

11-2015

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### Recommended Citation

Flores de Apodaca, Roberto O. (2015) "English Legal Thought, American Colonial Experience and the Creation of the United States' Constitution," *Armstrong Undergraduate Journal of History*. Vol. 5 : Iss. 2 , Article 4.

DOI: 10.20429/aujh.2015.050204

Available at: <https://digitalcommons.georgiasouthern.edu/aujh/vol5/iss2/4>

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English Legal Thought, American Colonial Experience, and the Creation of the United States'  
Constitution

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The United States' Constitution is the fruit of centuries of legal thought and working institutions. In order to understand its jurisprudential underpinnings, one must go deeper than a cursory study of the summer of 1787 when it was drafted. First, a study of its essential principles must be traced back to their original sources, which requires a review of English Legal theory. Additionally, an understanding of the many trials and errors of early American constitutions is necessary to appreciate its ultimate incorporation of costly experience. Finally, and perhaps most importantly, in depth analysis of both Federalist and Anti-Federalist arguments proves invaluable to appreciating the truly unique and innovative aspects of the Federal Constitution. Mixed and weighed properly, these ingredients combine to produce a solid foundation for understanding the origins of America's Constitution.

Relevant English Legal Theory

The roots of American Constitutional law run deep through English legal history, even back to the Magna Carta of 1215.<sup>1</sup> Among the leading contributing English legal scholars and

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<sup>1</sup> Russell Kirk, *The Roots of American Order* (Wilmington: ISI Books, 2003), 194-195.

philosophers are Sir Edward Coke (1552–1634), John Locke (1632–1704), and Sir William Blackstone (1723–1780). It is difficult to overstate the influence of any one of these thinkers on the development of U.S. Constitutional jurisprudence. The most recent of contributors is not always the most significant, as is the case with these three individuals. Of the three, Coke was the most influential in developing U.S. Constitutional theory. An analysis of these authors' relative contributions, followed by a brief weighing of the said contributions will demonstrate Coke's primary influence.

Sir Edward Coke's contributions are three in number: an early form of judicial review, a concept of a law fundamental and an insistence on legislative supremacy under the law. Constitutional Scholar Edward S. Corwin identifies the seed of U.S. judicial review in Coke's decision in the *Bonham* Case of 1610. In it Coke asserted judicial power to declare an act of Parliament void. The relevant passage in Coke's decision reads: "And it appears in our books, that in many cases, the common law will control acts of parliament and sometimes adjudge them to be utterly void."<sup>2</sup> Coke's grounds for such authority was adherence to "common right and reason," a familiar standard in U.S. legal practice. This notion of "right reason" eventually became the higher law to which judges ought to appeal when judging an act of the legislature. Corwin explains: "'Common right and reason' is, in short, something fundamental, something permanent; it is higher law."<sup>3</sup> Thus, Coke introduced the idea that judges may void an act of the legislature based on common right and reason. It is important to note however that there cannot be a direct line drawn from this to U.S. judicial review, given that Coke had no concept of the separation of powers.

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<sup>2</sup> Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Indianapolis: Liberty Fund, 2008), 41.

<sup>3</sup> *Ibid.*, 44.

Rather than leave this higher law in the reasonableness standard, Coke equated higher law with the Magna Carta. Coke's most significant contribution to U.S. legal theory is this move of positing higher law into a written document. The U.S. Constitution is the supreme law to which all judges are bound in their adjudications. This practice is begotten from Coke and the Magna Carta. Coke viewed the Magna Carta as the "fountain of all fundamental law," held that "statutes against it 'shall be void'" and that its "benefits extend to all."<sup>4</sup> With these characteristics, Coke showed that the Magna Carta embodied higher law and was a "law fundamental," under which all common laws were to yield. Corwin summarizes this move: "Thus, the vague concept of common right and reason is replaced with a 'law fundamental' of definite content."<sup>5</sup> Understanding "law fundamental" as a document to which all common law is accountable is a key to understanding how the U.S. Constitution functions as the supreme law of the land.

The last significant contribution of Coke's to American Constitutional law is his notion of Parliament's supremacy under the law. Far from asserting that Parliament is sovereign, which Blackstone claimed he did, Coke "generally regarded the cause of parliament and the law as identical."<sup>6</sup> Parliament was in no way above the law and legislation was to be subject to adjudication on the basis of the "law fundamental."

John Locke's influences can likewise be narrowed to three: natural rights theory, limitations on the legislature, and property rights. In Locke's *Two Treatises of Government*, he completely transformed the longstanding notion of natural *law* into a doctrine of natural *rights*. One definitive passage reads: "The state of nature has a *law of nature* to govern it, which obliges

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<sup>4</sup> Ibid, 52.

<sup>5</sup> Ibid, 52.

<sup>6</sup> Ibid, 53.

everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in *his life, health, liberty, or possessions*.”<sup>7</sup> Hence, Locke transforms a concept of abstract natural law principles, which regulate the authority of government, to one in which individuals have particular rights that cannot justly be violated. This shift is profound. Corwin observes, “Locke’s treatment of natural law is the almost complete dissolution which this concept undergoes through his handling into the natural rights of the individual.”<sup>8</sup> Locke based this theory of natural rights on his popular social contract theory, which is equally significant in American constitutional theory. One can find Locke’s theory of natural rights influence most clearly in the preamble to the Declaration of Independence.<sup>9</sup> Corwin also points to the social contract theory’s influence in the early colonial charters in Plymouth and elsewhere.<sup>10</sup> Finally, the U.S. Constitution is likewise understood as a contract between the people and government.

Regarding limitations on the legislature, Locke lays out four.<sup>11</sup> Two limitations merit emphasis here. The first is that the legislature may not transfer any of its power to any other entities.<sup>12</sup> We see this doctrine asserted vigorously in the United State’s Constitutional jurisprudence in order to maintain proper separation of powers. Second, the legislature is not the ultimate authority, but the people always reserve the right to restructure their government.<sup>13</sup> This is affirmed in the preamble to the Constitution; which states that The People are the ultimate arbiters of power. Also influential was Locke’s theory of property rights; which provided

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<sup>7</sup> John Locke, *Two Treatises of Government* (London: Everyman, 1993), 117.

<sup>8</sup> Corwin, *The “Higher Law” Background of American Constitutional Law*, 58.

<sup>9</sup> U.S. Congress, *The Federalist Papers* (New York: Signet Classics, 2003), 528.

<sup>10</sup> Corwin, *The “Higher Law” Background of American Constitutional Law*, 61.

<sup>11</sup> Locke, *Two Treatises of Government*, 188.

<sup>12</sup> *Ibid*, 187.

<sup>13</sup> *Ibid*, 183.

philosophical justification for the numerous protections in the Constitution for private property, such as the Fifth Amendment.

Sir William Blackstone's additions are found in his means for legal interpretation and his doctrine of legislative sovereignty. Blackstone's primary input to American Constitutional theory is his method of constitutional interpretation. During the formative years of the republic, Blackstone's *Commentaries on the Laws of England* "tended to preserve the legacy of English law in America" through its widespread influence on America's young legal community.<sup>14</sup> In this monumental work, he argued that the best way to find the intent or meaning of a law is "by signs most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law."<sup>15</sup> These five methods of interpretation remain the predominate means for judges to discern the meaning of any law. Through this scheme of interpretation, Blackstone has indirectly shaped the U.S. Constitution via the numerous Supreme Court decisions and justices that they have affected it.<sup>16</sup>

The second and certainly more subtle way that Blackstone influenced the U.S. Constitution is through the doctrine of legislative sovereignty.<sup>17</sup> Blackstone argued that there must be a sovereign body and that the legislature was naturally it. Through this elevating of the legislature, Corwin argues that Blackstone added legislative sovereignty to "the stock of American political ideas." However, Corwin is quick to point out that legislative sovereignty did not stick institutionally in the United States because the written constitution made it possible to have a statute emanating from the sovereign people, which was the supreme law.<sup>18</sup>

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<sup>14</sup> Kirk, *The Roots of American Order*, 370.

<sup>15</sup> James McClellan, *Liberty, Order, and Justice* (Indianapolis: Liberty Fund, 2000), 466.

<sup>16</sup> Kirk, *The Roots of American Order*, 374.

<sup>17</sup> A. London Fell, *Origins of Legislative Sovereignty and the Legislative State: Volume Six, Book 1* (WestPort: Praeger Publishers, 2004), 258.

<sup>18</sup> Corwin, *The "Higher Law" Background of American Constitutional Law*, 84.

Of these three English contributors, Coke is the most essential for understanding U.S. Constitutional theory because of his notion of law fundamental. His equating higher law with a written document and demanding that judges adhere to it in deciding cases is of the utmost importance. While Locke clearly influenced the Declaration of Independence and Constitution, he did not emphasize the written constitution the way Coke did. Also, Blackstone's method of interpretation, while significant, is dependent upon Coke's law fundamental.

### Trials and Errors of Early American Constitutions

The Articles of Confederation were designed to be weak and functioned more as a treaty than a fundamental law; and nearly all of the early state constitutions were written in haste by inexperienced individuals. Each of these failed attempts served as invaluable practice in creating a constitution capable of maintain order. As Alexis de Tocqueville instructed in his examination of state constitutions: "The mighty political principles which govern present-day American society undoubtedly began and developed in the state. Thus close scrutiny of the state holds the key to the rest."<sup>19</sup> Constitutional Scholar James McClellan correctly characterizes the three general problems of these early attempts at a constitution as: failure to create a proper separation of powers, lack of an independent executive, and absence of a supremacy clause.<sup>20</sup>

The Articles of Confederation provide the most blatant example of the failure to institutionalize a proper separation of powers. This document instituted no executive or judicial branch (see article v.).<sup>21</sup> All of its functions were performed by one legislative body.<sup>22</sup> States jealously guarded their sovereignty against this new contract and concluded that the government

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<sup>19</sup> Alexis de Tocqueville, *Democracy in America* (London: Penguin Books, 2003), 72.

<sup>20</sup> James McClellan, *Liberty, Order, and Justice* (Indianapolis: Liberty Fund, 2000), 149.

<sup>21</sup> U.S. Congress, *The Federalist Papers*, 534.

<sup>22</sup> McClellan, *Liberty, Order, and Justice*, 159.

structured by the Articles would have such little authority that a separation of powers was not necessary. This mistake was made in most state constitutions as well, but for different reasons. Almost without exception, the state constitutions instituted an inadequate separation of powers.<sup>23</sup> McClellan explains this inadequacy as a misunderstanding of checks and balances. While state governments had three distinct branches, they had no checks and balances between these branches.<sup>24</sup> This left each branch without means of protecting itself, often allowing the legislature to encroach on the other branches; the notable exception to this rule being the Massachusetts Constitution of 1780, written by John Adams.<sup>25</sup>

Related to the lack of separation of powers was the failure of these early constitutions to create an independent executive. This clear deficiency in the Articles of Confederation was assailed by Alexander Hamilton who argued in *Federalist 71* that the executive “should be in a situation to dare to act his own opinion with vigor and decision.”<sup>26</sup> Since the Articles set up no distinct branches, the executive authority was exercised by committees within the legislature.<sup>27</sup> Thus, the executive power was in no ways independent, which led to conflicting jurisdictions and an inability to enforce laws due to lack of personnel. Similarly defective, the Pennsylvania Constitution contained a plural executive consisting of thirteen members. This made any uniform action nigh impossible.<sup>28</sup> Also, this plural executive was chosen by the legislature, which made the executive beholden to it. Most of the state constitutions also fell into this trap and had their executives appointed by the legislature, leaving them dependent and ineffective.<sup>29</sup>

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<sup>23</sup> John Adams, *The Political Writings of John Adams* (Indianapolis: Hackett Publishing Company, 2003), 143.

<sup>24</sup> McClellan, *Liberty, Order, and Justice*, 149.

<sup>25</sup> Adams, *The Political Writings of John Adams*, 93.

<sup>26</sup> U.S. Congress, *The Federalist Papers*, 431.

<sup>27</sup> McClellan, *Liberty, Order, and Justice*, 159.

<sup>28</sup> *Ibid*, 147.

<sup>29</sup> Adams, *The Political Writings of John Adams*, 143.



Finally, the lack of a supremacy clause abandoned most state constitutions to be ignored by the courts. This was perhaps the fatal flaw of the Articles of Confederation.<sup>30</sup> It allowed state judges to favor their state legislatures over the Articles, which they did readily. With similar consequences, all of the early state constitutions also neglected to add a supremacy clause. The acts of the legislatures could not be struck down, leading to ever-expanding legislative authority.

One additional defect of the Articles of Confederation was its inability to tax and pay for its own operations. However, it was ultimately the improper separation of powers, a dependent executive, and the lack of a supremacy clause that were the primary problems of these early attempts at a constitution. Largely through the influence of John Adams' colossal work *A Defense of American Constitution*, these problems were realized and remedied in The Constitution of The United States.<sup>31</sup>

#### Federalist and Anti-Federalist Debate

Perhaps nothing was as influential on The Constitution as the Federalist debates over ratification. It was this debate and the pointed arguments of the Anti-Federalists that eventually led to the adoption of a Bill of Rights. Given that the Anti-Federalist case is typically overshadowed by The Federalist's arguments, it is necessary to review their case here to reveal their influence on The Constitution. To assess the strength of the Anti-Federalist case, each of its primary arguments must be weighed against the counter-arguments of the Federalists. The chief arguments of the Anti-Federalists can be summarized as follows: the illegality of the Constitution, its insufficiency to govern a large area, its creation of an uncontrollable empire, the overly-powerful three branches, and its lack of a Bill of Rights.

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<sup>30</sup> McClellan, *Liberty, Order, and Justice*, 159.

<sup>31</sup> Kirk, *The Roots of American Order*, 417.

Perhaps the most persuasive argument of the Anti-Federalist case was that the Constitution is illegal.<sup>32</sup> In *The Address and Reasons for Dissent*, two evidences are given for this argument. First, state delegates to the Constitutional Convention were sent merely “for the purposes of revising and amending the present Articles of Confederation.”<sup>33</sup> Secondly, the delegates were strictly bound by their state constitutions to refrain from any actions that “lessened or abridged rights and privileges” retained by their state constitutions.<sup>34</sup> They clearly went beyond their legally delegated authority in both of these respects. The only response to this charge comes from James Madison in *Federalist 40*, where he denied the accusation of illegality and asserts that substantial change is in the country’s best interest.<sup>35</sup> If it is true that liberty depends on the rule of law, this constitution was on shaky ground. The Anti-Federalist argument was sound and perhaps should have won them the debate.

Their case in its entirety was not so persuasive. The Anti-Federalists argued that the large population and number of diverse interests among the states would make a federal government inevitably despotic. This was a leading argument in *The Address and Reasons for Dissent*.<sup>36</sup> Madison provides the conclusive counterargument in *Federalist 10*: “Extend the sphere [of a republic], and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength or act in unison with each other.”<sup>37</sup> Thus, Madison shows that a larger republic will make it less susceptible to despotism. This Anti-Federalist argument fails.

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<sup>32</sup> Pennsylvania Minority, *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Signet Classics, 2003), 244.

<sup>33</sup> Pennsylvania Minority, *The Anti-Federalist Papers*, 244.

<sup>34</sup> McClellan, *Liberty, Order, and Justice*, 432.

<sup>35</sup> U.S. Congress, *The Federalist Papers*, 249.

<sup>36</sup> Pennsylvania Minority, *The Anti-Federalist Papers*, 249.

<sup>37</sup> U.S. Congress, *The Federalist Papers*, 78.

Emphasized the most by the Anti-Federalists was the argument that the sheer amount of power delegated to the federal government would create an uncontrollable empire, or so argued Patrick Henry.<sup>38</sup> The Federalists responded that the delegated power was divided, not only between the states and the national government, but also within the national government itself.<sup>39</sup> However, the Anti-Federalists countered that such internal divisions created a “dangerous mixture of the powers of government;” in that each branch exercised some portion of the powers of the other branches.<sup>40</sup> For example, the Senate is needed to create foreign treaties, thereby making the executive partially dependent upon the legislative branch. However, Madison shows in *Federalist 47* that this blending of powers is needed for the efficacy of proper checks and balances between each branch.<sup>41</sup> In addition, Madison writes in *Federalist 45* that the powers of the national government are “few and defined,” while the powers of the state governments are “numerous and indefinite.”<sup>42</sup> Again, the Anti-Federalist argument falls under the weight of the Federalists’ responses.

The next series of arguments from the Anti-Federalists are specific to the three branches of government created by the Constitution. With regard to the legislative branch, an Anti-Federalist writer, with the penname “Brutus”, argued that the taxing power of Congress was dangerous because its amount and purposes are undefined.<sup>43</sup> Alexander Hamilton responds in *Federalist 34* that it would be unwise to specify a particular amount for taxation given the probability of war and national emergencies.<sup>44</sup> Madison also responds in *Federalist 41* that the

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<sup>38</sup> Patrick Henry, *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Signet Classics, 2003), 210.

<sup>39</sup> McClellan, *Liberty, Order, and Justice*, 394.

<sup>40</sup> Pennsylvania Minority, *The Anti-Federalist Papers*, 259.

<sup>41</sup> U.S. Congress, *The Federalist Papers*, 299.

<sup>42</sup> *Ibid*, 289.

<sup>43</sup> Brutus, *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Signet Classics, 2003), 295.

<sup>44</sup> U.S. Congress, *The Federalist Papers*, 203.

purposes for taxation are not indefinite, but limited to carrying out the enumerated powers of congress.<sup>45</sup> In addition to attacking the taxing power of Congress, Brutus criticized “the necessary and proper” clause as a comprehensive power that would be able to overwhelm state legislatures.<sup>46</sup> Hamilton counters in *Federalist 33* that this clause was simply a nod to reality, only meant to make sure that Congress could not be subverted or incapable of carrying out its legal functions.<sup>47</sup>

The arguments of the Anti-Federalists against the Executive and Judicial branches are their weakest. “Cato” claimed that the executive was a functional Monarch.<sup>48</sup> However, Hamilton showed in *Federalists 69* that this charge was baseless, describing the numerous and significant differences between the two. One difference being that the president is elected and serves for a limited term – a Monarch is hereditary and indefinite.<sup>49</sup> In opposition to the judiciary, the Anti-Federalists claimed that the national courts’ ability to judge cases based on equity gave them too much indiscriminate power that would overwhelm the states.<sup>50</sup> Hamilton retorts in *Federalist 78* that the judiciary is no threat because it has no power over the “sword or purse; no direction either of the strength or of the wealth of the society.”<sup>51</sup> Thus, the Anti-Federalists charges against each of the three branches are halted.

The crowning achievement of the Anti-Federalists was the Bill of Rights. Drafts of which rights ought to be enumerated therein were offered up by various state conventions.<sup>52</sup> Initially, all states blocked a motion to add a bill of rights to the constitution.<sup>53</sup> The Federalists had

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<sup>45</sup> Ibid, 258.

<sup>46</sup> Brutus, *The Anti-Federalist Papers*, 284.

<sup>47</sup> U.S. Congress, *The Federalist Papers*, 199.

<sup>48</sup> Cato, *The Anti-Federalist Papers*, 337.

<sup>49</sup> U.S. Congress, *The Federalist Papers*, 420.

<sup>50</sup> Brutus, *The Anti-Federalist Papers*, 312.

<sup>51</sup> U.S. Congress, *The Federalist Papers*, 464.

<sup>52</sup> Ralph Ketcham, *The Anti-Federalist Papers*, 220.

<sup>53</sup> McClellan, *Liberty, Order, and Justice*, 401.

persuasively argued that it was unnecessary. In addition, Hamilton adds five reasons in *Federalist 84* explaining why such enumeration would be harmful. Among them was the argument that the constitution already contained specific liberties maintained by the people.<sup>54</sup> Although the Bill of Rights did find its way into the Constitution, the Federalists sufficiently dispelled the Anti-Federalists' argument that it was necessary.

The Anti-Federalists claim that the constitution was illegal was true and perhaps should have been heeded. However, as to the substance of the constitution, The Anti-Federalists' case was not strong enough to overcome the explanation and argumentation of the Federalists. They failed to prove that one government could not properly rule such a large area, show that the powers delegated to the national government would lead to despotism, disparage the three branches, and demonstrate the necessity of a Bill of Rights.

### Conclusion

The structure and principles of the Constitution were the culmination of legal thinking that developed over several centuries. This unique document was not born out of the untried, abstract ideas of fifty-five isolated lawyers, but grew out of a rich tradition of trial and error. The early idea of a governing constitution, to which the people and the courts are accountable and on which the people could depend for justice is owed to the legal genius of Sir Edward Coke. By treating the Magna Carta as such a governing document, in many ways, he created the blueprint for our constitutional society today. John Locke's philosophical groundwork for natural rights added the impetus for individual rights and privileges which are included in this governing document. However, with a governing document in place, it remains a challenge to interpret and

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<sup>54</sup> U.S. Congress, *The Federalist Papers*, 514.

apply the legal statutes within that document to a developing society. Blackstone filled this critical void with his rules for legal interpretation.

Although these legal principles inherited from English minds were vital, they remained abstract and could not simply be grafted onto young America. Creating a government that fits the particular manners and mores of a people takes skill and nuance and the only way to develop these is experience. The early American Constitutions provided this experience of drawing on the abstract legal principles to construct a constitution for a particular society. In addition, the debates of the Federalists and the Anti-Federalists served the crucial role of balancing the diverse interests among the many states. Each party served to moderate the other, leaving the nation with a strong national government that nonetheless reserved most rights to the states and restrained its own power.

Societies will not typically respect ad hoc decrees and arbitrary institutions. It is passage through the trial of time and experience that its respect is earned. Understanding this rich tradition underlying the advent of the American Constitution reveals that it is anything but an insulated achievement; it incorporates western legal thought and experience that has been refined throughout many centuries. This progression from the Magna Carta to today has been the U.S. Constitutions trial and it remains the oldest standing Constitution in the modern world.

### *About the author*

Roberto O. Flores de Apodaca is a Junior studying History at Concordia University in Irvine, CA. He hopes to go to graduate school and eventually become a history professor.