* 352-53 (1858); Madden, *Some Origins and Purposes in the Formation of British Colonial Government*, in *Essays in Imperial Government* 4 (K. Robinson & F. Madden eds. 1963).

57. A related question was whether the British ministry, without specific parliamentary decree, could alter a colonial constitutional usage. When the Lords of Trade ordered that Massachusetts statutes contain clauses suspending their operation until approval by the Crown, the General Court argued: "The Co[n]temporary, as well as constant usage to the [contrary], ever since the Charter, and which has never before been called in question, is, as we think, an unanswerable argument in Law, and in reason, that no such thing was ever intended." Instructions from the Massachusetts Council and House of Representatives to Agent Jasper Mauduit June 14, 1762, in Jasper Mauduit: Agent in London for the Province of the Massachusetts-Bay 1762-1765, at 50 (74 *Collections Mass. Hist. Society* 1918).

ican Whigs were making an argument which British Whigs associated with the seventeenth, not the eighteenth century. By contending that the constitution was the product of customs, they were reviving constitutional traditions that English lawyers thought of as legal history, not as current law. There had been a time when the theory of binding constitutional usages were the main prop of English whiggery, as when John Pym told the House of Commons that

the law of England, whereby the subject was exempted from taxes and loans not granted by common consent of Parliament, was not introduced by any statute, or by any charter or sanction of princes, but was the ancient and fundamental law, issuing from the first frame and constitution of the kingdom.<sup>58</sup>

In other words, English lawyers such as Pym, Coke, and Selden had based their defense of established liberty against the arbitrary government of Charles I on the preservation of the status quo as discovered, proven, and defined by custom.<sup>59</sup> Time and the Glorious Revolution had ravished that method of constitutional advocacy. Colonial Whigs by reviving it were depending upon essentially medieval legal arguments rendered constitutionally illogical by the doctrine of parliamentary sovereignty<sup>60</sup>—illogical, that is, in Great Britain, not in North America.<sup>61</sup>

The Glorious Revolution of 1688, making Parliament supreme over the Crown, had altered forever the constitution of England and, therefore, the constitution of Great Britain. Custom as well as monarchy had plainly been subordinated to the will of the legislature.<sup>62</sup> With their representatives now made the supreme sovereign, people in the mother country no longer feared arbitrary government—at least not in constitutional theory. So accepted was the doctrine of parliamentary

58. J. Gough, *Fundamental Law in English Constitutional History* 70 n.2 (1955).

59. J. Pocock, *The Ancient Constitution and the Feudal Law* 30-69 (1957). "Strict interpretation of mediaeval legal theory implied, therefore, that it was possible for an individual to prevent entirely the formation of a corporate will, for according to mediaeval conceptions, the maintenance of existing political conditions, even down to the smallest details, was, in the ultimate analysis, a part of the subjective rights of every individual member of the community. The State which held on the longest to this true mediaeval principle, so far as the nobility were concerned, was Poland; and for this very reason, Poland was brought to ruin by an absurd extension of the right to veto." F. Kern, *Kingship and Law in the Middle Ages* 192-93 (S. Chrimes transl. 1970).

60. 5 W. Holdsworth, *A History of English Law* 480 (1927).

61. J. Gough, *Fundamental Law in English Constitutional History* 192-93 (1955).

62. Charles II in 1660 had sworn to "Confirm to the People of England the Laws and Customs to them granted by the Kings of England . . . agreeable to the Prerogative of the Kings thereof, and the Ancient Customs of the Realm." William and Mary, by contrast, swore "[t]o Govern . . . according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same." The Coronation Oath, in 1 W. Costin & J. Watson, *The Law and Working of the Constitution: Documents 1660-1914*, at 58 (1952) (italics omitted). See also B. Kemp, *King and Commons 1660-1832*, at 30 (1957).



supremacy that a complaint of governmental tyranny in London raised a political, not a legal, issue.<sup>63</sup> As a result, colonial Whigs and their supporters in the House of Commons, while appearing to be in agreement, were making different arguments. Americans, claiming a customary freedom from taxation, were arguing law. Their British friends, though echoing their words, were arguing not law but public morality.

Thomas Pownall, a former governor of Massachusetts, contended that past usage demonstrated that Parliament did not impose internal taxes on Great Britain's North American colonies. Established, customary practice should be respected, and a solution be found that conformed to that usage, not because Parliament was bound to respect custom but because it was right for Parliament to do so.<sup>64</sup> "Whatever the right might have been," Edmund Burke agreed, the exercise of taxation was new and it was the newness that made it questionable.<sup>65</sup> The common-law tradition was not rejected but modified. Sovereignty was all very well as constitutional theory, but institutional success—a new test for nonlegal custom—should not be tampered with.<sup>66</sup>

Again, and again, revert to your old principles,—seek peace and ensue it,—leave America, if she has taxable matter in her, to tax herself. I am not here going into the distinctions of rights, nor attempting to mark their boundaries. I do not enter into these metaphysical distinctions; I hate the very sound of them. Leave the Americans as they anciently stood, and these distinctions, born of our unhappy contest, will die along with it. They and we, and their and our ancestors, have been happy under that system. Let the memory of all actions in contradiction to that good old mode, on both sides, be extinguished forever. Be content to bind America by laws of trade: you have always done it. Let this be your reason for binding their trade. Do not burden them by taxes: you were not used to do so from the beginning. Let this be your reason for not taxing. These are the arguments of states and kingdoms. Leave the rest to the schools; for there only they may be discussed with safety.<sup>67</sup>

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63. J. Gough, *Fundamental Law in English Constitutional History 174-91* (1955).

64. T. Pownall, *The Administration of the Colonies 89-96* (2d ed. 1765). Pownall would have found the solution through requisitions asking colonial assemblies to bring their method of taxation as close as possible to that of Great Britain in order to conform to the British constitution. *Id.* at 93-101.

65. Burke, *Speech on American Taxation*, Apr. 19, 1774, in *Debate*, *supra* note 11, at 137.

66. "Burke's essential ideas are that institutions are the products of history, that history consists in an unceasing and undying process, in which the generations are partners and in which men perpetually adapt themselves to new needs and new situations; that existing institutions are the fruits of this process . . . . In all this we cannot be mistaken in recognizing the voice of the great tradition of common-law thought, and in particular of those men who had conceived the law of England as custom and custom as perpetual adaptation." J. Pocock, *The Ancient Constitution and the Feudal Law 242-43* (1957).

67. Burke, *Speech on American Taxation*, Apr. 19, 1774, in *Edmund Burke on Revolution 48-49* (R. Smith ed. 1966); see *2 Writings and Speeches of Edmund Burke 34* (1901).

Prior to passage of the Sugar Act<sup>68</sup> and the Stamp Act, Americans had been content to acquiesce in Burke's moral constitutionalism.<sup>69</sup> The arbitrariness of taxation without representation—without even consultation of representatives—awoke American Whigs to an old danger,<sup>70</sup> and to combat it they resurrected a constitutional doctrine equally old: "[T]o declare that which was desirable as being from time out of mind and that which was undesirable as being an innovation."<sup>71</sup> John Adams had stated the rule when discussing judicial tenure:

[T]he office of chancellor of England, my Lord Coke says, could not be granted to any one for life. And why? Because it never was so granted. *Custom and nothing else prevails, and governs in all those cases:* of those offices that were usually granted for life, a grant of such an office for life was good, and of those that were not usually granted for life, a grant of such an office for life was void.<sup>72</sup>

The other side of custom may not have required the government to prove a precedent to sustain every innovation,<sup>73</sup> but it made innovation suspect. "It is well observ'd by an ingenious writer," a Boston newspaper quoted during the most stormy period of the Stamp Act crisis,<sup>74</sup>

[t]hat the first article of safety, in Princes and States, lies in avoiding all councils, or designs of innovation, in ancient and established forms and laws, especially those concerning liberty, property and religion; which are the possessions men will ever have most at heart, and be most tenacious of retaining: By avoiding which designs of innovation, they will leave the channel of known and common Justice clear and undisturbed.<sup>75</sup>

68. 4 Geo. 3, c. 15 (1764).

69. The chief instance where custom was argued as law was to justify the rebellion against Governor Edmund Andros in New England. He had, it was charged, violated rights established "by constant usage," and proved himself one of the "Arbitrary Governours." [E. Rawson & S. Sewall], *The Revolution in New-England Justified, and the People there Vindicated from the Aspersions cast upon them by Mr. John Palmer . . .*, in 1 *The Andros Tracts* 65, 80 (5 Prince Society 1868).

70. Arbitrary government by the Crown, which Coke had combatted with appeals to custom, was now replaced by arbitrary government by Parliament.

71. S. Prall, *The Agitation for Law Reform During the Puritan Revolution 1640-1660*, at 15 (1966).

72. J. Adams, *The Independence of the Judiciary*, in 3 *Works of John Adams* 526-27 (1851) (quoting Mr. Hawles) (emphasis in original).

73. "[T]he English revolutionaries, because of the conservative nature of the English character, and because of the pervasive influence of their legal education, had to find a precedent even for an innovation." S. Prall, *The Agitation for Law Reform During the Puritan Revolution 1640-1660*, at 6 (1966).

74. The period was that between Boston's two Stamp Act riots—the riot of August 14 against stamp agent Andrew Oliver and the riot of the 26th during which the house of Chief Justice Thomas Hutchinson was destroyed. H. Zobel, *The Boston Massacre* 24-37 (1970).

75. *Boston Evening-Post*, Aug. 19, 1765, at 2, col. 2 (italics omitted).

When we consider that this constitutional tradition—the legal theory that constitutional innovation was dangerous if not automatically unlawful—was still strong in eighteenth-century North America, it is possible to appreciate what the people of Weymouth had in mind when they capitalized and placed in quotation marks the word “novelties” in their list of grievances against both the Sugar and Stamp Acts: “[W]e really look upon these taxation and the extraordinary power of the admiralty judges, as so many ‘NOVELTIES’ that time itself will never reconcile us to.”<sup>76</sup> Again, words should be weighed, for they have more meaning than we might think. The inhabitants of Weymouth did not say that arguments, reason, force, or loyalty would never reconcile them to the Stamp Act. They said that “time” would never do so, for just as only time could create a legal custom, so only time could overcome a custom by replacing it with a different custom or invalidate it by nonusage.

## VI. THE TEST OF CUSTOM

Under the traditional common-law theory of rights, the binding force of conventions or institutions was roughly proportionate to their antiquity: custom acquired legal validity by being handed down from time immemorial.<sup>77</sup> Indeed, so strong was the concept of time as proof of authority that it was one doctrine of customary constitutionality that lingered in the British legal mind for some years after the new era of parliamentary supremacy had been ushered in.<sup>78</sup>

We may think that the requirement of antiquity placed an impossible burden on the American Whigs’ case. Quite the contrary, perhaps more than any ancient English or British rights, the colonial rights that the Stamp Act threatened to abolish were demonstrably “immemorial.” They could not only be traced back to “a time whereof the memory of man runneth not to the contrary,” they were traceable to the very

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76. Instructions of the town of Weymouth. n.d., Boston Evening-Post, Oct. 21, 1765, at 2, col. 1.

77. M. Hale, *The History of the Common Law of England* 23 (2d corr. ed. 1716); B. Levack, *The Civil Lawyers in England 1603-1641: A Political Study* 146 (1973); J. Pocock, *The Ancient Constitution and the Feudal Law* 30-35, 174-75, 189-90 (1957). “At least in the Middle Ages, such antiquity suggested a higher than human origin. Blackstone [whose writings were contemporary with the Stamp Act] saw the mere survival of an institution through many centuries as evidence of the cumulative approval of many generations.” D. Boorstin, *The Lost World of Thomas Jefferson* 209 (1960).

78. Thus protesting the Septennial Bill of 1716, the dissenting lords argued “that frequent and new Parliaments are required by the fundamental constitution of the Kingdom; and the practice thereof for many ages (which manifestly appears by our records) is a sufficient evidence and proof of this constitution.” Protest 184, Apr. 14, 1716, in *1 A Complete Collection of the Protests of the Lords* 228 (J. Rogers ed. 1875).

beginning of relevant time.<sup>79</sup> The Barbados Committee of Correspondence could truthfully claim that "we have enjoyed that privilege" of "an exemption from every other internal tax, than such as may be laid upon us by the representatives of our own people . . . ever since the first establishment of a civil government in this island to the present time."<sup>80</sup> Gloucester, Massachusetts, made the same boast:

Voted unanimously, That the first settlers of this country left their native land and came into this, when a wild uncultivated wilderness, inhabited by no human creatures except Savages, and suffered extreme hardships, risked their lives and spent their fortunes to obtain and secure their civil and ecclesiastical liberties and privileges, invaded and wrestled from them by violence.

That their posterity enjoyed those liberties and privileges (except in the tyrannical and arbitrary government of King James the second) with very little molestation or interruption, for almost an hundred and fifty years, until the late execrable stamp act.<sup>81</sup>

It may be too late for twentieth-century lawyers to grasp the strength of the argument. We have lost our sense of custom. The idea that continuance of 150 years was immemorial is a notion easily resisted. In fact, a much shorter span of time could prove a binding usage, as English Whigs opposing Charles I and prerogative law had discovered during the decades before the Puritan civil war. Referring to the precedents supporting royal authority that had been established during Tudor times, Sir Frederick Pollock observed that "on questions of constitutional law the practice of nearly a century is a formidable thing to deal with."<sup>82</sup>

The finding that the Americans stood on solid ground with respect to time does not mean their case for a customary constitution is established. The test of immemorial continuance also had to be met and again proof depended on facts. Factual difficulties were revealed early during the Stamp Act debate when the people of Pomfret, Connecticut, admitted that there had been exceptions to the practice of uniform legal usage which they claimed created a customary right to

79. From the first settlement the colonists made their own laws. See, e.g., 1 Pamphlets of the American Revolution 1750-1776, at 112-13 (B. Bailyn ed. 1965) (Massachusetts laws).

80. [J. Dickinson], An Address to the Committee of Correspondence in Barbados, in South Carolina Gazette, Aug. 4, 1766, at 1, col. 2. See also 1 Writings of John Dickinson: Political Writings 1764-1774, at 225 (P. Ford ed. 1895). Americans expected Britons to understand them when they said colonial rights had been "rendered sacred by a possession of near two hundred years, that is . . . from the first, settlements of North America, until a late period." Letter of Richard Henry Lee to the Earl of Shelburne, May 31, 1769, in 1 Letters of Richard Henry Lee 1762-1778, at 37 (J. Ballagh ed. 1911).

81. Gloucester Resolves of Mar. 27, 1770, Boston Evening-Post, Apr. 16, 1770, at 4, col. 1.

82. F. Pollock, The History of English Law as a Branch of Politics, in Jurisprudence and Legal Essays 185, 202 (1961).

freedom from parliamentary taxation. It was historically demonstrable, they contended,

[t]hat we have ever unmolestedly enjoyed (except some grievous Acts of Trade, &c.) our just Rights and Privileges, as the true born Sons of Liberty, until the oppressive and detestable Stamp Act was deeply formed and fatally levelled at the very Root and Foundation of our dearest Rights.<sup>83</sup>

The exception of the Acts of Trade may seem damaging to the Whig case—a precedent that went the other way, disproving the custom of autonomous control and furnishing evidence that Parliament had always decided what rights and privileges the colonists enjoyed. Logic suggests it should have been damaging, but law tells us it was not—at least it was far less damaging than the lawyers of the 1970s might think.

There were several ways to refute the argument that exceptions to a usage disproved the usage: to contend, as John Dickinson contended, that taxation is inherently different from trade regulations, even though revenue might be an incidental result of any act of trade; to distinguish, as Benjamin Franklin distinguished, between internal (Stamp Act) and external (import duties) taxation; to concede, as Thomas Hutchinson urged, that questions of imperial order must be entrusted to Parliament while other legislation is left to local control; and to resolve, as the First Continental Congress resolved, that Parliament regulated imperial trade because the colonies, more for convenience than from necessity or legal motivation, acquiesced in that regulation. Another argument that seems to have been especially convincing to eighteenth-century lawyers was based on the doctrine of custom itself. It was never better stated than by Edmund Burke when he told the House of Commons:

[T]hey who are friends to the schemes of American revenue say, that the commercial restraint is full as hard a law for America to live under. I think so, too. I think it, if uncompensated, to be a condition of as rigorous servitude as men can be subject to. But America bore it from the fundamental Act of Navigation until 1764.<sup>84</sup> Why? Because men do bear the inevitable constitution of their original nature with all its infirmities. The Act of Navigation attended the colonies from their infancy, grew with their growth, and strengthened with their strength. They were confirmed in obedience to it even more by usage than by law. They scarcely had remembered a time when they were not subject to such restraint.<sup>85</sup>

83. Resolves of Pomfret, Connecticut, Dec. 25, 1765, *Mass. Gazette*, Jan. 9, 1766, at 1, col. 2.

84. This was a period of 113 years. The earliest Navigation Act was in 1651. See I S. Fisher, *The Struggle for American Independence* 37 (1908). The first significant law, however, came on September 13, 1660. 12 Car. 2, c. 18 (1660).

85. E. Burke, *Speech on American Taxation*, Apr. 29, 1774, in 2 *Writings and Speeches of Edmund Burke* 32-33 (1901).

If Burke's argument fills us with wonder, it would not do to credit his genius for originality. He was merely matching established facts to a familiar doctrine of law. Voluntary acquiescence did not establish binding custom.<sup>86</sup> It could be explained away, as Burke explained it, by custom itself or by necessity, convenience, or expediency.<sup>87</sup>

Although mere absolute time was strong as proof of a custom, even stronger were facts tracing the custom to the very beginning of relevant time, especially if those facts also proved there were no earlier contradictions, variations, or periods of transition or change. The usages upon which they took their stand, Americans could say, had always existed unchanged and, to a degree, unchallenged. "Your Memorialists," Virginia's House of Burgesses argued, "have been invested with the Right of taxing their own People from the first Establishment of a regular Government in the Colony."<sup>88</sup> It was

their ancient and inestimable Right of being governed by such Laws respecting their internal Polity and Taxation as are derived from their own Consent, with the Approbation of their Sovereign or his Substitute: A Right which as Men, and Descendants of Britons, they have ever quietly possessed since first by Royal Permission and Encouragement they left the Mother Kingdom to extend its Commerce and Dominion.<sup>89</sup>

The colonists were not claiming abstract rights or natural rights, but rights established by uninterrupted continuance—customary rights. Or, as the Pennsylvania House insisted,

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86. Thus Sir Frederick Pollock wrote of the attempt by Stuart royalists to rely upon precedent from Tudor times: "The Tudor sovereigns had frequently, if not constantly, done things as high-handed and as difficult to justify by law as anything Charles I had yet attempted. The difference was that their government, on the whole, had been popular, and they knew where to stop. . . . [I]f the Tudors were allowed to carry things with a high hand, it was by an acquiescence confined to the particular times and occasions, not by the allowance which makes a binding custom." F. Pollock, *The History of English Law as a Branch of Politics*, in *Jurisprudence and Legal Essays* 185, 202-03 (1961).

87. See, for example, Proposition Four of the First Continental Congress: "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 a revenue on the subjects in America, without their consent." *The Declaration of Colonial Rights and Grievances*, Oct. 1, 1774, in 9 *English Historical Documents: American Colonial Documents to 1776*, at 806-07 (M. Jensen ed. 1955) (italics omitted).

88. *The Virginia Petitions to the King and Parliament, December 18, 1764: The Memorial to the House of Lords*, in *Prologue*, supra note 29, at 15.

89. Address of the Council & House of Burgesses of Virginia to King George III [Dec. 18, 1764], *Boston Post-Boy and Advertiser*, Mar. 25, 1765, at 1, col. 1, in *Prologue*, supra note 29, at 14 (italics omitted).

[t]his right in the people of this province, of being exempted from any taxations, save those imposed by their Representatives, has been recognized by long established usage and custom, ever since the settlement thereof, without one precedent to the contrary, until the passing of the late Stamp-act.<sup>90</sup>

## VII. THE ROLE OF PRECEDENT

When citing the lack of contrary precedent, the Pennsylvania House did not carelessly borrow a common-law technique to build a constitutional case. Precedent was a valid, respected, and familiar tool of British constitutional advocacy and was, in fact, the chief method used by lawyers seeking to prove the existence of an individual right or disprove the legitimacy of asserted governmental power. Precedent was another test of custom in addition to popular acceptance, practical success,<sup>91</sup> and established antiquity.

Colonial Whigs not only searched history for precedents to sustain their legal argument,<sup>92</sup> they conducted contemporary politics with an eye on the growth of adverse precedents.<sup>93</sup> When the Stamp Act first was proposed, a writer in London advised Americans that

the several Assemblies should signify their Assent and Desire to that Tax, under the present Exigencies of the State, and the Necessity of the Case, by which they avoid every Appearance of an Infringement of their Liberty . . . ; by this Means they will prevent a Precedent from internal Taxes being imposed without their Consent, which will inevitably be the Case next Session, if they with-hold their Assent to the Stamp Act.<sup>94</sup>

Most Whigs probably thought that suggestion a bit far-fetched, but they were aware that the underlying premise was legally sound.

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90. Petition from the Pennsylvania House of Representatives to King George III, *The Boston Chronicle*, Feb. 13, 1769, at 51, col. 3.

91. As the New York assembly expressed the principle, rights should be preserved which were "so long and happily enjoyed." *New York Resolves*, Dec. 18, 1765, in *Prologue*, supra note 29, at 60.

92. A remarkable example is John Adams' reply to Governor Thomas Hutchinson in the debate of 1773, in *Answer of the House of Representatives to the Speech of the Governor, of Sixth January . . .*, Jan. 26, 1773, in *Speeches of the Governors of Massachusetts 1765 to 1775; And the Answers of the House of Representatives, to the Same 351-64* (A. Bradford ed. 1818) [hereinafter cited as *Speeches*]; *Answer of the House of Representatives to the Speech of the Governor, of February Sixteenth . . .*, Mar. 2, 1773, id. at 384-96. For another excellent example see J. Adams, *Novanglus VII*, 4 *Works of John Adams 108-13* (1851). For the citation of an historical event as a precedent of custom during the Stamp Act debate, see *Remonstrance of the Council & Burgesses of Virginia to the House of Commons, Boston Post-Boy and Advertiser*, Mar. 25, 1765, at 1, col. 3.

93. Naturally, royal officials were also conscious of the danger of creating adverse precedent. See M. Kammen, *People of Paradox: An Inquiry Concerning the Origins of American Civilization 39-40* (Knopf ed. 1972).

94. Extract of a Letter from London, dated March 24, *Boston Post-Boy and Advertiser*, June 11, 1764, at 3, col. 1.

During the debate over the stamp tax in the House of Commons, "sundry acts of parliament were recited that from time to time had been enacted, imposing duties on the American subjects."<sup>95</sup> Colonial Whigs would have disputed the validity of these precedents but they were given little opportunity to be heard. By the time the Whigs were able to get attention, the Stamp Act had become law and the emphasis had shifted from past precedent to future precedent. Since precedent was one of the tests of custom, and it (along with antiquity and reasonableness) established the rightfulness or authority of usage, American Whigs said they were justified in employing violence to ensure that no stamps were sold, thus rendering the Act a nullity.<sup>96</sup> The constitutional danger was that if the Stamp Act were not resisted it could become "a precedent for their fellow subjects in Britain for the future, to demand of them what part of their estates they shall think proper, and the whole if they please."<sup>97</sup> By forcing every stamp distributor to resign, colonial crowds not only denied "their fellow subjects in Britain" that precedent, they also preserved one favorable to their cause. As a result of mob action, the Stamp Act Congress could truthfully assert "that no Taxes ever have been . . . imposed on them, but by their respective Legislature."<sup>98</sup>

As evidence of custom, precedent worked two ways.<sup>99</sup> Whatever

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95. Extract of a letter from a gentleman in London to his friend in Charles-Town, Feb. 8, 1765, *South Carolina Gazette*, Apr. 20, 1765, at 3, col. 2. For discussion of statutory precedents see [W. Knox], *The Controversy between Great Britain and her Colonies Reviewed* 13-14, 147-51 [misnumbered 127-31], 167-72, 177 (1769); T. Pownall, *The Administration of the Colonies* 120-27 (4th ed. 1768).

96. The theories of legal justification for mob action are discussed in Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 *N.Y.U.L. Rev.* 1043, 1050-86 (1974). Another illustration of the necessity of avoiding a precedent providing justification for what otherwise would have been lawless violence is the Boston Tea Party. The Whigs wanted the tea returned to London, but that was contrary to parliamentary law. Reid, *Book Review*, 49 *N.Y.U.L. Rev.* 593, 608-11 (1974). The consignees of the tea therefore proposed that they would store the tea and would not sell any. That would have seemed a victory for the Whigs, but it would also have meant that a tax would have been paid because once the tea was "imported" the duty became due. 7 *Geo. 3, c. 46, § 9* (1766). That would have created a precedent.

97. Answer from the Massachusetts House of Representatives to Governor Francis Bernard, Oct. 23, 1765, in *Speeches*, *supra* note 92, at 47.

98. *Declarations of the Stamp Act Congress*, Oct. 1765, in *Prologue*, *supra* note 29, at 63.

99. It must also be remembered that precedent played a role in the larger debate over custom, with which this Article is not concerned: the meaning of the British constitution. Thus it was argued by the government that taxation only by consent was not a constitutional right and precedents were cited of taxes collected from persons not represented in Parliament. E.g., Grenville, *Speech on Repeal*, in *Prologue*, *supra* note 29, at 137. In answer, the other side, both British and Americans, cited precedents to show that Parliament had granted representation to areas such as Chester before taxing them and did so in order to tax them. See Lord Camden's argument, *Boston Evening-Post*, Jan. 18, 1768, at 2, col. 2. One example was Ireland, which was



had been done in the community from time immemorial was legally right; whatever had been abstained from was legally wrong.<sup>100</sup> The fact that Parliament before the Stamp Act had never directly taxed the colonies for the purpose of raising revenue was evidence showing it was wrong for Parliament to do so.<sup>101</sup> Even more telling, as former Governor Pownall pointed out, Parliament had done more than merely fail to act. Instead of taxing the people of a colony directly, "[r]equisitions have been constantly made to them by their Sovereigns on all Occasions when the Assistance of the Colony was thought necessary to preserve the British Interest in America."<sup>102</sup> In other words, Parliament had permitted the ministry, in the name of the Crown, to ask American assemblies for contributions to imperial defense, thus creating a precedent against itself.<sup>103</sup> From one set of facts two constitutional arguments arose. The first, that the Stamp Act was unprecedented, stated a constitutional grievance. The second, that the Stamp Act was contrary to precedent, also was a constitutional grievance against being taxed "in a Manner . . . contrary to that in which 'till late, Government has been supported by the free Gift of People in the *American Assemblies or Parliaments.*"<sup>104</sup>

The complaint that Parliament departed from established practice illustrates one of the ways that Americans were able to define their constitutional rights. They might claim that "our particular Rights as Colonists" were "long since precisely known and ascertained, by uninterrupted Practice and Usage from the first Settlement of this

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not directly taxed by the British Parliament. Letter from the Massachusetts House to Agent Mauduit, June 13, 1764, in W. Tudor, *The Life of James Otis of Massachusetts* 169 (1823). These precedents, the most famous in the entire debate, related to the British, not to the American, constitution.

100. A correlative rule demonstrating the strength of abstention as a test of law was the doctrine of nonusage. Ignored for a time, a custom could lose its authority. A contemporary example in British constitutionalism was the King's veto. It had been lost by disuse, and the constitution was thereby, without enactment or decision, drastically altered. B. Kemp, *King and Commons 1660-1832*, at 27 (1957).

101. "[W]hile firmly establishing its authority over colonial trade and related matters despite initial colonial opposition, Parliament had consistently abstained from taxing the colonies for revenue, disregarding repeated suggestions from royal Governors and other British officials in the colonies that such taxes be laid. Thus usage, a powerful force in establishing legal rights and constitutional principles under English law, had drawn a line between Parliament's legislating for the colonies as to trade and related matters and Parliament's levying taxes for revenue on the colonies." B. Knollenberg, *Origin of the American Revolution 1759-1766*, at 149 (rev. ed. 1961).

102. The Virginia Petitions to the King and Parliament, December 18, 1764: The Memorial to the House of Lords, in Prologue, *supra* note 29, at 15 (italics omitted).

103. C. Pownall, Thomas Pownall M.P., F.R.S. Governor of Massachusetts-Bay 179 (1901).

104. Circular Letter from the Boston Selectmen to the Selectmen of other Massachusetts Towns [the Call of the Convention of 1768], Sept. 14, 1768, *Boston Gazette and Country Journal*, Sept. 19, 1768, at 2, col. 1.

Country",<sup>105</sup> but what "Practice," and how were they known? The answers were the practice of the British government, the understanding of the colonists past and present, and principles drawn from English constitutional history.

#### VIII. THE ARGUMENT OF ACQUIESCENCE

The proper practice of British governments seemed self-evident to American Whigs. One needed only to consider the long tradition of colonial home rule to be convinced.<sup>106</sup> The "auspicious Government of the illustrious House of Hanover," Connecticut's assembly pointed out, "have ever held sacred and inviolable, those Rights and Privileges of their loyal Subjects in this Colony."<sup>107</sup> They were, according to the resolves of a Massachusetts town meeting, "rights and privileges derived to us by charter from a King of Great Britain, acknowledged and consented to 'really or virtually' by the Parliament thereof."<sup>108</sup>

The colonial claim to constitutional rights established by governmental acquiescence or inertia was supported by William Pitt, at least with regard to the claim of freedom from external taxation.<sup>109</sup> Referring to recent ministers, including himself, who had "taken the lead in government," Pitt argued that none of them

thought, or ever dreamed, of robbing the colonies of their constitutional rights . . . . [N]ot that there were wanting some, when I had the honour to serve his Majesty, to propose to me to burn my fingers with an American Stamp-Act. With the enemy at their back [during the Seven Years' War],<sup>110</sup> with our bayonets at their breasts, in the

105. Instructions of the town of Providence, Aug. 13, 1765, *Boston Post-Boy*, Aug. 19, 1765, at 3, col. 1.

106. Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760-1775*, 18 *Am. J. Legal Hist.* 1, 13 (1974).

107. Connecticut Resolves, Oct. 25, 1765, in Prologue, *supra* note 29, at 54. "Your Majesty's dutiful Subjects of Virginia most humbly and unanimously hope, that this invaluable Birthright, descended to them from their Ancestors, and in which they have been protected by Your Royal Predecessors, will not be suffered to receive an Injury under the Reign of your sacred Majesty . . . ."; see Prologue, *supra* note 29, at 14.

108. Instructions of the town of Weymouth, n.d., *Boston Evening-Post*, Oct. 21, 1765, at 2, col. 2. The words "really or virtually" were a sarcastic reference to British assertions that Americans were "virtually" represented in Parliament.

109. Pitt abandoned this view with regard to the other Stamp Act grievance—trial in admiralty without juries. Another Member of Parliament supporting the American contention was Burke. An eyewitness to his speech in Commons urging repeal reported: "His principal argument . . . was, without entering on the right of taxation, to show from constant usage, that internal taxation was never once thought of since the first emigration of the Americans from this country, and that England never thought of any other power over them or interest in them, but that of regulating their commerce to the advantage of their mother country." P. Thomas, *British Politics and the Stamp Act Crisis: The First Phase of the American Revolution, 1763-1767*, at 231 (1975) (italics omitted).

110. "In the war of 1755 . . . the Parliament had in no instance attempted to raise either men

day of their distress, perhaps the Americans would have submitted to the imposition; but it would have been taking an ungenerous, and unjust advantage.<sup>111</sup>

It was this history of restraint that had led Americans to believe they were secure from taxation without representation or interference with their internal affairs. As David Ramsay, a member of the Continental Congress, an active Whig, and one of the Revolution's first historians, explained:

From the acquiescence of the parent state, the spirit of her constitution, and daily experience, the Colonists grew up in a belief, that their local assemblies stood in the same relation to them, as the Parliament of Great Britain to the inhabitants of that island.<sup>112</sup>

And a Connecticut writer could conclude:

If the concurrent usages of a number of parliaments in succession, and of different complexions, and for so long a term together, does not carry in it the full consent and approbation of parliaments, it is difficult to say what can do it, or how the subject can know and be secure of it.<sup>113</sup>

After all, "[i]s not the mind of parliament known by their usages? And is not the usage of parliament, the law of parliament[?]"<sup>114</sup> Should Parliament, therefore, consider revoking the colonial right to self-taxation, it should first recall that the privilege "is sanctified by successive usage, grounded upon a generous reliance on English Faith and Compact, and that usage [is] ratified by repeated author[it]ative acquiescence."<sup>115</sup>

or money in the Colonies by its own authority." 1 D. Ramsay, *The History of the American Revolution* 48 (London ed. 1793).

111. William Pitt, Speech on Repeal of the Stamp Act, in Prologue, *supra* note 29, at 139.

112. 1 D. Ramsay, *The History of the American Revolution* 18 (London ed. 1793). For a discussion of Ramsay see Smith, *David Ramsay and the Causes of the American Revolution*, 17 *Wm. & Mary Q.* 51 (1960). Acquiescence was also a pro-imperial argument against which Whigs had to be on guard. As anti-liberty precedents could be created by acquiescence, the people of Salem, Massachusetts, instructed their representative to give "your closest attention to our true & real interests, & to those rights and privileges which we are justly intitled to; the firm and prudent assertion, & equitable establishment whereof now, will be the best defence & security to the liberty & happiness of ourselves & posterity; as a negligent, weak & pusillanimous conduct in these most important concerns, may involve both in endless miseries." Instructions of the town of Salem, May 27, 1769, in J. Phillips, *Salem in the Eighteenth Century* 303 (1937).

113. *New-London Gazette*, Sept. 20, 1765, in *Boston Evening-Post*, Oct. 21, 1765, at 1, col. 2.

114. *Id.*

115. "AEQUUS," *Mass. Gazette*, Mar. 6, 1766, at 2, col. 2. The constitutional issue at stake during the Stamp Act controversy (together with the right to trial by jury) was taxation without representation. It was not the right of Parliament to pass legislation in general for the colonies. In fact, Benjamin Franklin believed that the colonies originally had been free from all parliamentary legislation. Then, with the restoration of Charles II, Parliament "usurp'd an Authority of making Laws for [the colonies]." Franklin was troubled about how the colonies could escape from that

## IX. THE IMMUTABILITY OF CUSTOM

For colonial Whigs the Stamp Act debate was practical, not theoretical. Confident that their case for the customary constitution rested on sound principles, they saw no need to consider obviously adjective questions arising from the nature or theory of usage. Forfeiture of rights, however, was a legal issue too fundamental to ignore, since the Americans were certain it would be the final answer of the British ministry. All Whigs agreed that if customary rights were alienable or forfeitable, those who would terminate them had an enormous burden of proof to sustain.<sup>116</sup> Americans had the principle on their side, but an Englishman articulated it best, and did so in just two sentences. "The gentleman asks," William Pitt told the House of Commons, "when were the colonies emancipated? But I desire to know, when they were made slaves?"<sup>117</sup>

Such pronouncements encouraged American Whigs to claim that rights were absolute. Some even suggested that customary rights jeopardized by the Stamp Act were so basic to the nature of British government that they were immutable and inalienable, and therefore were secure from the penalty of forfeiture, presumably even for the crime of treason. When a Tory suggested "[t]hat the particular colonies have certain rights, powers and privileges circumscribed within their respective limits,"<sup>118</sup> a Whig writer answered:

These rights must be such as we have had in possession and exercise, ever since we were colonies; the rights superceded and vacated by the [stamp] act—if we have not these we have none—and if these be our rights, they are ours to have and hold, to possess and defend against all claimants whatsoever. They are indefeasible rights; we

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precedent, once having permitted it to be established "partly through Ignorance and Inattention, and partly from our Weakness and Inability to contend." Letter of Benjamin Franklin to Samuel Cooper, June 8, 1770, in *5 Writings of Benjamin Franklin* 260 (A. Smyth ed. 1906). One solution offered by a Whig during 1765 would seem contradictory to the argument that acquiescence by Parliament had established the custom of freedom from taxation. American acquiescence in direct parliamentary legislation did not establish Parliament's right, he suggested. Rather, such laws as Parliament passed that did not involve taxation, "the colonists [had] adopted and submitted to, without desiring or claiming the privilege of being represented in Parliament; and while this is the case, the colonies may in some proper sense be said to be govern'd agreeable to that maxim of the British constitution, that no laws are made to bind them without their consent." *Connecticut Gazette*, Aug. 30, 1765, in *Boston Evening-Post*, Sept. 9, 1765, at 2, col. 1.

116. "[H]ow it hath come to pass that the colonists, as part of the king's natural subjects, have forfeited such ancient privileges, always heretofore acknowledged to be the birth-right of all the king's free subjects without distinction, hath not been yet told us." Letter from a Plain Yeoman, *Providence Gazette*, May 11, 1765, in *Prologue*, *supra* note 29, at 74.

117. William Pitt, *Speech on Repeal of the Stamp Act*, Jan. 1766, in *Prologue*, *supra* note 29, at 140.

118. *New-London Gazette*, Sept. 20, 1765, in *Boston Evening-Post*, Nov. 5, 1765, at 1-2.

cannot yield them up, because they are the birth-right inheritance of our children, to which they are born; nor can any claimants rightfully take them from us: this would make them rights and no rights, or our's, and not our's at the same time: for such claimants could take them away, only, on account of their having a better right to them than we.<sup>119</sup>

### X. THE BRITISH REACTION

The confidence with which American Whigs defended the customary constitution during the Stamp Act controversy must not mislead us. It was only one of several alternative arguments that made up their constitutional brief. They knew an appeal to usage alone could no longer win their case. The Whigs' counterparts in the mother country, the political radicals, were abandoning the standards of the past as a measure of freedom,<sup>120</sup> and the British legal mind was more receptive to Filmerian notions<sup>121</sup> than to Coke's constitutionalism. Aside from the constitutional dilemma (to be discussed in the next section), American Whigs had to contend with a ministry that depended on Lord Mansfield for legal advice. He was a Scots lawyer who seems to have paid no heed to the possibility that custom might render a practice constitutionally legitimate.<sup>122</sup> He certainly could not be persuaded that usage might nullify an act of Parliament.<sup>123</sup>

Another difficulty was the very nature of the proof needed to verify the customary constitution. The proof came from history, and like common-law precedent, could be selected with an eye on what the advocate sought to establish. Thomas Hutchinson, chief justice and governor of Massachusetts Bay, was one colonial Tory who admitted the force of usage. He met the Whigs on their own ground, argued their history, and challenged their conclusions, showing that for most

119. *Id.* at 2, col. 1.

120. Sheps, *The American Revolution and the Transformation of English Republicanism*, in *2 Historical Reflections* 3, 14-15 (1975).

121. "Now concerning customs, this must be considered, that for every custom there was a time when it was no custom, and the first precedent we now have had no precedent when it began. When every custom began, there was something else than custom that made it lawful, or else the beginning of all customs were unlawful. Customs at first became lawful only by some superior power which did either command or consent unto their beginning." *Patriarcha and Other Political Works of Sir Robert Filmer* 106-07 (P. Laslett ed. 1949).

122. George Grenville, before bringing forward the Stamp Act, asked Mansfield his opinion about the colonial protest that Parliament had not the constitutional right to tax Americans. Thinking of law as the sovereign's command, Mansfield turned the question around. "I wish," he told Grenville, "you would employ somebody to look . . . into the origin of their power to tax themselves and raise money at all." Letter of William Murray, Lord Mansfield, to George Grenville, Dec. 24, 1764, in *2 The Grenville Papers: Being the Correspondence of Richard Grenville, Earl Temple, K.G., and the Right Hon. George Grenville* 478 (1852).

123. C. McIlwain, *The American Revolution: A Constitutional Interpretation* 118-19 (1923).

precedents there were others proving the opposite, and what could not thus be neutralized could be reinterpreted and explained away.<sup>124</sup> It was a matter of picking and choosing between the relevant and the irrelevant. Hutchinson was pleased, for example, that Whigs "will [agree that] acts for regulating your trade by force of long usage are become part of your constitution."<sup>125</sup> But he was not so pleased when custom was counted against his case. While eagerly seizing on favorable usage, Hutchinson summarily dismissed related but unfavorable nonusage. The fact that Parliament had not previously taxed the colonies was, he contended, a mere indulgence and "ought not to be urged against the right itself."<sup>126</sup>

Perhaps the most telling British reaction to the colonial claim of customary constitutional rights was not to deny them, debate them, distinguish them, or reinterpret them. It was to treat them as a mistake, to suggest that the historical precedents were invalid not for lack of proof but because they were historical anomalies. The arguments of William Knox sum up this position. He had been provost marshal of Georgia, a member of the provincial council, and at the time of the Stamp Act was Georgia's agent in London. He believed the Stamp Act constitutional and publicly defended it, as a result of which he lost his agency and ceased being a spokesman for one of the colonies. But his views became even more significant a few years later when he was appointed undersecretary for colonial affairs, a post making him chief architect of the disastrous policies of the 1770s.<sup>127</sup>

The constitutional arguments advanced by William Knox tell us much about British attitudes. We may accept them as a reflection of general parliamentary thought if for no other reason than that most members of Parliament did little thinking about the American constitution, preferring to follow the lead of a few experts such as Knox. Where colonial Whigs saw a customary constitution establishing home rule and freedom from parliamentary interference William Knox saw only the carelessness of earlier British governments. He found no intention to recognize American rights and liberties in the fact that for over a century, the mother country had been too preoccupied with civil wars, domestic politics, and a series of conflicts with France, to give

124. See Speech of the Governor to the Two Houses, Jan. 6, 1773, in *Speeches*, supra note 92, at 336-42; Speech of the Governor to Both Houses, Feb. 16, 1773, id. at 368-81.

125. Hutchinson, *A Dialogue Between an American and a European Englishman*, in 9 *Perspectives in American History* 369, 376 (D. Fleming & B. Bailyn eds. 1975).

126. Id. at 382.

127. F. Wickwire, *British Subministers and Colonial America 1763-1783*, at 42-43 (1966); E. Wright, *Fabric of Freedom 1763-1800*, at 30 (1961); Greene, *William Knox's Explanation for the American Revolution*, 30 *Wm. & Mary Q.* 293 (1973).

attention to the governance of a few new, sparsely-settled colonies on the North American seacoast.

[I]t was with no small degree of astonishment, I perceived a total want of plan or system in the British Government, as well at the time of their establishment, as in their future management, that the seeds of disunion were sown in the first plantation in every one of them, and that a general disposition to independence of this country prevailed throughout the whole.<sup>128</sup>

What American Whigs thought to be their customary government was to Knox not government at all, but a lack of government dictated by the peculiar circumstances of the times and irresponsible laziness of past imperial officials. The American argument had been turned around; Knox understood the potential of constitutional advocacy. Rather than supporting colonial Whig contentions, the long history of British neglect was a precedent, providing a justification for contrary action correcting that neglect, and doing what should have been done a century before. As viewed from the constitutional perspective of William Knox and those who thought as he, the Stamp Act was not an innovation; it was merely very late.

#### XI. THE DUAL CONSTITUTION

American Whigs could easily have answered Knox. Carelessness was not a plea in abatement, justifying total disregard of a customary right.<sup>129</sup> There was little to be gained by answering every objection, however. It was not just that London would not listen; it was that London thought the debate irrelevant. Like their contemporaries, the Enlightenment rationalists who rejected history, British lawyers had discarded custom as a source of constitutional law.<sup>130</sup> Knox explained why in commenting upon an assertion made by the Pennsylvania Assembly in its Stamp Act resolutions that the colonists were entitled to "the noble Principles of English liberty."<sup>131</sup> It was all very well to

128. Quoted in T. Barrow, *Trade and Empire: The British Customs Service in Colonial America 1660-1775*, at 253 (1967).

129. It was charged that Americans had not complained about the Sugar Act and therefore could not be heard against the Stamp Act or other taxation—a sort of constitutional estoppel or laches. Edmund Burke defended the colonies on the ground that they had been unaware of the risk, rather than merely careless. "[I]t has been said in the debate, that, when the first American revenue act . . . passed, the Americans did not object to the principle. It is true they touched it but very tenderly. It was not a direct attack. They were, it is true, as yet novices,—as yet unaccustomed to direct attacks upon any of the rights of Parliament. The duties were port-duties, like those that they had been accustomed to bear,—with this difference, that the title was not the same, the preamble not the same, and the spirit altogether unlike." *Speech on American Taxation*, Apr. 29, 1774, in 2 *Writings and Speeches of Edmund Burke* 42 (1901).

130. *Pamphlets of the American Revolution 1750-1776*, at 28 (B. Bailyn ed. 1965).

131. *Pennsylvania Resolves*, Sept. 21, 1765, in *Prologue*, supra note 29, at 51 (italics omitted).

make general claims, Knox observed, "but where to find these noble principles of English liberty, except it be in the laws of the land, I confess I am ignorant."<sup>132</sup>

To state the question was to end the debate. American Whigs by appealing to custom had turned to one British constitutional tradition; Knox invoked another.<sup>133</sup> Parliament was supreme and sovereign by 1765, and whatever it said was the law of the land.

It is well to consider the debate from the British as well as the American side. We must not underestimate the full implication of American claims to an American constitution. Colonial Whigs may have sought only to curtail the authority of the British Parliament to govern North America, but few British lawyers could see the issue in such narrow terms. From the British perspective, Americans were seeking to alter the current constitution. After all, by insisting that Parliament's discretion could be limited, they were denying the doctrine of Parliament's sovereign supremacy. It was not any claim to American constitutional rights, but the claim that those rights were beyond modification by Parliament, that eighteenth-century British constitutionalists could not tolerate.

For Lord Mansfield, common lawyers, and most British Whigs, the constitution was Parliament and Parliament was the constitution.<sup>134</sup> For American Whigs the supremacy of Parliament had not yet been established as part of their customary constitution<sup>135</sup> and, now that the Stamp Act exposed the danger of parliamentary supremacy, it would never be established.<sup>136</sup>

In every sense, the American argument represented a return to the early medieval Germanic and English concepts of constitutional traditions. To claim rights created by custom was to deny the validity of the dominant eighteenth-century (as well as twentieth-century) doctrine that whatever the King enacted in Parliament is lawful. However, it

132. [W. Knox], *The Controversy between Great Britain and her Colonies Reviewed* 12 (1769) (italics omitted).

133. History and custom became irrelevant, for "any theory of sovereignty, rigorously interpreted, renders the appeal to the past unnecessary or of only emotional weight." J. Pocock, *The Ancient Constitution and the Feudal Law* 20-21 (1957).

134. Ewing, *The Constitution and the Empire—From Bacon to Blackstone*, in 1 *The Cambridge History of the British Empire* 603, 632 (J. Rose, A. Newton, & E. Benians eds. 1929).

135. It is not correct to say that the Declaratory Act changed the premises of the constitutional debate. See L. Leder, *Liberty and Authority: Early American Political Ideology 1689-1763*, at 145 (1968). The Declaratory Act merely restated parliamentary dogma. By ignoring it, colonial Whigs may not have acted as today's historians think they should have, but they acted as any lawyer would have done.

136. C. McIlwain, *The American Revolution: A Constitutional Interpretation* 1-11, 118 (1923).



cannot be said that their argument was unconstitutional.<sup>137</sup> They were appealing to a constitution, though not the current British constitution. They were invoking that earlier English constitution defined by Sir Edward Coke, a constitution based on the fundamental tenet that legality means harmony with preexisting custom.<sup>138</sup>

Turning not to the Glorious Revolution of 1688 but to the earlier struggle against Charles I,<sup>139</sup> Americans could answer the new constitution of George Grenville by quoting John Selden. Where there is a right, he had said, "there is a remedy. And the usages of the nation is the law of the nation, as much as the usages of parliament is the law of parliament."<sup>140</sup> It had been departures from the "usages of the nation" and "the arbitrary taking away and trampling upon the privileges of royal charters," that had provided justification for the barons' revolt against King John, the beheading of Charles I, and the Glorious Revolution exiling James II.<sup>141</sup> An arbitrary Parliament, American Whigs were saying in 1765, should take warning from the constitutional history that had made it supreme over an arbitrary Crown.

## XII. CONCLUSION

Looking upon custom as law, not history, American Whigs did not trouble themselves with historiographical theories. Historians might wonder what principle explained the transmutation of immemorial continuance into binding legal authority, but lawyers did not. Customary practice was so much a part of the definition of contemporary law

137. It is also incorrect that to say that Americans had a valid case, or one they believed in, leads to "the simplistic and pro-American idea that the English [British] were pigheaded and stubborn, traitors to their own heritage . . ." L. Leder, *Liberty and Authority: Early American Political Ideology 1689-1723*, at 12 (1968). It just as easily leads to the conclusion that they were arguing about two different constitutions. As the same writer observed: "Two general approaches can be distinguished in eighteenth-century American writings on the British constitution: one that it was a fixed and rigid collection of rules and laws; the other that Parliament itself was really the constitution and therefore continually subject to change." *Id.* at 85-86.

138. T. Plucknett, *A Concise History of the Common Law* 51 (5th ed. 1956); W. Holdsworth, *Some Makers of English Law* 117-18, 131 (1966); Holdsworth, *The Influence of Coke on the Development of English Law*, in *Essays in Legal History Read Before the International Congress of Historical Studies Held in London in 1913*, at 297-311 (P. Vinogradoff ed. 1913), S. Prall, *The Agitation for Law Reform During the Puritan Revolution 1640-1660*, at 41 (1966).

139. At that time Charles Herle, a clergyman, argued that fundamental law was superior to prerogative law as "that originall frame of this coordinate government of the three estates in Parliament consented to, and contrived by the people in its first constitution, and since in every severall raigne confirm'd both by mutuall Oathes betweene King and people, and constant custome time (as we say) out of mind, which with us amounts to a Law." M. Judson, *The Crisis of the Constitution: An Essay in Constitutional and Political Thought in England 1603-1645*, at 412 (1949) (*italics omitted*).

140. *Boston Evening-Post*, Oct. 28, 1765, at 1, col. 2.

141. *Id.*

that questions were not asked. Should we ask them, however, we may be able to obtain a clearer understanding of what colonial Whigs were asserting. One answer seems indisputable: they were not repeating the historicism of seventeenth-century English Whigs. The legal doctrine of immemorial custom, as expounded by colonial Whigs in 1765, did not lead to a view of the past that freezes history in terms of the present and concludes that what is now law has always been law.<sup>142</sup>

Like Sir Matthew Hale,<sup>143</sup> American Whigs realized that law is the product of historical evolution. The rights they claimed were not rights locked in changeless time but rights "constantly" reaffirmed both by usage and British reacknowledgement.<sup>144</sup> Sound historical theory, however, does not guarantee sound legal theory. That colonial lawyers did not view history as petrified past indicates that they did not view law as unchanging,<sup>145</sup> but does not reveal how they rationalized the authority of custom.

American Whigs had several justifications for basing rights on the customary constitution. The fact that custom bore the imprimatur of popular approval, or that custom was evidence of legal practicality or of current legal reality, were reasons sometimes asserted.<sup>146</sup> The predominant claim, however, though more implied than stated, was that governmental privileges belonged to Americans, as a London newspaper put it, "from long quiet possession or what is called prescription."<sup>147</sup> In the legal theory of prerevolutionary colonial Whigs, what custom proved was prescriptive right.<sup>148</sup> It was an

142. J. Pocock, *The Ancient Constitution and the Feudal Law* 30-39 (1957). There were, of course, exceptions, and interestingly these exceptions were quite often nonlawyers. A notable example was the Georgia clergyman John Joachim Zubly, who argued that the constitution "is permanent and ever the same," and hence Parliament could make no laws "against" the constitution. *Pamphlets of the American Revolution 1750-1776*, at 103 (B. Bailyn ed. 1965).

143. M. Hale, *History of the Common Law of England* 57-64 (2d corr. ed. 1716).

144. See, e.g., *Resolves of the Connecticut House of Representatives, May 1774*, in *Boston Evening-Post*, June 20, 1774, at 4, col. 1.

145. While Americans seemed to regard their rights as inflexible, it is not true that they believed them to be fixed. They realized that custom not only proved the constitution, custom also changed the constitution. Compare L. Leder, *Liberty and Authority: Early American Political Ideology 1689-1763*, at 92-93 (1968) to J. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies 1689-1776*, at 403-04 (Norton Library ed. 1972).

146. Answer of the Massachusetts House of Representatives to Governor Francis Bernard, Jan. 31, 1767, in *Speeches*, supra note 92, at 103 (italics omitted). A Whig editor in the deep south thought this answer worthy of publication. See *South Carolina Gazette*, Mar. 2, 1767, at 1, col. 3. See also T. Pownall, *The Administration of the Colonies* 163 (4th ed. 1768); Governor Johnstone's Speech to the House of Commons, Nov. 1775, in *The American Revolution: The Anglo-American Relation, 1763-1794*, at 85, 89 (C. Ritcheson ed. 1969).

147. *London Chronicle*, Nov. 12, 1768, in F. Hinkhouse, *The Preliminaries of the American Revolution as Seen in the English Press 1763-1775*, at 99 (1926) (italics omitted).

148. "If the American claims are founded on a right the Kings of England had not a

argument Americans had been making ever since the seventeenth century.<sup>149</sup>

While colonial Whigs understood the argument, we may doubt if they knew where it would lead. During the Stamp Act debates of 1765, they equated the constitution not with fundamental law but with the form of government that currently existed.<sup>150</sup> Within a generation they would see the form of government not as the constitution, but as the creature of the constitution.<sup>151</sup> The very need to combat the supremacy of Parliament thrust that concept upon them.

But if the colonial constitutional theorists had not known where they were headed, they did know where they had been. "All that is desired by the people of this province," the Massachusetts House declared, "is, that they may be restored to their original standing . . ."<sup>152</sup> The struggle was to preserve what they already possessed, not to demand new privileges.<sup>153</sup> It was to define what they possessed and give it

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constitutional power to give, the want of that power in the King annihilates the claims. I am not lawyer to decide the question: but let me suppose, that a family had held an estate of the crown for 150 years, by a right which the crown was then supposed to be possessed of, would it not be deemed great injustice to resume that grant from the present possessors, who trusting to that right, had inconceivably improved the estate, and by these improvements, had greatly benefited the King's other estates indeed to a degree that our forefathers never dreamed of?" From a Late London Newspaper, Boston Evening-Post, Apr. 11, 1771, at 1, col. 1. Earlier, Benjamin Franklin had argued: "[L]et me suppose, that a family had held an estate of the crown for 150 years, by a right which the crown was then supposed to be possessed of, would it not be deemed great injustice to resume that grant from the present possessors, who trusting to that right, had inconceivably improved the estate, . . . to a degree that our forefathers never dreamed of?" London Chronicle, Oct. 20, 1768, in Benjamin Franklin's Letters to the Press 1758-1775, at 136 (V. Crane ed. 1950). "If the British Subjects, residing in this Island, claim Liberty, and the Disposal of their Property, on the Score of that unalienable Right . . . the British People, residing in America, challenge the same on the same Principle. If the former alledge, that they have a Right to tax themselves, from Prescription, and Time immemorial, so may the latter." London Public Advertiser, Jan. 4, 1770, id. at 169.

149. It has been contended that because the founders of Plymouth colony never received a charter, their "right to exist as a self-governing state . . . always rested upon the Mayflower Compact." R. Perry, *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 58 (R. Perry ed. 1959). That assertion is invalid as a legal proposition. Without a charter, Plymouth's right to a constitution was based on prescription. Thus after the rebellion against Governor Andros and the overthrow of the Dominion of New England, the people of Plymouth informed William and Mary not that they were again governed by the Mayflower Compact, but that they had resumed their "former way of government" to which they had good title "by Perscription," and as authority cited "that Oracle of the Law," Sir Edward Coke. D. Lovejoy, *The Glorious Revolution in America* 246 (Torchbook ed. 1972).

150. 3 Works of John Adams 478-79 (1851).

151. 4 Works of John Adams 579 (1851).

152. Letter from the Massachusetts House of Representatives to Secretary of State Henry Seymour Conway, Feb. 13, 1768, in 1 Writings of Samuel Adams 192 (H. Cushing ed. 1968).

153. G. Wood, *The Creation of the American Republic, 1776-1787*, at 12-13 (1969); H. Colbourn, *The Lamp of Experience* 91 (1965).

legal legitimacy and constitutional permanency that the American Whigs had turned to custom.

The colonial constitutional argument based on the authority of custom and usage may be criticized as out of touch with eighteenth-century British constitutional realities. But we would do well not to criticize; instead we should marvel. What seemed to common and Scots lawyers a misunderstanding of the contemporary British constitution, was, from another legal perspective, both a vindication of the English constitutional past and an affirmation of the American constitutional present. Speaking for most Americans, the Stamp Act Congress told the House of Commons:

The People here, as every where else, retain a great Fondness for their old Customs and Usages, and we trust that his Majesty's Service, and the Interest of the [British] Nation, so far from being obstructed, have been vastly promoted by the Provincial Legislatures.<sup>154</sup>

A decade later, when they learned their trust had been misplaced, the colonial Whigs rebelled.

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154. Petition from the Stamp Act Congress to the House of Commons, in Prologue, *supra* note 29, at 68.