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THE COLONIAL BAR AND THE AMERICAN REVOLUTION

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I. INTRODUCTION

Before discussing the contribution of the bar of colonial America to the Revolution we must define our term "revolution." Do we refer to the series of battles on land and sea fought against the British between Lexington on April 19, 1775, and Yorktown on October 19, 1781? No, we do not. We accept John Adams' definition of the Revolution as something quite apart from the war with Great Britain. He wrote in his memoirs:

What do we mean by the revolution? The war with Britain? That was no part of the revolution; it was only the effect and consequence of it. The revolution was in the minds and hearts of the people, and this was effected from 1760 to 1775, in the course of fifteen years, before a drop of blood was spilled at Lexington.¹

The Revolution, as distinguished from the Revolutionary War, was the series of events by which the British Empire came to an end in the thirteen colonies which became the United States. It began, John Adams thought, on February 24, 1761, in a Boston courtroom, and it ended on July 4, 1776, when the final draft of the Declaration of Independence was adopted in the Continental Congress at Philadelphia. After that it was left to the fortunes of war to decide if Americans would enjoy the fruits of their Revolution.

The years 1761 through 1776 gave the American Revolution its peculiar and particular character, stamped it as something

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1. Quoted in C.D. BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION xiv (1949) [hereinafter cited as BOWEN].

so different from other revolutions known to history, that not even a bloody and desparate struggle of six long years could divert it from its course. It began as a Revolution for the Rule of Law. When, twenty-six years later, the United States Constitution was written and the Bill of Rights added in the first amendments, the resultant work product represented a triumph for the concept "liberty under law" which had guided the Revolution from its beginning. That it never got off the track, never swerved left into the chaos of anarchy, or right into the shackles of dictatorship, is the debt we owe to the men we call fondly the "Founding Fathers." Bicentennial-era Americans need to be reminded that these men were mostly lawyers and judges and that the influence brought to bear on the events which shaped the destiny of the Nation at its birth was a legal influence which only that profession could contribute. And more specifically, for a legal influence might also be despotic, we need to remember that the lawyers of the Revolution for Law shaped America's commitment to the Rule of Law in the image of the great legal system which was our English birth-right. What a paradox that we should fight our war for independence against the very nation which gave us the heritage for which we fought!

II. LAWYERS IN COLONIAL AMERICA

Lawyers were johnnies-come-lately in the American colonies. In the seventeenth century there were hardly any lawyers in America. There was animosity toward the bar based upon the theocratic organization of the New England colonies, Quaker mistrust in the middle colonies, and the jealousy of the aristocratic planters in the Southern provinces.² There were early statutes in some colonies prohibiting the practice of law, and judges were deliberately appointed who had no legal training.³ But gradually in the eighteenth century (and none too soon as it turned out) the legal profession became established, first in the middle colonies, then in the South and in New England.⁴ The colonists who settled America with utopian ideals came to find out that no society, no free society at least, can exist without a legal profession.

2. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 135-44 (1953) [hereinafter cited as POUND].

3. *Id.*

4. *Id.* at 144-63.

The Inns of Court in London were, in those pre-war days, the seat of English legal education. By the eighteenth century they had declined from their position of eminence as England's "great legal university," but they still trained lawyers, mostly by the apprenticeship method, for the English and colonial bars. Roscoe Pound estimated that between 140 and 165 colonial lawyers studied at the Inns of Court, most of them after 1760.⁵ A legal education at the Inns did not make a man a Tory; quite the contrary, the constitutionalism of Sir Edward Coke was enshrined there, and of him Thomas Jefferson once wrote that "a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called British liberties."⁶ Before the Revolution, the Toryism of Sir William Blackstone was pretty much confined to his classroom at Oxford, and the *Commentaries on the Laws of England*, first published in 1765, were not an influence in British legal education until after the lines were drawn.

The Inns of Court produced a splendid corps of American patriot lawyers. Thirty of the fifty-six signers of the Declaration of Independence were lawyers or judges; of those thirty, nine, or almost a third, were Inns of Court men. These were: from Delaware, Thomas McKean and George Read; from Maryland, Charles Carroll of Carrollton⁷ and William Paca; from Virginia, Richard Henry Lee, who moved independence on the floor of Congress on June 7, 1776;⁸ and from South Carolina her entire delegation, Thomas Heywood, Thomas Lynch, Arthur Middleton and Edward Rutledge.⁹

5. *Id.* at 157-58.

6. A. E. HOWARD, *THE ROAD FROM RUNNYMEDE* 131 (1968) [hereinafter cited as HOWARD].

7. Charles Carroll of Carrollton was a very unusual man of the law. He was a Roman Catholic, the cousin of John Carroll, who became the first Catholic bishop in the United States. He was a Jesuit educated at an underground Jesuit school in Maryland, at the College de St. Omer in French Flanders and the Jesuit College at Rheims. He then studied law in the famous French law school at Bourges, after which he went to the Inner Temple of the Inns of Court to study the common law for six years. But he had no hope of practicing in his native Maryland; the Protestants had gained power there, repealed the laws of religious toleration, and forbade Catholics to hold public office, teach school or practice law. K. BAKELESS AND J. BAKELESS, *SIGNERS OF THE DECLARATION* 233 (1969) [hereinafter cited as BAKELESS]; POUND, *supra* note 2, at 159.

8. The original motion, made by Lee on instructions of the provisional government of Virginia, was made on June 7, 1776; it was debated for nearly a month and finally adopted on July 2. The full text of the Declaration was adopted on July 4. See BOWEN, *supra* note 1, at 583-99.

9. The signers from the Inns are verified by BAKELESS and POUND, *supra* note 7 and

Inns of Court lawyers gained fame within the halls of Congress as well. John Dickinson of Pennsylvania was known as the "Penman of the American Revolution;" Peyton Randolph of Virginia was President of the First Continental Congress.¹⁰ John Blair of Virginia was afterward an Associate Justice of the United States Supreme Court, and John Rutledge of South Carolina was Chief Justice of the United States in 1795.¹¹ Judge William Henry Drayton of South Carolina was an Inns man who was fired from his royal judgeship for writing a constitutional defense of the American position, restored to the bench when the royal government collapsed and a new state constitution was written in March, 1776.¹²

Other great lawyers of the colonial period were home-trained by an apprenticeship method with far higher standards than those employed after the war when the ties to the Inns were broken. These men, too, were imbued with the legal philosophy of Lord Coke. Count among them twenty-one more signers of the Declaration, including Thomas Jefferson, its author, and John Adams, who managed it through Congress. There was George Wythe of Virginia, America's first law professor (at William and Mary) and the teacher of Jefferson, John Marshall, James Monroe and Henry Clay.¹³ The constitutional

note 2. That these English-trained lawyers meant to pledge their "lives, fortunes, and sacred honor" in the cause of American independence is attested to by some interesting facts disclosed by Bakeless' short biographies, *supra* note 7. After voting for independence, Thomas McKean rushed off to join his regiment, returning on furlough to sign. Charles Carroll and William Paca spent private fortunes outfitting Maryland troops. Three of the four from South Carolina, Heywood, Middleton and Rutledge, joined the army, were captured by the British in the battles around Charleston in 1779, and spent two years in a British P.O.W. camp. Thomas Lynch, despite an illness, stayed in Philadelphia to vote for independence. Sailing to France to regain his health, he was lost at sea in 1779. He was the youngest signer, only thirty years old when he died.

10. Dickinson, a prolific pamphlet writer for the American cause, was a Pennsylvania delegate to the Second Congress, but he could not bring himself to vote for independence. He absented himself from Congress when the critical vote was taken on July 2, but afterward he was a tireless worker for the Revolution. Peyton Randolph was called home from Congress to help organize the Virginia state government; John Hancock was elected President in his place. Thomas Jefferson took his seat for Virginia. BOWEN, *supra* note 1, at 520 *et seq.*

11. Rutledge was also the war-time governor of South Carolina. He was appointed Chief Justice by President Washington, but the Senate refused to confirm the appointment.

12. 5 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1026 (P. Force ed., ser. 4, 1844) [hereinafter cited as FORCE]; HOWARD, *supra* note 6, at 180-85.

13. BAKELESS, *supra* note 7, at 96-100. Professor Wythe held the second chair of

scholar James Wilson, later an Associate Justice of the Supreme Court, signed for Pennsylvania; he is remembered for his stirring defense of the right of British subjects to bear arms against ministerial oppression. Samuel Chase of Maryland, afterward a most controversial Justice of the Supreme Court,¹⁴ delivered Maryland for Union and Independence. Richard Stockton of New Jersey was that colony's leading lawyer; he lost everything in the war and died of disease contracted on a British prison ship.¹⁵ Robert Treat Paine was there to sign for Massachusetts. He had been the crown prosecutor in the 1770 trial of the British soldiers charged in the Boston Massacre.

Reading the biographies of the lawyer signers of the Declaration of Independence¹⁶ one is impressed with the fact that these men were, for the most part, legal practitioners. They were men engaged in the daily practice, not lawyers in name only. They took off time from practice to perform a public service, just as lawyers do today. But their public service was not service on a bar association committee or aiding the United Fund; they were called to Philadelphia to create the United States of America. From that effort, some, like Adams and Jefferson, were called to even higher service. But the majority did their duty and returned to practice law. They brought to the Continental Congress not just political acumen, but sound jurisprudential insights which kept the Revolution on a true course.

One example of such a lawyer-signer must suffice. William Ellery of Rhode Island was born in 1727 into an old Massachusetts family. He graduated from Harvard College in 1742, when he was fifteen years old. He was so attached to his alma mater that he made an annual "homecoming" visit every year for the 62 years between 1745 and 1807! After holding several jobs, and trying his hand in business, he became clerk of the court of common pleas in Rhode Island. This service aroused an interest

common law established in a college or university. Sir William Blackstone's, at Oxford, was the first, in 1758. Wythe lived to be 77 years old, poisoned in 1806 by a nephew who hoped to accelerate his inheritance. He lived long enough to change his will, saying as he died, "I shall die leaving him my forgiveness." *Id.*

14. In the battle between John Marshall's Supreme Court and Thomas Jefferson's Republican Democrats, Congress impeached Justice Chase, an ardent Federalist. His acquittal by the Senate was a great victory for the Court. A good discussion of the struggle may be found in L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* 417 *et seq.* (1974).

15. BAKELESS, *supra* note 7, at 166-69.

16. BAKELESS, *supra* note 7.

in law, which he studied, and in 1770 he was admitted to the bar. He built an extensive practice in both Rhode Island and Connecticut. He was elected to the Second Continental Congress to replace a delegate who had died, arriving in Philadelphia in May, 1776, just as the independence question was coming to a head. He served in Congress through the war, losing to British incendiaries his Newport home and all its contents when the Royal Army occupied that town late in 1776. After the war he simply returned home and, to restore his fortunes, resumed the practice of law. Though not admitted to practice until he was forty-three years old, he was a member of the bar for fifty years. He died February 15, 1820, in his ninety-third year, peacefully in bed, reading Cicero "[w]ithout glasses . . . and in small print . . ." ¹⁷

Beside the signers of the Declaration, there were other "home grown" giants of the bar who articulated the American Revolution as one for the Rule of Law. In the front rank is James Otis of Boston, of whom more will be said later. If John Adams is to be believed, he was the "father of the American Revolution." George Mason of Virginia is another. His Virginia Bill of Rights was the model for the first ten amendments to the United States Constitution and for similar declarations in every state constitution.

There were, of course, loyalists among the members of the bar, but not as many as might be expected. Pound's research disclosed that, by the most reliable count, forty-eight lawyers were Tories who left the country, going to Canada, England or elsewhere in the Empire.¹⁸ Among these were Jonathan Sewall, John Adams' good friend, and James Putnam under whom he studied law. There were some Tories who did not leave; Edward Shippen, for example, was Chief Justice of Pennsylvania under both the royal authority and the new commonwealth.¹⁹ But the Tory bar was hardly a force in the Revolution; in the main the lawyers of America stood with the colonists because they perceived the law to be on that side.

17. *Id.* at 216-20.

18. POUND, *supra* note 2, at 174, citing 2 L. SABINE, BIOGRAPHICAL SKETCHES OF LOYALISTS OF THE AMERICAN REVOLUTION (1864).

19. POUND, *supra* note 2, at 161. Chief Justice Shippen's daughter, Peggy, became the wife of General Benedict Arnold and is said to have been the cause of his betrayal of his country.

III. CONTRIBUTIONS OF THE COLONIAL BAR TO THE AMERICAN REVOLUTION

What, then, did the lawyers of America do in the cause of the American Revolution?

First, they articulated the cause as one for the Rule of Law. In the wake of the French and Indian Wars, and because the British wanted the colonists to pay a share of the war debt, the grievances against British rule built up. Nearly every one of them was the product of legislative or administrative action based upon a British theory that the colonies were subject in every respect to the sovereignty of the "King, Lords and Commons" of Great Britain "in Parliament assembled." This, of course, was a sovereignty in which they had no voice or vote. The American view was 180 degrees opposite, based upon colonial charters, upon the British constitution and common law which they insisted had emigrated with them from England, and, finally, as Jefferson put it in the Declaration, upon "the Law of Nature and of Nature's God." George Mason said in 1766:

[The colonists claim] nothing but the liberties and privileges of Englishmen, in the same degree, as if we had still continued among our brethren in Great Britain; these rights have not been forfeited by any act of ours; we cannot be deprived of them, without our consent, but by violence and injustice; we have received them from our ancestors, and, with God's leave, we will transmit them, unimpaired, to our posterity.²⁰

Despite what modern history books may say, what was presented here was not a political squabble. It was a constitutional crisis of such a magnitude as to shake the British Empire to its foundations. It was lawyers' work, not politicians' work, to defend the American position, because the crisis was jurisprudential. The British took a positivistic stance: the law is what the lawmakers say it is. "No," came the American reply, "there is a higher law, call it natural law, call it the British constitution, call it fundamental common law. Even the lawmakers must obey this law." And for the rectitude of their position the Americans called upon the greatest legal authority of English

20. George Mason in a letter to the merchants of London, *quoted in HOWARD, supra* note 6, at 205.

history, Sir Edward Coke, late Chief Justice of England, leader of the House of Commons, professor of the Inns of Court, and practitioner without peer before the bar in Westminster Hall. Edward Coke, who lived from 1552 until 1634, was a “fundamental common law” advocate. He argued that the common law measured the king’s prerogative, and as Chief Justice he had looked James I in the eye and told him so.²¹ He also held the view that the powers of Parliament were circumscribed by fundamental common law principles, and he had declared that to be the law of England when, as Chief Justice, he found an act of Parliament unconstitutional in the celebrated *Bonham’s Case*.²²

John Adams said that “the child Independence” was born on February 24, 1761, when James Otis, arguing against the crown and citing *Coke on Magna Carta*, thundered in Boston’s superior court:

This writ is against the fundamental principles of English law. . . . Only for felonies may an officer break and enter —

21. The incident occurred on November 13, 1608, and is discussed at length in C. D. BOWEN, *THE LION AND THE THRONE* 291 *et seq.* (1957). The controversy was a complex one, involving ultimately the question of whether the king was above or under the law. James became enraged to hear that he was under the law and called it treason to hold that doctrine. To this the Lord Chief Justice replied “that Bracton [the great 13th century judge and ‘father of the common law’] saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege* — that the King should not be under man, but under God and the Laws.” He was nearly committed to the Tower for this restatement of orthodox British constitutional law dating to the time of *Magna Carta*. *Id.*, at 305. Two years later, in the Case of Proclamations, 12 Coke 74, 77 Eng. Rep. 1352 (1610), he had a chance to rule that the king had no power to make laws except with the concurrence of Parliament. James swallowed the bitter pill.

22. 8 Coke 107a, 113b, 77 Eng. Rep. 638, 646 (1610). This was probably, from the American point of view, the most important case decided in English courts from 1215 to 1776. It was a false imprisonment suit brought by Dr. Thomas Bonham against the President and Censors of the Royal College of Physicians who had imprisoned the plaintiff and fined him for practicing medicine without a license from the college. The statute of 14 & 15 Hen. VIII c. 5 (1524) gave the college that power and allowed it to keep half of the fines collected. This, Coke said, offended the fundamental principle of the common law that no man could be a judge in his own cause. Then came the language which rang in American law courts for a decade and a half before the Revolutionary War:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . . .

8 Coke 107a, 118a, 77 Eng. Rep. 638, 652 (1610). Coke was working, of course, without a written constitution as we understand it. He anticipated the American idea by 177 years.

and then by special, not general warrant. For general warrants there is only the precedent of the Star Chamber under the Stuarts. . . . [A]ll legal precedents are under control of the fundamental principles of English law. . . . *An act against the constitution is void. An act against natural equity is void. If an act of Parliament should be passed in the very words of this petition for writs of assistance, it would be void.*²³

The case was *Paxton's Case* and Otis' dramatic argument, conducted for five hours beneath the rich, gilt-framed portraits of the Stuart despots Charles II and James II, was the real opening shot in the American Revolution. Paxton, customs collector for the port of Boston, applied to the superior court for a writ of assistance when his old writ expired with the death of King George II. This writ, allowed by a British statute which did not specifically give colonial courts the jurisdiction to issue them,²⁴ was a general search warrant issued for the king's lifetime without showing of probable cause. Otis lost his case but gave America a legal foundation for the Revolution. Drawing upon the writings of Lord Coke, he later expanded upon his constitutional theory in a pamphlet he published in 1764 entitled *The Rights of the British Colonies Asserted and Proved*, asserting that even the authority of Parliament was circumscribed by certain bounds. The exercise of governmental authority beyond those bounds, in Otis' view, was an act of mere power without right, and thus void.

Time and again this argument echoed in American court rooms as the American bar developed the legal base of the

23. *Paxton's Case*, 1 Quincy 51 (1761). The quote of the oral argument of James Otis is from BOWEN, *supra* note 1, at 215.

24. 13 & 14 Car. II c. 11 (1662). By the statute 7 Geo. III c. 46 (1766) colonial courts were expressly empowered to issue these writs. It was opposing the enactment of that statute in 1766 that William Pitt the Elder uttered these famous lines in the House of Lords:

General Warrants interfere with the immunity of an English home where the wind might blow through every cranny but the King's writ could not enter. The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake. The wind may blow through it, the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953), *quoted in* *Miller v. United States*, 357 U.S. 301, 307 (1958). A recent quotation of these lines was by Senator Sam Ervin, chairman of the Senate committee investigating Watergate. He recited them to John Erlichmann over national television when the latter was trying to justify the actions of the "White House plumbers."

Revolution. It was the argument for the supremacy of fundamental British common or constitutional law, expressive, as even Blackstone conceded,²⁵ of God-given natural rights. That was at the heart of every American argument, whether it was Otis arguing against illegal search warrants, John Adams opposing restrictions on jury trials,²⁶ Chief Justice Hopkins of Rhode Island refusing to change the venue of jury trials to England,²⁷ James Wilson defending the right to bear arms,²⁸ or Patrick Henry assailing taxation without representation.

The casual reader of history, the person who does not go much beyond the words of the Declaration of Independence, is apt to mistake the base of the American Revolution as political or philosophical. Politics, law and philosophy are sometimes hard to separate, and Thomas Jefferson, a wise politician and a philosopher of note, as well as a careful lawyer, made little reference to British law in penning his great work. It was not necessary, nor was it politic. In the decade before 1776 America

25. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *122 *et seq.* (1765) [hereinafter cited as BL. COMM.]. References to Blackstone will be to the page numbers of the first editions in 1765. Subsequent editions used a star paging system to preserve the original pagination; thus the cited language can be found easily in any of the many editions. Quotes are from the American edition of the 19th London edition, published by Lippincott at Philadelphia, 1859.

26. As he did in Hancock's Case, an unreported prosecution of John Hancock in 1768-69 to recover a 9,000 pound forfeiture for allegedly smuggling 127 cases of Madiera wine into Boston, contrary to the Revenue Act of 4 Geo. III c. 15 (1764) which transferred the trials of these huge money demands from common law to admiralty courts, where trials were without juries. Accounts of the trial, and of Adams' constitutional arguments on the subject's right to jury trial, may be found in BOWEN, *supra* note 1, at 310 *et seq.* and in HOWARD, *supra* note 6, at 161-62.

27. The case, also unreported, arose out of the burning of the British revenue cutter *H.M.S. Gaspee* off the Rhode Island coast in 1772. The British ministry issued warrants for the arrest and return to London for trial of the persons responsible, under the clearly inapplicable statute of 35 Hen. VIII c. 2 (1543) which provided for the trial in London of treasons committed outside the king's dominions. Chief Justice Stephen Hopkins, who later signed the Declaration for Rhode Island, refused to execute the warrants and enjoined all colonial officials from doing it, on the ground that they violated the constitutional right to local jury trial derived from *Magna Carta*. See 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 109-10 (1938); GARRISON, SIDELIGHTS OF THE AMERICAN REVOLUTION 23 (1974); BAKELESS, *supra* note 7, at 215.

28. Wilson, who later signed the Declaration and was appointed an Associate Justice of the Supreme Court, was an accomplished constitutional scholar. Just before Lexington and Concord, and citing Lord Chief Justices Sir Edward Coke and Sir Matthew Hale, he delivered to the Pennsylvania legislature his opinion that Massachusetts could lawfully resist an attempt by the British Army in Boston to subdue the colony by bringing it under martial law through force. He argued that the king's executive power was circumscribed by law and that an illegal exercise of it could be met by lawful force. Blackstone agreed. See 1 BL. COMM., *supra* note 25, at *143.

had flooded England with petitions and resolutions fully stating the case in legal terms. And the Declaration was intended for foreign eyes, notably those of King Louis of France and his Foreign Minister, the Count de Vergennes. But Jefferson did restate orthodox British constitutional law when he wrote, now without citing Lord Coke, "that all men . . . are endowed by their Creator with certain unalienable rights" ²⁹ He called them "life, liberty and the pursuit of happiness," a shorter form embracing all the more detailed constitutional or fundamental common law rights, "the *residuum*," as Blackstone said, ³⁰ "of natural liberty," which colonial lawyers had argued for since 1761. To show how close the Declaration follows British law in this regard, we can quote the Tory law professor Blackstone, who wrote in 1765:

These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property. . . . ³¹

All of the legal arguments of the colonial bar led to the discovery of a great truth: that the contractual promises of English liberties in the charters and the residuum of natural rights guaranteed by *Magna Carta* and the other documents of the British constitution were meaningless in the absence of Britain's recognition, within the Empire, of a separate American sovereignty not subject to the London Parliament but con-

29. Declaration of Independence, opening paragraph. Of course, the companion statement "that all men are created equal" is nowhere to be found in 1776 British law. This was a new contribution in a constitutional document, though the idea was old. Thomas Jefferson deserves the credit for it, as another great lawyer observed in 1859. Abraham Lincoln remarked then:

All honor to Jefferson — to the man, who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document an abstract truth, applicable to all men and all times, and so to embalm it there that today and in all coming days it shall be rebuke and a stumbling-block to the very harbingers of reappearing tyranny and oppression.

Letter from Abraham Lincoln to H. L. Pierce and others, April 6, 1869, *quoted in 5 COMPLETE WORKS OF ABRAHAM LINCOLN* 126-27 (Nicolay and Hay eds. 1894).

30. 1 BL. COMM., *supra* note 25, at *129.

31. *Id.*

federated through allegiance to the person of the king. The fact was apparent, as the lawyers did their work, that Britain had (perhaps not wittingly) created such a confederation in exporting English liberties with the colonists.³² There was, unobserved in the drawing rooms of London, a "Commons of North America" quite separate and distinct from the "Commons of Great Britain," but entitled to the same legal rights. Those rights were infringed every time the home legislative sovereignty purported to act for the colonial legislative sovereignties. American lawyers, pretty much on a case-by-case basis, finally developed a view of the Empire not unlike the present day British Commonwealth of Nations, in which the Empire-wide sovereignty of the home Parliament is all but discarded. This view was clearly articulated by the lawyer-led First Continental Congress in 1774 and very carefully restated by the Second in the Declaration of Independence.

The Declaration, a careful reader will observe, assumes a separate sovereignty, does not declare it. What is declared is King George's North American abdication, based upon breaches of trust under English law.³³ All the grievances are against the king in person; Parliament, the source of most grievances in fact, is an "unindicted co-conspirator" and nothing more, and intermeddler in American affairs without authority in the premises. Thomas Jefferson might have wanted a more spectacular statement of the dissolution, but he was writing for a basically conservative Congress and so he said, in very lawyer-like terms, when writing of the grievances against Parliament:

He [the king, personally] has combined with others to subject us to a Jurisdiction [the British Parliament] foreign to our Constituton, and unacknowledged by our Laws; giving his assent to their Acts of pretended Legislation³⁴

Thus the American Revolution was cast in a legal mold by the lawyers of the colonial bench and bar. It is the Nation's first debt to those great men, setting a restorative tone for all that happened in those stirring days.

32. See discussion, *infra*.

33. Based upon the case of King James II, the last Stuart who was driven from the throne in 1688 in the "Glorious Revolution," Blackstone held it to be the law that a British king could abdicate by his acts. See discussion, *infra*.

34. Declaration of Independence, grievance paragraphs.

Secondly, the colonial bar anticipated British excesses, permitting timely action to nip tyranny in the bud. Not only was the American Revolution based upon thoughtful consideration of legal principles, as opposed to the emotion-packed frenzy which attends most rebellions, but it was undertaken in timely fashion and before too much actual damage was done. For that the lawyers can be thanked, too. Lawyers are trained in the power of legal analysis; they can look at a statute or read a case and anticipate future problems likely to arise. They reason by analogy; it is a technique of the common law going back at least to the Middle Ages. This ability to sense the future impact of contemporary events served America well in the Revolution years.

While Boston celebrated the repeal of the Stamp Act in 1766³⁵ with bonfires and toasts to the king, lawyer John Adams was studying the provisions of a second statute which had come over on the same ship as the repealer. It was the Declaratory Act,³⁶ Parliament's attempt, though the tax was repealed, to preserve its control by declaring the colonies subordinate to its legislation. It declared its own power and authority "to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever."³⁷ "Query" Adams wrote in his diary, "What is the end and design of this bill?"³⁸ It was the "declaration of dependence" which, acted upon, forced America to a Declaration of Independence. And American lawyers were on top of it as soon as the ship docked. Their vigilance prepared the colonies for the worst, permitting articulate and well-reasoned objections to be prepared for each new grievance.

The bar's role as a watch dog for America did not go unnoticed in England. In the course of his great speech "On Conciliation with America," given in the House of Commons on March 22, 1775, Edmund Burke said:

35. 6 Geo. III c. 11 (1766).

36. 6 Geo. III c. 12 (1766).

37. *Id.* This law put the colonies in the same position as Ireland, which had been the subject of a military conquest. The legal authority for equating the position of the American colonists and the conquered Irish was Sir William Blackstone, who, without citing any authority, simply declared the two countries to be in identical circumstances. See 1 BL. COMM., *supra* note 25, at *106-08.

38. BOWEN, *supra* note 1, at 295.

In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to Congress were lawyers. . . . This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. In other countries, the people more simple and of a less mercurial case, judge of an ill principle in government only by an actual grievance. *Here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and snuff the approach of tyranny in every tainted breeze.*³⁹

From a position of supporting the Declaratory Act in 1766, William Pitt the Elder, the Earl of Chatham, was converted to the American view and argued for a resettlement of the British constitution along the lines suggested by the lawyers of the First Continental Congress. He said in the House of Lords earlier in 1775:

For genuine sagacity, for singular moderation, for solid wisdom, manly spirit, sublime sentiments, and simplicity of language, for everything respectable and honorable, the Congress of Philadelphia shine unrivaled. This wise people speak out. They do not hold the language of slaves; they tell you what they mean. They do not ask you to repeal your laws *as a favor*; they claim it *as a right* — *they demand it.*⁴⁰

Great statesmen like Pitt and Burke saw and admired the role of the bar. Unfortunately for Great Britain, the government was in the hands of very ordinary politicians and nothing could be done to save the Empire. The day after Burke's famous speech from which the quote about lawyers is taken, an American lawyer, Patrick Henry, rose before the Virginia provisional convention in Richmond and captivated his audience with a stirring call to arms.

The battle, sir, is not to the strong alone; it is to the vigilant, the active, the brave. Besides, sir, we have no election. If we were base enough to desire it, it is now too late to retire from the contest. There is no retreat, but in submission and slavery! Our chains are forged! Their clanking may be heard on

39. 1 GREAT DEBATES IN AMERICAN HISTORY 122 (M. Miller ed. 1913) (emphasis added) [hereinafter cited as M. MILLER].

40. *Id.*, at 102.

the plains of Boston! The war is inevitable — and let it come! I repeat, sir, let it come! It is in vain, sir, to extenuate the matter. Gentlemen may cry, Peace, Peace — but there is no peace. The war is actually begun! The next gale that sweeps from the north will bring to our ears the clash of resounding arms! Our brethren are already in the field! Why stand we here idle? What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; *but as for me, give me liberty, or give me death!*⁴¹

Henry, of course, was right; it was too late for talk. The Massachusetts militia was in the field, and the War Office in London had already sent the orders to General Gage which would lead to the Battles of Lexington and Concord just twenty-seven days after Henry spoke. The American Revolution was becoming a shooting war; but, for the timely work of the bar, it would continue to rest on a firm legal base. Thus arose the nation's second debt to the lawyers of long ago.

Thirdly, the colonial bar created the American Union. That sounds like an extravagant claim to make for the lawyers, but it is not. On the surface the thirteen colonies seemed to be totally disunited on the eve of the war. They were competitive and quarrelsome and suspicious of each other; they had different political and social outlooks, different economic interests, and different religious persuasions. One hundred and seventy years of colonial history tended to show hopeless division. It was not a large risk, then, for Britain to assume that the American colonists could not unite themselves. And so, in the early months of 1774, the legislations called by the Americans the "Intolerable Acts" cleared Parliament. These punished the whole citizenry of Massachusetts for the acts of the few participants in the Boston Tea Party and in effect held Boston ransom for the price of the tea.⁴² Parliament could not have provided a better example of the despotic control which the policy of the 1766 Declaratory Act made possible, but it was all aimed at one

41. MY AMERICAN HERITAGE 172 (Henry and Pannell eds. 1949).

42. Boston Port Act, 14 Geo. III c. 19 (1774); Act to Transfer Certain Trials to England, 14 Geo. III c. 39 (1774); Act for Better Regulating the Government of Massachusetts Bay, 14 Geo. III c. 45 (1774); Quartering Acts, 14 Geo. III c. 54 (1774); 15 Geo. III c. 15 (1775).

colony which had been a hotbed of resistance to the London government.

On May 10, 1774, the first of the "Intolerable Acts," the one which closed the port of Boston until reparations were made for the tea, arrived in that city by ship from England. One hundred and sixty-seven days later the American Union was complete. An organizational miracle had been accomplished: *E pluribus unum*. Americans forget that Union was created within the structure of the British Empire and before there was a United States of America. Seven days after the arrival of the Boston Port Act, Rhode Island called for a Continental Congress. Nine days after that, in Williamsburg, Virginia, 500 miles distant from the scene of the troubles, the lawyer-led Virginia House of Burgesses issued the same call and, with the Declaratory Act in mind, resolved that an attack upon one colony "*is an attack made on all British America, and threatens ruin to the rights of all, unless the united wisdom of the whole be applied.*"⁴³ It was a remarkably perceptive declaration, for within a month Parliament expanded its attack to include all colonies north of the Mason-Dixon line, forfeiting their western land claims to the Northwest Territory. That was the Quebec Act⁴⁴ which gave all the area now comprising Ohio, Indiana, Illinois, Michigan, Wisconsin and eastern Minnesota to Quebec Province. That outrageous legislation was in America before Congress convened on September 5, 1774.

Union was a fact as a result of the work of the First Continental Congress, in which all the British mainland colonies but Florida, Georgia and Quebec were represented. The separate American sovereignty was declared to exist,⁴⁵ and the congressmen went home after October 26 to sell the provincial govern-

43. Quoted in HOWARD, *supra* note 6, at 173.

44. 14 Geo. III c. 83 (1774).

45. Fourth Resolve of the First Continental Congress, *quoted in part in* HOWARD, *supra* note 6, at 444:

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed.

ments the plan of a "Continental Association," a trade boycott which was ninety-five percent successful by the spring of 1775.⁴⁶ The Congress was, as Burke pointed out, mostly a Congress of lawyers. The Union achieved was, of course, not perfect; but it was perfect enough to be the beginning of the basic national government which fought and won the war; and it lasted until, at a calmer time, another group substantially made up of lawyers could meet in a Constitutional Convention to form, not the Union, but "a more perfect Union."⁴⁷

But the 167 day rush to Union, and the role of American lawyers in it, is not the main reason why the colonial bar is to be credited with bringing about the cherished unity of the United States. Union was not a sudden inspiration nor an accident of history. Offensive British legislation in execution of the Declaratory Act brought to the surface the single underlying factor which made Union possible: it was law and respect for law; more precisely, the British constitution and common law. That this should happen in the American colonies is a magnificent tribute to the integrity, the competence and the persuasive ability of two generations of the colonial bar. In less than a century of colonial history (we might measure it from the year 1700) the bar turned colonial public opinion on this subject 180 degrees. Colonials of the 1770s were willing to accept the Rule of Law, were willing in short to live under the single force which could unite them. It had not always been thus in America.

From the beginning of colonization the British policy had been "the law follows the flag." The first colonial charter, that of the Virginia Company in 1606, contained the clause which became the prototype for all the others, drawn incidentally by Attorney General Sir Edward Coke:

Also, We [King James I] do, for Us, our Heirs, and Successors, DECLARE by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other

46. BOWEN, *supra* note 1, at 488 *et seq.* See also L. B. MILLER, *THE DIE IS NOW CAST: THE ROAD TO AMERICAN INDEPENDENCE, 1774-1776* 34 *et seq.* (1975) [hereinafter cited as MILLER].

47. U. S. CONST., PREAMBLE.

Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.⁴⁸

By 1720, with all the American colonies but Georgia chartered, Attorney General Richard West was stating the orthodox British policy as follows:

The common law of England is the common law of the plantations, and all statutes in affirmance of the common law, passed in England antecedent to the settlement of a colony, are in force in that colony unless there is some private Act to the contrary; though no statutes, made since those settlements, are thus in force unless the colonists are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear.⁴⁹

But the reception of English law by the colonists was another matter. For example, the Puritans in New England had fled the mother country because of the harsh application of the law to their particular circumstances in Stuart England; liberty for them meant escape from law. Chief Justice Attwood of New York, an Inns of Court lawyer, visited Boston in 1700 and complained that he had to "expose the argument of the Boston clergy that they were not bound in conscience to obey the laws of England," adding that the procedure in the superior court at Boston was by "methods . . . abhorrent from the laws of England and all other nations."⁵⁰ Massachusetts was trying to resolve legal disputes according to Holy Scripture and the consciences of the judges; the Salem witchcraft trials were only a few years in the past.

The situation in Maryland illustrates the long range effort of the bar to bring the colonists to appreciate the idea that English liberties were best secured by law. There was a long battle there between the citizens and the proprietors over the reception of English law. The champion of the Rule of Law in

48. Quoted from 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 47 (Z. Chafee ed. 1951) [hereinafter cited as CHAFEE].

49. 1 Chalmers' Opinions 194-95 (1720), as quoted in Sioussat, *The Theory of the Extension of English Statutes to the Plantations*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 416 at 420 (1907).

50. Reinsch, *The English Common Law in the Early American Colonies*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 384 (1907).

the 1720s was Daniel Dulaney, Sr., trained at the Inns, who wrote in 1728:

‘Tis this Law [of England] that will effectually secure every Honest Man, who has the benefit of it, in his Life, the Enjoyment of his Liberty, and the Fruits of his Industry. ‘Tis by Virtue of this Law, that a British Subject, may with Courage, and Freedom, tell the most daring, and powerful Oppressor, that He must not injure him, with Impunity. This Law, uprightly and honestly applied, and administered, will secure Men from all Degrees of Oppression, Violence, and Injustice; it tells the Magistrate what he has to do, and leaves him little Room, to gratify his own Passion, and Resentment, at the Experience of his Fellow-Subject.⁵¹

Dulaney was, of course, anticipating by nearly fifty years John Adams’ call that each former colony form “a government of laws and not of men.”

There were similar experiences in each colony: mistrust of law and lawyers at the beginning of the 1700s; veneration of the Rule of Law and a willingness to fight for it at the time of the Revolution. Conversions are not effected without missionaries. And it was with the zeal of missionaries that the colonial bar won converts to the Rule of Law. Dean Roscoe Pound measured the beginning of the era of substantial bar influence in public affairs from the establishment of true judicial systems in each of the colonies from New York in 1691 to Pennsylvania in 1722.⁵² Professor Howard of the University of Virginia has written:

In short, American lawyers had come a long way since they were thought to be ‘base and vile’ [in the 1600s]. Instead of being outlawed as exploiters of the unwary, the American lawyer by the latter half of the eighteenth century was a figure of prestige and a leader — in colonial assemblies, in court contests, in pamphlets and speeches — in the fight to preserve to Americans the guarantees of Magna Carta and the rights of Englishmen.⁵³

And colonial lawyers extolled the Rule of Law in a manner that puts to shame the feeble efforts of the bar today. Consider John Adams’ statement in a 1763 essay for the *Boston Gazette*:

51. D. DULANEY, SR., *THE RIGHT OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF ENGLISH LAWS* (1728), quoted in HOWARD, *supra* note 6, at 62.

52. POUND, *supra* note 2, at 144-56.

53. HOWARD, *supra* note 6, at 131.

[T]he liberty, the unalienable and indefeasible rights of man, the honor and dignity of human nature . . . and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, *the Common Law of England*.⁵⁴

This was the same John Adams who, as a young school teacher in Worcester, Massachusetts, in the mid-50s, harboring the concerns about law and lawyers of his Puritan forbears, wondered if he should take up the study of law. Again he wrote to his fellow citizens and colleagues of the bar in 1765:

Let the *bar* proclaim, 'the laws, the rights, the generous plan of power' delivered down from remote antiquity; inform the world of the mighty struggles and numberless sacrifices, made by our ancestors, in the defense of freedom. Let it be known that British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts, coequal with prerogative and coeval with government.⁵⁵

Thus was the gospel of Union preached in the name of the Rule of Law. The seed fell in good and fertile ground. So well had the colonial bar done its work, in word and in deed, so cognizant were Americans of the one tie that bound them, that the Union was achieved within 167 days of the first specific threat to the legal rights of one colony. It is significant that the American Union, after frontier Georgia sent delegates to the Second Congress, consisted of, and only of, the thirteen British colonies with common law traditions. Not comprehending the issues, recently conquered Florida and Quebec, despite invitations, did not send delegates. It is also appropriate that the first expression of American nationalism spoken on the floor of Congress should have come from the lips of a lawyer. Patrick Henry, addressing the organizational meeting of the First Congress, said:

Let freemen be represented by numbers alone! Throughout the continent government is dissolved. Landmarks are dissolved! Where are now your boundaries? The distinctions between Virginians, Pennsylvanians, New Yorkers and New

54. *Id.* at 132 (emphasis added), quoted from an article published September 5, 1763.

55. J. ADAMS, DISSERTATION ON THE CANON AND FEUDAL LAW (1765), as quoted in M. MILLER, *supra* note 39, at 35-36.

Englanders are no more. *I am not a Virginian, but an American!*⁵⁶

Fourthly and finally, the colonial bar managed the Revolution, kept it one for liberty under law. Revolutions can so easily go awry. England had one in 1642, begun to subject Charles I to the Rule of Law. It ended in regicide and the ironclad military dictatorship of Oliver Cromwell. France's lofty crusade for "liberty, equality, fraternity" became a bloodbath called the Reign of Terror and culminated in the absolute monarchy of Napoleon I. The fate of the Russians after 1917 is modern history. Nothing like that happened in America. The United States stands as an example to the world of a nation which violently ejected imperialists while preserving intact all of the good values planted by the very same imperialists. The extremely critical time for America was in and just after the ejection process. Of course there was some violence and outlary and recorded instances of injustices done to loyalists. Tempers ran high and the struggle was a desperate one. But the Revolution itself, the great movement to insure Americans the enjoyment of unalienable rights, never swerved from its purpose. The quest for liberty never became a thirst for license; the dedication to law never became a lust for power.

One of the best illustrations of how the restorative character of the Revolution was preserved, and the role of the bar in it, comes from Massachusetts. It was there, and particularly in Boston, that things might have easily gotten out of hand. There were mobs and gangs in Boston, some well-intentioned, some merely ruffians taking advantage of a period of unrest. Troops came in 1768 to restore order; their presence only made matters worse, leading to the so-called Boston Massacre of 1770. By 1773 there were four thousand British regulars in Boston, one soldier for every four inhabitants of the city. In the surrounding countryside there were enough armed militia to create a New England army of twenty thousand. The place was a veritable powder keg.

The judges of the colonial courts were royal appointees who served at the king's pleasure. But their salaries were paid by appropriation of the colonial legislature from locally raised taxes. This provided a check on judicial power considered of

56. BOWEN, *supra* note 1, at 477.

utmost importance by the colonists. In 1766 Parliament passed a foolish statute⁵⁷ which allowed the king at any time to assume the payment of judicial salaries in the colonies, paying them out of customs revenues collected at colonial ports. The Massachusetts legislature fired off a protest of this law in 1768, the resolution declaring:

The judges in the several colonies do not hold their commissions during good behavior [but at the king's pleasure]. If, then, they are to have their salaries independent of the people, how easy it will be for a corrupt governor to have a set of judges to his mind, to deprive a bench of justice of its glory and the people of their security.⁵⁸

The London government did not act upon the statute until 1773 when it was suddenly announced that henceforth the five judges of Boston's superior court would have their salaries paid by the king under the 1766 law. Four of the five judges wisely refused their royal salaries, but the Chief Justice, a haughty high Tory named Peter Oliver, not only accepted his with pleasure, but announced from the bench he would never reject it, castigating the legislature for its past penury in fixing judicial salaries. Feeling against Oliver ran high; there was talk of lynching. In the midst of the controversy, the Boston Tea Party took place, further fanning the flames. The bar knew that Oliver had to be gotten off the bench before he was driven off by the mob or, worse, martyred in office. That had to be prevented and it was prevented. Nowhere in the annals of the Revolution is there a better specific example of its management for the Rule of Law.

Without a colonial precedent, on February 14, 1774, Chief Justice Oliver, royal appointee of the king, was impeached by the Massachusetts House of Representatives in proceedings managed by John Adams and other Boston lawyers, following the procedure of the British House of Commons.⁵⁹ It was unimportant that Governor Hutchinson refused to acknowledge the impeachment or convene the upper chamber to try the charges. The mob was defused, the Revolution saved. Word of the impeachment spread like wildfire, and at the next term of court not a single venireman called for grand or petit jury service

57. 7 Geo. III c. 46 (1766).

58. M. MILLER, *supra* note 39, at 72.

59. An account of these events may be found in BOWEN, *supra* note 1, at 425-39.

would take the oath from the impeached Chief Justice.

But putting out brush fires was only a part of the contribution of the bar to the management of the Revolution. Lawyers engineered skillfully an amazing transfer of political power to thirteen sovereign states. This feat was based upon the declaration of the First Congress, and the assumption of the Second, both discussed above, that a separate "Commons of North America" existed within the Empire. But declaring and getting hold of a separate sovereignty are two different things. The lawyers, using British law,⁶⁰ had declared the sovereignty. Then they proceeded to deliver it into the hands of the American people; and in that process democracy was born. It was not the broad-based democracy that later evolved, but it was democracy compared to the British oligarchy which had purported to govern them before.

John Locke, the great English political philosopher of the seventeenth century, wrote a treatise in 1690⁶¹ which was designed to justify the "Glorious Revolution" of 1688. Briefly stated, Locke's theory was that, government being based on social compact, destroyed itself by breaches of trust implicit in the compact. On this basis it could be argued that the Parliament of his day was justified in forfeiting James II's crown and tendering the crown to William and Mary.⁶² Sir William Blackstone reluctantly agreed⁶³ with Locke's theory. In effect Blackstone said that the British constitution could never be destroyed by the ruled, only by the rulers in the manner stated by Locke.⁶⁴ And he also declared it to be the law of England,

60. The principal authority was Calvin's Case, 7 Coke 1a, 77 Eng. Rep. 377 (1610). Calvin was born in Scotland after James VI of Scotland became James I of England, two separate kingdoms thus having a single sovereign. The question was whether Calvin could hold lands in England, which he could not do if he was an alien there. Lord Coke, speaking for the combined benches of Westminster, held that he was not an alien in England because he owed allegiance to the person of King James. But the court distinguished the person of the king from his corporate or "body politic" capacity, holding there were two such capacities, one for England and one for Scotland, and these were independent of each other. The separation of the idea of corporate capacity or sovereignty from the person of the king and its placement in "the King, Lords and Commons in Parliament assembled," effected by the Revolution of 1688, made the argument from Calvin's Case stronger in 1774 than it had been in 1610.

61. J. LOCKE, SECOND TREATISE ON GOVERNMENT (1690); see J. W. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 134 *et seq.* (1973).

62. J. LOCKE, SECOND TREATISE ON GOVERNMENT (1690).

63. 1 BL. COMM., *supra* note 25, at *52.

64. *Id.*

based upon the case of James II, that a British king abdicated his throne by the combination of three acts: (1) breach of the original contract with the people; (2) breaking fundamental laws; and (3) absenting himself from the kingdom.⁶⁵

When calamities of this magnitude befell a nation, according to Locke, the people were reduced to a "state of nature" because government simply evaporated. In this condition, according to Blackstone, the people were at liberty to form a new government.⁶⁶ This Lockean-Blackstonian theory fit the American situation like a tailor-made suit of clothes. The compact and its trusts were breached by the exclusion of the Commons of North America from the legislative sovereignty; the king abdicated by breaching express and written original contracts, by violating fundamental constitutional rights in assenting to Parliament's interference, and by absenting himself from his North American kingdom. The Declaration of Independence

65. Blackstone was walking on jurisprudential eggs as he penned the law of abdication just as things were warming up in America. On the one hand he had to justify the proceedings by which James II had been run off the throne and the Stuart dynasty ended in 1688. The claim of the present king, George III, depended on the propriety of those actions. On the other hand, if he too warmly supported the idea of abdication by conduct, he could become the attorney for the American Revolution. Thus his statement, to be found in 1 BL. COMM. *245, is very guarded; but nevertheless it was a joy to behold for the American patriot. The causes of separation stated in the Declaration of Independence describe acts of George III meeting Blackstone's test. He said:

[T]hough the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When King James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as the precedent leads us and no further, we may now be allowed to lay down the law of redress against public oppression. If, therefore, any future prince shall endeavor to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity or the safety of the whole should require it, the exercise of those inherent, though latent, powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

The odd language "we are now authorized to declare" suggests that Sir William may have submitted his draft to Whitehall for approval before he published it. In any event, the paragraph is of extreme importance, for it is a statement by a legal scholar of the first rank who was politically a Tory.

66. 1 BL. COMM., *supra* note 25, at *52.

articulates the conclusion of law to be drawn from these circumstances: "that these United Colonies are, *and of right ought to be*, Free and Independent States"

But the lawyers knew that it was not enough to develop a jurisprudential theory upon which to justify the Revolution. They understood "state of nature"; they translated it correctly from the abstract world of Locke and Blackstone's academe. In the streets of Boston or Philadelphia or Charleston, on the farms of Massachusetts or the plantations of Virginia's tidewater, on the western frontier, indeed among the troops of the Continental Army besieging the British in Boston,⁶⁷ it meant one thing: anarchy. They realized an incredible fact, that the colonies were not only in theory but in fact in a state of nature. The British Empire, in an amazing demonstration of the practical workings of what had been merely a theory of John Locke, had "self-destructed." Crown officials had fled before irate citizens; the "Empire," which John Adams called a mere "idea, a frame in the mind," existed where royal troops were garrisoned and nowhere else. Perhaps the final straw came when King George's "Proclamation for Suppressing Rebellion and Sedition," dated August 23, 1775, arrived in America.⁶⁸ Now the colonists knew that they were officially outlaws; they also knew that Britain was preparing to send a military force to capture and subdue her possessions.

In this dangerous situation, at this fork in the road for the Revolution, the lawyers acted promptly and decisively. It is a part of the Revolution hardly remembered today. The "Commons of North America" was organized; state governments were created. This, perhaps more than anything else, prevented a reign of terror or a military dictatorship. All the colonies had provisional state governments of some kind before independence was declared. Eight state constitutions were written and in effect before the end of 1776.⁶⁹ Two more were

67. In a remarkable example of commitment to the Rule of Law, the committee trying to govern Massachusetts in its "state of nature," with a 20,000 man militia force in the field besieging the British army in Boston, wrote to Congress on July 2, 1775, for instructions on how to form a government. "We tremble," the letter said, "at having an army (although of our countrymen) established here without a civil power to provide for and controul them." BOWEN, *supra* note 1, at 527. What would a similar commitment have accomplished in France fourteen years later?

68. MILLER, *supra* note 46, at 149.

69. CHAFEE, *supra* note 48, at 181-203.

adopted in 1777.⁷⁰ Today the prodding of state government by “the feds” is commonplace. The very first federal prod came on May 15, 1776, when John Adams and other lawyers rammed through Congress a resolution urging the completion of state governments where that work had not been finished. The long preamble recited the plain fact that an army of conquest was nearing our shores. It declared that under these circumstances the people could tolerate no vestige of royal government and had to assume the sovereignty. The resolution announced:

Resolved, That it be recommended to the respective Assemblies and Conventions of the United Colonies, where no government sufficient to the exigencies of their affairs have hitherto been established, to adopt such governments as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.⁷¹

John Adams was the national leader in the push to organize state governments. It was in response to a request from North Carolina for assistance in framing its government that he wrote the famous line, “You must build a government of laws, not of men.” He also served as a consultant to Virginia, and in this connection he wrote his friend Professor George Wythe:

You and I, my dear friend, have been sent into life at a time when the greatest law givers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making an election of government for themselves or their children! When, before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?⁷²

South Carolina was the first state to adopt a written constitution, in March, 1776.⁷³ This was accomplished under the

70. *Id.* at 203-07.

71. *Quoted from* BOWEN, *supra* note 1, at 578-79.

72. *Id.* at 560.

73. FORCE, *supra* note 12, at 1026. John Adams wrote the speaker of the new Massachusetts House of Representatives in April, 1776: “If North Carolina and Virginia should follow South Carolina’s example, it will spread through all the rest of the Colonies like Electric Fire. We are advancing by slow but sure steps, to that mighty Revolution which you and I have expected for some time.” *Quoted from* BOWEN, *supra* note 1, at 576. When he wrote the letter he did not know that North Carolina had acted — and gone even further, instructing its delegates to Congress to “delcare an independency,” the first state to do so. *Id.* at 637.

leadership of two Inns of Court lawyers, Governor John Rutledge and Judge William Henry Drayton.⁷⁴ The Carolinians offered a splendid example of the American Revolution for the Rule of Law. By April the state government was functioning as if the "Commons of South Carolina" had always exercised the sovereignty. On April 23 the grand jury was convened in the ordinary course of things and Judge Drayton opened his charge as follows:

GENTLEMEN OF THE GRAND JURY: When, by evil machinations tending to nothing less than absolute tyranny, trials by jury have been discontinued, and juries, in discharge of their duty, have assembled, and, as soon as met, as silently and arbitrarily dismissed without being empannelled, whereby, in contempt of *Magna Charta*, justice has been delayed and denied; it cannot but afford to every good citizen the most sincere satisfaction once more to see juries, as they now are, legally empannelled, to the end that the laws may be duly administered. I do must heartily congratulate you upon so important an event.⁷⁵

Two months later the executive branch was called upon to give an account of itself. At the Battle of Fort Moultrie in Charleston harbor the state militia, on June 28, 1776, repulsed a British invasion force in such a devastating defeat for the king that the war was kept out of the South for three full years. The remarkable organization of the State of South Carolina was no accident. It had at the time more English-trained Inns of Court lawyers than any other state in the Union.⁷⁶

Much has been written of the ineptitude of the Continental Congress and the state legislatures of the war period to provide General George Washington with a military machine sufficient to repel the British invasion force. That criticism is unfair. When in the history of the world did a people pull themselves up from a *de facto* state of nature and drive from their shores an enemy force proved within the recent past to be the mightiest in the world? If Congress and the state legislatures were inefficient then (or now) it is an indictment of democracy, not of them. Of course there were defects in their early organiza-

74. HOWARD, *supra* note 6, at 180-85.

75. FORCE, *supra* note 12, at 1026.

76. POUND, *supra* note 2, at 153, 162. Dean Pound found that forty-seven South Carolinians had studied at the Inns before the Revolution; fifteen were practicing there when it began, this out of a total bar of fifty-eight.

tions; they were hurriedly put together in a time of crisis. But they were the most important factor in keeping the Revolution in bounds.

IV. CONCLUSION

The four general areas in which the colonial bench and bar contributed to the American Revolution were:

1. In articulating the American cause as one based upon the British constitution and common law and principles of natural law, thus casting the Revolution in a restorative mold and making it one for the Rule of Law, indeed a very unique kind of revolution.

2. In serving as a watch dog for America, analyzing the offensive British legislation which led up to the war, predicting the inevitable legal result of the British policy, alerting the American people while time still remained to act responsibly against a creeping despotism.

3. In converting the people from their earlier hostility to British law to a position of insistence upon it as a birthright, creating in the process the single common bond which made possible the American Union; finally forging that Union in the Continental Congress.

4. In managing the Revolution to keep it one for the Rule of Law, controlling excesses right and left, organizing state governments to fill the void created by the collapse of British sovereignty.

There is no way for America to pay her debt to these great lawyers other than by a continued devotion to the principle upon which they based our Revolution: the Rule of Law. We may, in the Bicentennial year, salute them in the words of Ralph Waldo Emerson:

Not gold, but only man can make
A people great and strong;
Men who, for truth and honor's sake
Stand fast and suffer long.
Brave men who work while others sleep,
Who dare while others fly —
They build a nation's pillars deep
And lift them to the sky.