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THE EVOLUTION OF CONSTITUTIONALISM

By C. Perry Patterson*

Constitutionalism is probably the greatest achievement of modern civilization, without which little or none of the rest is conceivable; under it, for the first time in the history of man, has a measure of freedom and well-being been achieved for the common man—Carl Friedrich.

I. THE MEANING OF CONSTITUTIONALISM

Constitutionalism is only the name of the trust which man reposes in the power of a document as a means of controlling a government. It is a legal device for the prevention of tyranny and for the protection of the rights of man. It furnishes the opportunity to provide exact, enduring, and compulsory language in a document to limit the powers of government and to control the conduct of government officials. Man down through the ages has searched for the means of establishing limitations upon government and of forcing government to observe these limitations in practice. Constitutionalism is the result not only of his inventive mind but also of a heroic struggle at the expense of his life and property. It is a priceless heritage which gives man the right to govern himself. It is the means which enables him to draft his own constitution, to establish his own government, and to organize its powers in such form as "shall seem the most likely to affect his safety and happiness." It was what James Madison had in mind when he said that "In framing a government which is to be administered by men over men," it is necessary to "oblige it to control itself."

II. THE RISE OF CONSTITUTIONAL GOVERNMENT

To understand and properly to appreciate the importance of constitutional government it is necessary to know something of

*Professor of Government, University of Texas.
1. The Federalist (Bourne ed.), No. LI, 354.
the origin and development of constitutionalism. The framers of the American Constitutions made a significant contribution to this development. In fact, their distinctive contribution practically marked the culmination of this development and determined the model for true constitutionalism which has been widely copied by the rest of mankind.

1. Contribution of Greece and Rome

Constitutionalism in a rather primitive form began in Greece some twenty-three centuries ago. The Greek Constitution was the general system of authority by means of which the functions of the state were performed. It was the essence of the state. The constitution fixed the number and relationship of the organs of government, the methods of selecting its officers, and the location of the supreme or sovereign power. The location of the sovereign power determined the nature of the constitution. If it was exercised by the people, the constitution was a democracy; if by a few, the constitution was an oligarchy.2

Constitution then to the Greek mind meant the general nature or character of the state. It was the organic character of the state. It was used in the same sense as in the expression—the constitution of the human body. It was, therefore, not a written fundamental law paramount to the acts of the government. It was not a coercive law, and therefore, in no sense a means of controlling the government. Laws might be good or bad, but not unconstitutional.3 Constitutional government to the Greek was not a limited government, but merely the government of any type of state possessing a constitution, and, therefore, could be monarchical, oligarchial, aristocratic or democratic. The constitution changed when the state changed. A revolution was a complete change in the life of the state, economic, social and political.4 The Greek state was not a legal abstraction but was a synonym of the people themselves. It was an assemblage of the citizens.

All constitutionalism is based on a higher law. There must be some standard or qualification which a law has to satisfy in order to be a law. It is not a mere matter of force. If this were true, the decrees of the mob would be considered law. To the Greeks, what was right was law, and what was wrong was unlaw, what was right

2. See William A. Dunning, Political Theories, Ancient and Modern 64-65 (1913).
was discovered from "the law of nature." Aristotle said "there really is, as everyone to some extent divines, a natural justice... that is binding on all men." Demosthenes contended that "Every law is a discovery, a gift of God,—precept of wise men." Aristotle in his Rhetoric advised lawyers that when in their pleadings they found that they had no case according to the law of the land "to appeal to the law of nature," and to argue according to Sophicles that "an unjust law is not a law." Here is the idea of a higher law, a fundamental law, overruling man-made law—the idea of different kinds of laws varying in sanctity and validity. In other words, man-made law is only law when made in pursuance of a higher or fundamental law. This doctrine is basic in the development of constitutional government. In Greece, it was a matter of substance not form.

The Greek Stoic philosophers furnished the material for the transition from the Greek to the Roman constitutionalism. They laid increased emphasis on the doctrine of natural law or the doctrine of a higher law. When the barriers between Greek and barbarian were destroyed by the inclusion of Athenians, Thracians, Asiatics, and Egyptians in the same political system, racial distinctions and state lines were forced to yield to a universal law or a cosmopolitanism. Human nature or man become the basic consideration. Cosmopolitanism expanded into humanitarianism and a universal citizenship. Greek Stoic ideals under the Roman scheme of things became realities. "Universal law and universal citizenship," said Dunning, "became practical facts." The doctrine of natural law and the principle of justice common to all men were accepted and developed by the great jurists of Rome.

Rome's contribution to constitutionalism consists of (1) the principle of checks and balances, (2) the doctrine of popular sovereignty, and (3) the principle of a higher law or the doctrine of natural law, or the doctrine of a limited government.

The first principle was regarded by Polybins as being a feature of the Roman system. Polybins was imprisoned in Italy for sixteen years, and during this time wrote a history of the Roman Republic in which he made the first exposition of the principle of checks and balances known to political theory. In the Roman polity, later called state after the term state had been invented in the

7. Rhetorica I, 1375, a, 27 et seq.
9. Ibid. 107.
sixteenth century, he said that the consuls represented monarchy, the senate aristocracy, and the assemblies democracy, and that in the practical operation of the government, these three antagonistic elements were checks upon each other and gave a balanced character to the system.

Undoubtedly, the greatest contribution of Rome to constitutionalism is the principle of popular sovereignty, and the principle of the doctrine of natural law or of a limited government. The principle that the whole people was the exclusive source of legal authority came to be such a fundamental part of Roman constitutionalism that Justinian's commission of the sixth century was unable to delete it from Roman law.\textsuperscript{10} The spread of Roman law throughout Europe made this principle basic in the political and legal literature of the Middle Ages.

Cicero was the greatest lawyer of the ancient world and was an exponent of the doctrine of Natural Law. "\textit{True Law}," he said, in his \textit{De Republica}, "is right reason in agreement with nature; it is of universal application, unchanging and ever lasting... we cannot be freed from its obligations by Senate or people... and there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is God, over us all, for He is the author of this law, its promulgator, and its enforcing judge."\textsuperscript{11} He further states that "It is a \textit{sacred obligation} not to attempt to legislate in contradiction to this law." He did not hesitate to plead in the Roman courts the invalidity of a statute of the Roman Senate which in his opinion violated natural law.

It was customary to include in a Roman statute a clause stating it was not the purpose of the statute to violate what was sacrosanct or \textit{jus}. There were recognized limits on legislative power which assumed the character of a written constitution or a fundamental law. \textit{Jus} was, therefore, superior in validity to a statute. Cicero paused in his pleading once and asked: "What is it that is not \textit{jus}?... This saving clause (adscriptio) declares that it is something, otherwise it would not be provided against in all our laws. And I ask you, if the people had commanded that I should be your slave, or you mine, would that be validly enacted, fixed, established?"\textsuperscript{12}

\textsuperscript{10} McIlwain, op. cit. note 3, 59. See Robert N. Wilkin, Eternal Lawyer 208-233 (1947).
\textsuperscript{11} De Republica III, 22.
\textsuperscript{12} Pro Caecina, c. 33.
Here is definitely announced by a great philosopher and jurist the
document of a higher law which protects the rights of man against
legislative enactment and which in the eighteenth century furnished
the basis of the American and French revolutions and the founda-
tion of modern democracy. Rome increased the safeguards for
private rights by separating public from private law.

The Ancients, then, both Greece and Rome, distinguished be-
tween fundamental law and ordinary law. In Greece fundamental
law was politeia and ordinary laws were nomoi. Rome made the
same distinction and between the authorities which could enact
each. Neither Greece nor Rome went so far as to embody this
constitutional law in a fundamental statute or written document,
giving it a higher formal validity than ordinary laws. The distinc-
tion was one of substance not of form.

2. The Contribution of Continental Europe During the
Middle Ages

This doctrine was perpetuated by later Roman jurists—by Gaius
in the second century, Ulpian in the third, Justinian in the sixth,
and Gratian in the twelfth. It was also adopted by the early Chris-
tian fathers—Saint Paul and Augustine, Ambrose and Jerome.
The most able exponent of this doctrine during the Middle Ages
was the great philosopher St. Thomas Aquinas, who said that all
man-made laws must conform to the law of nature and that “if on
any point [a man-made law] is in conflict with the law of nature,
it at once ceases to be a law; it is a mere perversion of law.”

“Thomas Aquinas,” said Otto Gierke, “drew the great outlines
[of natural law] for the following centuries . . . however many
disputes that might be touching the origin of Natural Law and the
ground of its obligatory character, all were agreed that there was
Natural Law, which . . . was true and perfectly binding law. Men
supposed therefore that before the state existed the Lex Naturalis
already prevailed as obligatory statute and that immediately or
mediately from this flowed those rules of right to which the state
owed even the possibility of its own rightful origin. And men also
thought that the highest power on earth was subject to the rules
of Natural Law. They stood above the Pope and the Kaiser, above
the Ruler and above the Sovereign People, nay above the whole
community of mortals. Neither statute nor act of government,
nor resolution of people nor custom could break the bounds

that thus were set. Whatever contradicted the eternal and immutable principles of Natural Law was void and would bind no one.”

The contribution to constitutionalism made by natural law is that it is the basis of the principle of a limited government. Only a limited state can be constitutionalized. Limitations cannot be placed on supreme power and enforced. Natural law deposits all political authority in the people and, therefore, makes the state with all its machinery the agent of the people. Without this doctrine bills of rights against the state would be a mere pretense and utterly without validity. Of course, the right of self-government is derived from the principle that all political power rests in the people from whose consent government derives its constitutional powers. If this foundation of the principles of constitutional government had not been laid deep in the philosophy of medieval society—especially the principle that all authority is derived from the people—the birth of constitutional government would have been indefinitely delayed. The great defect of medieval constitutionalism was its lack of any means for the enforcement of its principles. Revolution was the only check against its violation. This was not a legal means. There remained, therefore, the problem of devising the means as a feature of the government itself for the enforcement of constitutionalism. Theory must be made into practice. As Madison well said, in establishing a government, two things must be kept in mind; “first enable the government to control the governed; and in the next place oblige it to control itself.” He further explained that “A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions!” What did Madison mean by “auxiliary precautions”?

3. Contribution of the English

The doctrine of a higher law and of a limited government came to America through England where it was elaborated by many able political theorists and jurists among whom the following made the most significant contributions: (1) John of Salisbury (c. 1120-80), “the most learned man of his day” according to Stubbs and the first systematic writer on politics in the Middle Ages, in his Poli-

14. Political Theories of the Middle Ages 75 (Tr. by F. W. Maitland 1938).
15. See McIlwain, op. cit. supra note 3, 69-94.
17. Ibid., I, 354-355.
braticus (1159), repeats the Ciceronian conception of natural law where he says “there are certain precepts of the law which have perpetual necessity, having the force of the law among all nations and which absolutely cannot be broken.” He maintained that government is limited by the *Jus Naturale* and that both the Prince and the judge are limited by this standard. The Prince, he said, “may not lawfully have any will of his own apart from that which the law or equity enjoins, or the calculation of the common interest requires.”

Bracton, Henry of Bratton (d. 1268), a judge of the King’s Bench in the reign of Henry III in his *De Legibus et Consuetudinibus Angliae* (written before 1256), a collection of about 2,000 common law decisions, says “The King himself ought not be subject to man, but subject to God and the law, for the law makes the King. Let the King then attribute to the law what the law attributes to him, namely, dominion and power, for there is no King where the will and not the law has dominion.” Bracton was the forerunner of the great Whig jurist, Sir Edward Coke, and his *De Legibus* had a tremendous influence in the development of the supremacy of law. He contended that all authority was derived from law and was, therefore, limited by law. He said natural law was immutable because it could not be repealed. His doctrine of the supremacy of law is the essence of constitutionalism. Through Coke, his influence touched the first generation of American lawyers and furnished the legal basis of English and American Whigism.

(2) Sir John Fortescue (c. 1394-1476), an English political theorist and jurist, Chief Justice of the King’s Bench from 1442-1460 during the reign of Henry VI in his *De Natura Legis Natural* (c. 1461) advocated the supremacy of natural law and made it the basis of a “Lancastrion experiment” in constitutional government. He defined “a positive law, in effect, as a sanction added by the state to a precept of natural law.” He maintained that the King could not change the laws of England “nor take from the people what is theirs against their consent.” Furthermore, on the question of who is the judge of the law—an issue of fundamental importance in constitutionalism—he contended that the laws of Eng-

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19. Ibid., 7. See also Dunning, Political Theories, Ancient and Medieval (1913) 186-187.
20. *De Legibus et Consuetudinibus Angliae* (Swiss ed. 1854) 5 b.
land were so technical and extensive that only trained experts could know the law, and that, therefore, it must be the peculiar and exclusive business of the Bar and the Bench to interpret it. "My Prince," he said, "there will be no occasion for you to search into the arcana of our law with such tedious application and study... It will not be convenient by severe study, or at the expense of the best of your time, to pry into nice points of law; such matters may be left to your judges and counsel...; furthermore, you will better pronounce judgments in the courts by others than in person, it being not customary for Kings of England to sit in court or pronounce judgment themselves. I know very well the quickness of your apprehension and the forewardness of your facts; but for the expertness in the laws the which is requisite for judges the studies of twenty years barely suffice." Here Sir John places the King in the list of laymen and excludes him from the judicial function. In other words, the interpretation of the law is the exclusive function of the judges. They, therefore, can determine the scope of the authority of the King under law.

(3) Sir Edward Coke (1552-1634), a great English Whig jurist, one hundred and thirty years later on Sunday morning November 10, 1608 as Chief Justice of the King's Bench engaged in a terrific battle with the King over this same issue. He, all the judges of England, and the Barons of the Exchequer, met James I at Hampton Court and refuted the idea that Archbishop Bancroft had instilled in him that in as much as the judges were only his delegates he could decide cases in person. "The judges," says Coke, "informed the King that no King after the conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the courts of justice...."

The King replied that "he thought the law was founded on reason and that he and others had reason as well as the judges." Coke practically repeated what Fortescue had said that "His Majesty was not learned in the laws of his realm of England, and that it requires long study and experience before that a man can attain to the cognizance of it." The King was offended and said "then he should be under the law, which was treason to affirm." Coke replied, in Bracton's words, "Quod Rex non debet esse sub homine, sed sub Deo et lege." In substance Coke's contention

22. Ibid., c. 8.

23. Prohibitions del Roy, 7 Co. 63-65 (1609). "That the King ought not to be made under man, but under God and the Law."
was “that the King hath no prerogative, but that which the law of the land allows,” and that the judges were the interpreters of this.

In the Dr. Bonham’s case, decided in the Common Pleas in 1610, Coke said: “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; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void.” “Common right and reason” is something permanent and fundamental, and, therefore, higher law.

The significance of this contest is that the principle of a fundamental law as a limitation upon government is involved and its corollary that the judges are the sole interpreters of the fundamental law. These two principles are just about the sum total of American Constitutional government and if at this time the English judiciary had been independent of the King, they might have become permanent principles of the English system. Coke was building upon Fortescue and later Locke built upon Coke. What happened was that the legalism of the sixteenth century was united with the rationalism of the seventeenth century and passed into American political theory and constitutional law.

While Coke lost the fight for judicial review, he finally restored the doctrine of fundamental law and became the father of the Petition of Right. He was transferred from the King’s Bench in 1613 to the Common Pleas and three years later was dismissed from the Bench. In 1620 he was elected to membership of the House of Commons and assumed the leadership of the opposition to the Stuarts. In 1625 Charles I succeeded James I and in 1627 occurred the arrest of the Five Knights, causing Parliament to make the Inquest on the Liberties of the subject and later under the leadership of Coke to frame the Petition of Right in 1628.

The Petition of Right was largely a restoration of Magna Carta which it was said had for a long time “lain bed-rid.” In the course of the debate on the Petition of Right the Lords attempted to insert a provision to save “the sovereign power of the King.” Bodin was quoted to the effect that the King was “free from any condition” whereupon Coke replied: “This is Magnum in parvo . . . I know that prerogative is a fact of the law, but Sovereign Power is no parliamentary word. In my opinion it weakens Magna Carta, and all the statutes; for they are absolute without any saving of

24. Proclamations, 12 Co. 74, 76 (1611).
'Sovereign Power'; and should we now add it, we shall weaken the foundation law, and then the building must needs fall. Take heed what we yield into; Magna Carta is such a fellow, that he will have no 'sovereign.'"25

In the course of the debate Wentworth and Pym agreed with Coke. Wentworth said "These laws are not acquainted with 'Sovereign Power,'" and Pym added that Parliament was "possessed of it." In the same discussion this doctrine was called "unconstitutional." Coke in this great contest for a government limited by law really restored Magna Carta to its rightful place as the great muniment of English liberties. He called it "the fountain of all the fundamental laws of the realm."26 These fundamentals, he said, consisted of (1) the historical procedure of the common law, (2) the known processes of the ordinary courts such as indictment by grand jury, trial by the "law of the land," habeas corpus, (3) security against monopoly, and (4) taxation by the consent of Parliament. Magna Carta was regarded by Coke, therefore, as a fundamental law. He regarded Parliament primarily as a court. Blackstone later misinterpreted Coke's doctrine of Parliamentary supremacy as a court into parliamentary supremacy as a legislative body, and thus converted judicial supremacy into legislative supremacy. In fact Parliament at this time administered a sort of super equity and was not a legislative body at all.27

Coke was by all means the most influential English jurist on American Constitutional development. He drafted the Petition of Right of 1628 in which, according to a distinguished American authority, the doctrine of a limited government was definitely announced.28 His Institutes (1628-1644) was the chief source of the legal education of the first generation of American lawyers. His contribution to American Constitutionalism may be summarized as follows:

First, his doctrine in Bonham's case that the common law controlled the acts of Parliament, and sometimes adjudged them null and void, furnished a phraseology which was later frequently quoted by American commentators, judges, and attorneys as the source of the principle of judicial review.

Second, his doctrine of a fundamental law which was binding

upon both the King and the Parliament and which had a definite and verifiable content in the customary procedure of every day institutions.

Third, there is a complete continuity of descent from his version of Magna Carta through the Petition of Right of 1628, and the Bill of Rights of 1689 to the American bills of rights in our state and national constitutions.

Fourth, his idea of parliamentary supremacy under the law was easily transformed into legislative supremacy within the law subject to judicial interpretation.

(4) Richard Hooker (1554-1600), English political theorist and historian, was an exponent of natural law and constitutional government. In his Ecclesiastical Politic (1594-97), he said that "In laws, that which is natural bindeth universally, that which is positive not so." Natural law was the same everywhere and at all times while positive law was restricted by state sanctions. Hooker really accepted the interpretation of natural law advanced by St. Thomas Aquinas. He believed that there were wide spheres of life that are ruled by the law of nature and the reason of man.

His preference as to form of government was constitutional monarchy established upon an implicit contract. He did not claim divine prescription for this form of government, but he regarded the English monarchy united with the Episcopal Church as a sound and practical agent of moderation and constitutional government. He believed that man should build his institutions upon the experience of the past free from the restriction of either conservatism or extremism.

Hooker prepared the way for Grotius and Locke. In fact his political theory was anti-monarchial. He believed in the presocial state of nature, the formal consent and contract for the institution of government, and the subjection of rulers to a law that embodied the terms of the contract. The terms of the agreement by which government is established, he said, constitute "that which we call the 'Law of the Commonwealth.'" It is clear that Hooker advocated constitutional government established by the consent of the governed. This doctrine was later converted from mere theory into practice by our American forefathers.

(5) Algernon Sydney (1622-83), English republican and political theorist, supported Parliament in the civil war and advocated

29. Francis W. Coker, Readings in Political Philosophy, 249 (1914).
30. See Dunning, Political Theories from Luther to Montesquieu, 210-11 (1905).
the deposition of Charles II. He was accused of treason, one of the charges being that he had written a book proving Kingship unlawful. He was convicted of treason and beheaded in 1683. The record of his trial is one of the most important documents of eighteenth century republicanism. Sydney's memory became a symbol of defiance to tyrants.

While Sydney's republicanism is regarded as debatable, it is clear from his famous book *Discourses concerning Government* (1698) that he regarded government as an institution created by men for their own security and interest, and that authority rests on consent and is bound by the terms of its establishment. He held that sovereignty is indefeasibly in the people and that the administration of government is subject to popular control. He did not regard monarchy as the proper form of government to achieve the ends for which authority is established, yet he was equally anti-democratic. He leaned toward an aristocratic republic of the Roman type.

One of the most significant of his statements about law is "that which is not just is not law and that which is not law ought not to be obeyed." This could mean that since it is the function of judges to determine what is law they would have the right to nullify legislative acts. While it cannot be maintained that Sydney anticipated Locke in all respects, it is clear that on certain specific doctrines of a republican character he was in substantial accord with Locke. There is, however, no doubt that his writings furnished one of the chief arsenals from which our forefathers drew many of their most effective arguments against the English Monarchy. Moreover, his life, trial, and martyrdom served as a great inspiration to Whigs and advocates of constitutional republicanism on both sides of the Atlantic. On the whole his philosophy furnished a substantial basis for the contentions and future program of the American revolutionary statesmen.

(6) John Locke (1632-1704), was preeminently and incomparably the philosopher of not only the Glorious Revolution of 1688 but also of the American Revolution, its complement and counterpart. Locke profited from a revival of the doctrine of natural law in which he was only a colleague of a number of able contributors to this doctrine. Hugo Grotius (1583-1645), a Dutch philosopher and jurist, was primarily responsible for a renaissance of natural law. He revived the Ciceronian conception of natural law and

stripped this doctrine of its dependence upon the ecclesiastical interpretation which the Middle Ages had sought to impose upon it. He defined it as the law of God and the law to God. God, he said, could not make twice two more or less than four.

Newton demonstrated that the universe was "left in law." Nature became Jus or law. This conception of natural law, it has been said, "deified nature and denatured God." Scrupulous nature was substituted for an inscrutable deity. Carl Becker said "that the eighteenth century, conceiving of God as known only through his work, conceived of his work as itself a universal harmony, of which the material and the spiritual were but different aspects." The positive laws of particular states might be expected to conform to the universal purpose of nature. Alexander Pope said "whatever is, is right." Butler regarded Christianity as "a promulgation of the law of nature."

The significant contributions of Locke may be summarized by his limitations on legislative power:

First, legislative power cannot be arbitrary power because it is only delegated power from free sovereign individuals who had "in the state of nature no arbitrary power over the life, liberty, or possessions" of others or even over their own. "For nobody," said Locke, "can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having, in the state of nature, no arbitrary power over the life, liberty, or possessions of another, but only so much as the law of nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this." Here Locke anticipates due process of law.

"Secondly, the legislature or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorized judges," nor may it vary the law in particular cases. There must be one law

34. J. Butler, Works (Gladstone ed. 1897), 162.
35. Two Treatises on Civil Government (London 1884), Ch. XI, Sec. 135, pp. 261-262.
36. Ibid., Ch. XI, Sec. 136, p. 262.
"for rich and poor, for the favorite at court and the country man at plough."

Here is foreshadowed some fundamental principles of American constitutionalism; (1) a general law of the land equally applicable to all and affording equal protection to all; (2) it cannot validly operate retroactively; (3) it must be enforced through courts; (4) legislative power does not include judicial power.

"Thirdly, the supreme power cannot take from any man any part of his property without his own consent," since the preservation of property is the end of government and the purpose for which men enter into society. In other words, there can be no taxation without representation—a fundamental principle of American constitutionalism. "If any one," Locke said, "shall claim a power to lay and levy taxes on the people of his own authority, and without such consent of the people, he thereby invades the fundamental law of property and subverts the end of government."

"Fourthly, the legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others." The people cannot "be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them."

Finally, legislative power is not the ultimate power of the commonwealth because "the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject." There is the right of revolution. In other words, the same power that was used against James II is equally available and applicable to Parliament.

(7) Sir William Blackstone (1723-80), a noted English jurist, graduate of Oxford and a barrister of the Middle Temple, though not successful at first as a practitioner became famous on the literary side of the law. He was made Vinerian Professor of English Law at Oxford in 1758 and it was his lectures at Oxford that were later revised and published as his Commentaries on the Laws of England (1765-69)—a widely used text on the Common Law in both England and America during the eighteenth century and still the most complete survey of the English legal system ever composed

37. Ibid., Ch. XI, Sec. 138, p. 264.
38. Ibid., Ch. XI, Sec. 140, p. 266.
39. Ibid., Ch. XI, Sec. 141, P. 266.
by a single hand. By means of a clear, urbane and dignified style he made English law into a system of justice comparable with Roman law and with the continental civil law.

For a hundred years after the publication of the *Commentaries*, it was claimed that no gentleman's library was complete without a copy. It has passed through seventy-three editions in English, fifty-six in French, eleven in German, nine in Italian, and at least one edition in most every other language including the Chinese. Sixteen signers of the Declaration of Independence knew it from cover to cover. There were 2,500 copies of Blackstone in the colonies. Lincoln found a copy in a barrel—it changed his life—and perhaps the life of our nation. It has been listed as one of the one hundred greatest books in the English language. Blackstone was a member of Parliament from 1768 to 70 and a judge of the Common Pleas from 1770 to 1780.40

Blackstone lacked the originality of Bracton, Fortescue, and Coke, but excelled them in lucidity of style and systematism of statement—a difficult achievement in the law. He brought the law into a closer association with history, philosophy, and politics, though, according to Oliver Wendell Holmes, he was not an historical scholar nor too expert as an analyst. This helps explain some of his confusion and contradictions. In the field of political philosophy he borrowed heavily and confusedly from Pufendorf, Locke, Burlamaqui, and Montesquieu.

In contrast with Coke, Blackstone was a Tory in politics, and, therefore, anti-Whig in his legal doctrines. He was a supporter of royal prerogative and the supremacy of Parliament. One of his historical blunders was mistaking Coke's supremacy of Parliament as a court for the supremacy of Parliament as a legislative body at a time when Parliament was not a legislative body at all.41

Blackstone was not a perfect authority for either a Whig or a Tory to quote, because whatever the quotation it could be contradicted by another quotation. Of course, serious students of the English constitution soon learn that the law of the constitution has very little relation to political realities. A distinguished English authority recently remarked that "Americans, with Blakstone's book before them, might be pardoned if they failed to see that its statement of legal facts was an unreal picture of political realities."

40. For a brief but illuminating account of his life, see Bernard G. Gavit, Blackstone's Commentaries on the Law, 3-14 (1941).
The voluntary illiberalism of Blackstone was an unintended disservice to Anglo-American understanding.\textsuperscript{42}

Blackstone says “there is and must be in all (forms of government) a supreme, irresistible, absolute, uncontrolled authority, in which the \textit{jura summi imperii}, or the rights of sovereignty, reside.”\textsuperscript{43} This statement was enough to enrage a James Otis, a Sam Adams, or Patrick Henry. However, this extravagant statement is preceded and followed by statements equally drastic but completely contradictory. The preceding statement says there is a “law of nature, coeval with mankind,” which “\textit{is of course superior in obligation to any other: ... no human laws are of any validity if contrary to this authority ... from this original.”\textsuperscript{44} This statement would satisfy the most radical Whig. The following statement says there are natural rights such as life, liberty and property which “need not the aid of human laws to be more effectually in every man than they are,” and which “no human legislature has power to abridge or destroy.”\textsuperscript{45} Here is the doctrine of natural law and the rights of man stated as absolutely as was done by either Burlamaqui or Locke. In fact, Blackstone quoted and paraphrased Burlamaqui without giving credit. Van Tyne asks “what did Christopher Cadson (of South Carolina) mean by allusion to those "latent though inherent rights of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish?”\textsuperscript{46} He was paraphrasing Blackstone who had paraphrased Burlamaqui.\textsuperscript{47}

While Blackstone could be and was quoted by the American Whigs in support of the rights of men and even of the doctrine of a limited government—foundational principle of republican constitutionalism—it was generally recognized that he stood for parliamentary supremacy. Jefferson was a vitriolic critic of Blackstone. He regarded his 	extit{Commentaries} as “a smattering of everything” in contrast with “the deep and rich mines of Coke on Littleton.”\textsuperscript{48} He stated that “Blackstone and Hume have made Tories of all England, and are making Tories of those young Americans whose native feelings of independence do not place them above the wily sophistries of a Hume or Blackstone. These two books, but especially the former, have done more towards the suppression of liberties.

\textsuperscript{42} Ernest Barker, \textit{Essays on Government}, 131 (1945).
\textsuperscript{43} \textit{Commentaries}, I, 49 (1765-9).
\textsuperscript{44} Ibid., I, 41.
\textsuperscript{45} Ibid., I, 54.
\textsuperscript{46} The Causes of the War of Independence, 237 (1922).
\textsuperscript{47} See Barker, op. cit. supra note 42, 130, fn. 1.
\textsuperscript{48} Writings (Library ed.), XIII, 166-167.
of man, than all the million of men in arms of Bonaparte, and the millions of human lives with the sacrifice of which he will stand loaded before the judgment seat of his maker." \(^{49}\) He referred to lawyers who substituted Blackstone for Coke as the "ephemeral insects of the law." \(^{50}\) Jefferson came to regard the "Blackstone Lawyers" as Tories without knowing it. He lamented "the general defection of lawyers and judges, from the free principles of government. I am sure they do not derive this degenerate spirit from the father of our science, Lord Coke. But it may be the reason why they cease to read him, and the source of what are now called 'Blackstone Lawyers.' " \(^{51}\)

Blackstone's conclusion, regardless of his equivocation and flirtation with natural law, was absolute supremacy in Parliament: "It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, revising, and expounding of laws... this being the place where that absolute, despotic power which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. ... It can, in short, do everything that is not naturally impossible, and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth no authority on earth can undo." \(^{52}\)

This doctrine of Parliamentary absolutism was later expressed by De Lome in the oft-quoted aphorism that "Parliament can do anything except make a man a woman and a woman a man."

While Coke and Locke advised safeguards against power, Blackstone like Hobbes exalted power. For a while legislative supremacy of the Blackstone variety was tried in the first state governments following the revolution, but experience soon produced a reaction against legislative omnipotence and a return to the doctrine of Coke—a supremacy of a fundamental law enforced by judicial review.

While Blackstone scored a victory in the first state constitutions, all of which provided for legislative supremacy, why did legislative supremacy not ultimately triumph? There were at least three fundamental reasons. First, the experience of the forefathers

\(^{49}\) Writings (Washington ed.) VI, 335.  
\(^{50}\) Ibid., VI, 66.  
\(^{51}\) Writings (library ed.) XIV, 63.  
\(^{52}\) Commentaries, I, 160-161.
under legislative supremacy was very unsatisfactory. Madison spoke of the mutability of state laws, producing almost chaos, endangering property rights, and shaking the faith of the steadfast friends of republicanism. It was almost the unanimous opinion of the members of the Federal Convention of 1787 that legislative supremacy must be destroyed and they destroyed it in both the nation and the states. Second, in the American written constitution, beginning with the third constitution of Massachusetts in 1780, the higher law at last assumed a form which gave it an entirely new sort of validity—the validity of a statute emanating from the sovereignty of the people. Legislative sovereignty of the agents of the people disappeared in the face of legislative sovereignty of the people themselves. The first became subordinate to the second. Two legislative bodies could not be supreme over the same subject matter in the same jurisdiction. Third, higher law as a recourse for the maintenance of the rights of individuals against each other and government required the backing of judicial review.

So it was that Blackstone won the first round for legislative supremacy, but Coke and Locke won the second round for higher law and judicial review. However, the fight has continued for more than a century and a half with the result that Blackstone's doctrine of legislative supremacy has practically been reestablished not by the sovereignty of the people but by judicial decrees.

The English contribution to the rise of constitutional government was not restricted to the writings of theorists and jurists but assumed documentary form. Magna Carta is especially significant to students of American constitutional development, for several

53. It must be remembered that our forefathers used property rights in the Lockian sense to include all the rights of man. Madison said: "This term in its particular application means that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."

"In its larger and juster meaning, it embraces everything to which a man may attach value and have a right; and which leaves to every one else the like advantage.

"In the former sense, a man's land, or merchandise, or money, is called his property.

"In the latter sense, a man has property in his opinions and the free communication of them.

"He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

"He has property very dear to him, in the safety and liberty of his person.

"He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

"In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights." (Works [Hunt ed.]) VI, 101.

54. Corwin, supra note 27 at 409.
reasons. First, as a document it gave concrete form to the idea of a higher or fundamental law. Second, its maintenance against the King required the support of all classes; hence its benefits had to be extended to all classes. Third, the growth of the document by repeated confirmations and extensions to embrace the rights and needs of all classes of society gave it the character of almost a modern written constitution.

It gradually assumed more and more the character of a fundamental law. By the confirmatio cartarum of 1297 Edward I ordered all "justices, sheriffs, mayors, and other ministers, which under us and by us have the laws of our land to guide" to treat the Great Charter as "common law," and any judgment contrary to it was to be "holden for naught." Here is the essence of American constitutionalism. Of the thirty-two confirmations of the charter noted by Coke, fifteen of them occurred in the reign of Edward III. In the confirmation of 1368 it was specifically provided in the charter that any statute passed contrary to Magna Carta "soit tenez p' nul" (shall be held null). John Neville Figgis (1866-1919), an English historian of political ideas without a peer, writing with the period of Magna Carta in mind, said: "The common law is the perfect ideal of law; for it is natural reason developed and expounded by a collective wisdom of many generations ... Based on long usage and almost supernatural wisdom, its authority is above, rather than below, that of acts of Parliament or royal ordinances which owe their fleeting existence to the caprice of the King or the pleasure of councillors which have a merely material sanction and may be repealed at any moment."

It is not generally understood that Magna Carta by its various expansions and adaptations came to embody so completely the characteristics of a fundamental law and in fact to possess most of the fundamental features of an American Constitution. Its repeated confirmations were really amendments to adapt it to the needs of the nation and to bring within its scope of protection the rights of all the people. Its supremacy to the acts of government is undeniable evidence of its embodying the principle of a limited government—the most fundamental principle of constitutional government. The principle that its violations were to be held null and void suggests judicial review as the means of maintaining its supremacy as a fundamental law. How could its violations be determined and declared as a matter of law except by the courts: this

55. Edward III, c. 1 (1368).
56. Divine Right of Kings (2d ed. 1914), 228-230.
was the doctrine of Coke. It is submitted that the essentials of constitutional government in the American sense are found in the principles that this great document finally embodied.

4. The American Contribution to Constitutionalism

The most significant and fundamental principle of American constitutionalism, according to James Madison, is the doctrine of a limited government. Constitutional government is meaningless on any other basis. This principle is based on the doctrine of a higher law because only a higher or a fundamental law paramount to the acts of government can be a limitation upon government. A constitution that is not a limitation on government is really not an instrument of government. The foundation of the principle of a limited government is the doctrine of natural law.

(1) The Doctrine of Natural Law in Eighteenth Century America

The influence of Coke and natural law are the two cornerstones of American constitutionalism. The revival of natural law by Grotius and Locke in the seventeenth century, reinforced by Newton of the eighteenth, extended its influence to America. Coke controlled American legal thinking during the seventeenth century and Locke during the first half of the eighteenth. The American bench and bar of the eighteenth century regarded a knowledge of natural law as the foundation of a legal education. In fact, they regarded the common law and the English constitution as derived from natural law. The American revolution was primarily a lawyer's revolution. Natural law was their chief weapon in their argument against the supremacy of Parliament. Our constitutional system would undoubtedly have been based on the principle of legislative supremacy advocated by Blackstone but for the fact that the legal profession was an uncompromising advocate of the doctrine of natural law. Among the more prominent members may be listed James Otis, Sam Adams, Patrick Henry, John Adams, John Dickinson, Thomas Jefferson, Oliver Ellsworth, John Rutledge, James Wilson, Luther-Martin, William Patterson, George Wythe, James Madison and Alexander Hamilton. There were also many laymen such as Franklin and George Mason, and especially the clergymen who were exponents of the doctrine of natural law.

The first gun fired in this great legal battle destined to end in revolution and the establishment of American constitutionalism was by James Otis in the Writs of Assistance case in 1761. He
based his arguments on the doctrine of Coke in the Bonham's case, and natural law. According to John Adams, Otis "was also a great master of the law of nature and nations. He had read Pufendorf, Grotius, Barbeyrac, Burlamqui, Vattel, Heineccius. . . . It was a maxim which he inculcated in his pupils . . . that a lawyer ought never to be without a volume of natural or public law, or moral philosophy, on his table or in his pocket." Adams gives the substance of the arguments of Otis as follows: "As to acts of Parliament. An act against the constitution is void: an act against natural equity is void; and if an act of Parliament should be made, in the very words of the petition, it would be void. The Executive Courts must pass such acts into disuse." Here and there," said Adams, "the child Independence was born." To day," says Corwin, "he must have added that then and there American Constitutional law was born, for Otis' contention goes beyond Coke's. An ordinary court may traverse the specifically enacted will of Parliament, and its condemnation is final." Here is announced both the doctrine of a fundamental law and judicial review as the means of enforcing it. Adams used the arguments of Otis before the Governor and Council of Massachusetts against the Stamp Act. Governor Hutchinson wrote at this time that "The prevailing reason at this time, is that 'the act of Parliament is against Magna Carta, and the natural Rights of Englishmen, and therefore, according to Coke, null and void.'" Of still greater significance is the fact that a Virginia court actually held the Stamp Act unconstitutional. "The judges were unanimously of the opinion," reads the report, "that the law did not bind, affect, or concern the inhabitants of Virginia "inasmuch as they conceived the said act to be unconstitutional."

Otis in his pamphlet, The Rights of the British Colonists Asserted and Proved (1764), said the colonists were entitled to "as ample rights, liberties, and privileges as the subjects of the mother country are and in some respects to more. . . . Should the charter privileges of the colonists be disregarded or revoked, there are natural, inherent and inseparable rights as men and citizens that would remain." Adams in the Canon and the Feudal Law (1865)

58. 8 Viner 118 (1761); Quincy 474 (Mass. 1761).
60. Supra note 27 at 398.
62. Appendix, Quincy, 527 n. (Mass. 1769).
64. Adams, op. cit. supra note 57, X, 293.
speaks of "Rights antecedent to all earthly government—Rights that cannot be repealed or restrained by human laws—Rights derived from the great Legislator of the universe. . . . British liberties are not the grants of princes or Parliament, but original rights, conditions of original contracts . . . coeval with government. . . . Many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed."\(^\text{65}\)

In the Massachusetts Circular Letter of 1768, which combines the doctrines of Coke and Locke, is definitely announced the doctrine of a limited government, borrowed from Vattel:

"that in all free states the constitution is fixed, and as the supreme legislative derives its power and authority from the constitution, it cannot over leap the bounds of it, without destroying its own foundation; that the constitution ascertains and limits both sovereignty and allegiance, and, therefore, his Majesty's American subjects, who acknowledge them bound by the ties of allegiance, have an equitable claim to the full enjoyment of the fundamental rules of the British Constitution; that it is an essential, unalterable, right, in nature, engrafted into the British constitution, as a fundamental law, and even held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent; that the American subjects may, therefore, exclusive of any consideration of charter rights, with a decent firmness, adapted to the character of free men and subjects, assert this natural and constitutional right."\(^\text{66}\)

This doctrine of natural rights and a fundamental law was repeatedly asserted both individually and collectively. The First Continental Congress in the "Declaration of Resolves" said, "that the inhabitants of the American colonies in North America," by the immutable laws of nature, the principles of the British Constitution, and the several charters or compacts "are entitled to life, liberty, and property."\(^\text{67}\) It was in this same Congress that Patrick Henry announced that the colonies were in a state of nature: "Government is dissolved. . . . Where are your landmarks, your boundaries of Colonies? We are in a state of nature, Sir. . . . The distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders, are no more. I am not a Virginian, but an American."\(^\text{68}\) In line with this sentiment, it became customary to refer to "the people of these United States," "your whole people,"

\(^{65}\) Ibid., 83.


\(^{67}\) Ibid., II, 248-164, especially at 449-463.

\(^{68}\) Adams, op. cit. supra note 57, II, 366-367.
"the people of America," "the liberties of Americans," "the rights of Americans," "American rights," "Americans." Here is the identity of Americans everywhere in possession of the rights of men. Natural rights were in the process of becoming national rights and natural law was being made into constitutional law.

One of the most beautiful expressions of the natural rights of man to be found in any language was made by Alexander Hamilton: "The sacred rights of mankind are not to be rummaged for among old records or musty parchments. They are written, as with a sunbeam, in its whole volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power." Again he said: "When the first principles of civil society are violated, and the right of a whole people are invaded, the common forms of municipal law are not to be regarded. Men may then betake themselves to the law of nature; and, if they but conform their actions to that standard, all cavils against them betray either ignorance or dishonesty. There are some events in society, to which human laws cannot extend, but when applied to them, lose all their force and efficacy. In short, when human laws contradict or discomfit the means which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void."

One of the most learned lawyers of the revolutionary period was James Wilson of Pennsylvania, sometimes designated the first professor of law in America, one of the framers of the constitution of the United States, leading advocate of its adoption in the ratifying convention of Pennsylvania, and appointed a member of the Supreme Court by George Washington. Wilson regarded the law of nature as forming a natural constitution for man. He said: "The law of nature is immutable; not by the effect of an arbitrary disposition, but because it has its foundation in the nature, constitution, and mutual relations of men and things." "The law of nature," he said, "is universal." He claimed it had "its foundations in the constitution and state of man. . ." "This law, or right

70. Works (Lodge ed. 9 vols. 1885), I, 108. Italics supplied.
71. Ibid., I, 129. Italics supplied.
72. George Wythe of Virginia is also called the first professor of law in America. Wilson taught law at the University of Pennsylvania and Wythe at Williams and Mary.
74. Ibid., I, 125.
reason,” he said, “as Cicero calls it, is thus beautifully described by that eloquent philosopher. ‘It is, indeed,’ says he, ‘a true law, conformable to nature, diffused among men, unchangeable, eternal. By its commands, it calls men to duty; by its prohibitions it deters them from vice. To diminish, to alter, much more to abolish this law, is a vain attempt. Neither by the Senate, nor by the people, can its powerful obligations be dissolved. It requires no interpreter or commentators. It is not one law at Rome, another at Athens; one law now, another hereafter; it is the same eternal and immutable law, given at all times and to all nations: for God, who is its author and promulgator, is always the sole master and sovereign of mankind.’”75 Wilson, therefore, believed unequivocally in the supremacy of natural law with all of its implications.

He disagreed with Blackstone’s definition of positive law as “the command of the sovereign.” He says Blackstone “cites the authority of no English court nor of any English preceding writer, lawyer, or judge. Indeed, so far as I know, he could cite no such authority.” In fact he says Blackstone’s “definition stands entirely unsupported in point of authority.”76

He believed in the contract theory of the state. Civil society, he said, is established by “the voluntary union of persons.” “It is from this union of wills and strength that the state or body politic results.” In the social compact, he said, “each individual engages with the whole collectively, and the whole collectively engages with each individual.” The purpose of this union is “to regulate, with one common consent, whatever regards their preservation, their security, their improvement, their happiness.” The union or state or body politic is established by “the convention or consent of the members, who compose it.”77 The contract theory of the state, inherent in the doctrine of natural law, was one of the basic concepts of American constitutionalism. It was the meeting of this requirement that caused American constitutions to be submitted to the people to obtain their consent and to give them the nature of a fundamental law as a superior statute emanating from the people themselves and not from a legislative body.

He believed that “the natural rights and duties of man belong equally to all.”78 He explained, however, that “when we say that all men are equal; we mean not to apply the equality to their vir-

75. Ibid., I, 125.
76. Ibid., I, 162.
77. Ibid., I, 272.
78. Ibid., I, 275.
EVOLUTION OF CONSTITUTIONALISM

While James Wilson was undoubtedly the most able expositor of the underlying principles of American constitutionalism, it was Thomas Jefferson that gave *immortality to the rights of man* in the Declaration of Independence—the most famous state paper and the most frequently quoted document which civilization has produced. His classic and almost poetic phrasing of the doctrine of natural law has become a universal inspiration to man to assert his natural rights of freedom and independence and to assume the prerogative of establishing his own political institutions. "We held these truths to be self-evident," says the Declaration, "that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to substitute new Government laying its foundation on such principles and organizing its powers in such form, as to them shall seem the most likely to effect their safety and Happiness."

Here in this brief quotation is found the essence of natural law and American constitutionalism: (1) the inalienable rights of man—the basis of our bills of rights; (2) the doctrine of delegated powers; (3) the contract theory of the state; (4) popular sovereignty—the basis of a fundamental law; (5) the right of altering, changing or abolishing government—the right of revolution guaranteed by the amendment processes of American constitutions; and (6) by implication, the doctrine of judicial review inherent in a fundamental law based on "the consent of the governed."

"Every man, and every leader of men on earth," said Jefferson, "possess the right of self government. *They receive it with their being from the hand of nature.* Individuals exercise it by their single will; collections of men by that of the majority; for the law of the majority is the natural law of society." "It is to secure our rights," he said, "that we resort to government at all." "The idea is quite

79. Ware v. Hylton, (U.S. 1797) 3 Dall, 199, 232.
80. Commager, op. cit. supra note 66, 100.
81. Works (Ford ed.), 205.
82. Ibid., VII, 4.
unfounded," he said, "that on entering society we give up any natural rights."83 "All natural rights," he counseled, "may be abridged in their exercise by Law,"84 but "Laws abridging the natural right of the citizen should be restrained by rigorous constructions within their narrowest limits."85 "The mass of the citizens," he advised, "is the safest depository of their own rights."86

It would require a volume to analyze the literature on natural law produced by the founding fathers. The fact is every educated American was grounded in natural law.

(2) Putting Theory into Practice

Separation from Great Britain furnished the forefathers with the opportunity to correct the defects of medieval constitutionalism. There were two fundamental weaknesses in constitutionalism as late as 1776: (1) Some process had to be devised for the creation of a fundamental law or a constitution independent of legislative action, and (2) some means had to be created to maintain the supremacy of the constitution.

As early as 1774, in the same number of Common Sense in which he urged the colonies to declare their independence of Great Britain, Tom Paine suggested that they establish a fundamental law as a basis for a system of government. He urged the calling of a "Continental Conference" whose task he described as follows:

"The conferring members being met, let their business be to frame a continental charter, or charter of the United States (answering to what is called the Magna Charta of England) fixing the number and manner of choosing members of Congress, members of assembly, with their date of sitting; and drawing the line of business and jurisdiction between them: Always remembering that our strength is continental, not provincial. Securing freedom and property to all men, and above all things, the free exercise of religion, according to the dictates of conscience; with such other matter as it is necessary for a charter to continue. . . . But where, say some is the King of America? I'll tell you, friend. He reigns above, and doth not make havoc of mankind like the royal brute of Great Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon; by which the world may know, that so far as we approve of monarchy, that in America the law is King."87

83. Ibid., X, 32.
84. Ibid., V, 206.
85. Writings (Washington ed.) VI, 176.
86. Ibid., VI, 608.
Here is a proposal to substitute the supremacy of a fundamental law for the absolutism of a King. The charter was to be framed by a constituent convention to give it the character of a fundamental law. While this proposal was both suggestive and prophetic in its constitutional aspects, it was premature in its national character because at this stage of the game the forefathers were more interested in the preservation of the right of local self-government than they were in separation from Great Britain and the formation of a new nation.

It was inevitable that American constitutionalism would first be established on a state basis for several reasons: first, the American Revolution was in final analysis a contest for state rights; second, the forefathers regarded the preservation of the rights of their assemblies, or "constitutions," as they called them, as the surest means of preserving the rights of men; third, in arguing for the right of their assemblies, they were not speculating in philosophy, but were emphasizing the importance of local institutions which they had and which they meant to preserve at all hazards. During the last peaceful year of the relation of the colonies to the mother country—the eventful 1774—John Adams, James Wilson and Thomas Jefferson—three of the most learned lawyers of the colonial bar—wrote highly juristic documents, asserting the doctrine of state autonomy. While Wilson's pamphlet was the most legalistic and convincing, Jefferson's *Summary View of the Rights of British America* (1774) is better known and it was prophetic of the Declaration of Independence. Its doctrine of states' rights became a principle of our dual federalism and a permanent issue in American politics and constitutional law. In substance Jefferson's contention, with which Adams and Wilson agreed, was that Parliament had no power whatever to legislate for the colonies on any matter, that they were mutually independent political societies, equal partners with England in a commonwealth, that each political unit or state of the commonwealth had its own parliament which was the supreme law-making power within its territorial limits, and that the only common connection was a monarch, who was "no more than the chief officer of the people, appointed by the laws and circumscribed with definite powers to assist in

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working the great machine of government erected for their use."\(^{90}\)

It was decreed by history, therefore, that constitutional government in America would first assume the form of state institutions. In fact, this movement began before separation was announced. As early as May 10, 1776, Congress, which was only an executive council of state diplomats, advised the colonies (not yet independent states) to establish new governments "such as shall best conduce to the happiness and safety of their constituents." But the transformation of a colony into a constitutional state in accordance with the principles of natural law announced in the Declaration of Independence was a task that challenged the political genius of the wisest statesmen of eighteenth century America. It meant making the doctrines of Coke and Locke into constitutional law. How could a government be established in harmony with the principles of the revolution? How could a government deriving its powers from the consent of the governed be brought into existence? How could this age old theory be transformed into practice? It had never been done.

The Town Meeting of Concord, Massachusetts, on October 22, 1776 announced the formula for accomplishing this great achievement. It first announced

"that the supreme Legislative, either in their Proper Capacity or in Joint committee, are by no means a body proper to form and establish a constitution or form of government; for reasons following: first, because we conceive that a constitution in its proper Idea intends a system of Principles Established to Secure the Subject in Possession and enjoyment of their Rights and Privileges against any Encroachments of the Governing Part. 2—Because the same body that forms a constitution have of consequence a power to alter it. 3—Because a constitution alterable by the Supreme Legislative is no security at all to the subject against any encroachment of the Governing part on any or on all of their Rights and privileges."\(^{91}\)

Here is the suggestion that a constitution must be a fundamental law, that it must be paramount to a legislative act, and that, therefore, the legislature is not the proper body to draft and adopt a constitution. This suggestion struck at the most fundamental weakness of medieval constitutionalism. The meeting then suggested the procedure for the accomplishment of its program: (1) that the legislature of Massachusetts be instructed by the people at the next election to call an election of delegates to a state constitutional

\(^{90}\) Writings (Library ed.) I, 185.

\(^{91}\) Commager, op. cit. supra note 66, 105.
convention; (2) a popular election of delegates to a state constitutional convention for the sole purpose of drafting a constitution; (3) drafting of a constitution by the convention and submission of it to the people; (4) the adoption of the constitution by the people.

None of the first state constitutions was adopted by this process due to war conditions and lack of knowledge of the proper procedure. The constitutions of Virginia, South Carolina, New Jersey, Rhode Island and Connecticut were adopted by legislatures without being submitted to the people. In the other eight states the constitutions were framed and adopted by the existing conventions or congresses by virtue of authorization by the people but in no instance were these constitutions submitted to the people for adoption. New Hampshire was the first state to use a convention for the sole purpose of framing and submitting a constitution to the people. This proposal was made in 1778 and was rejected by the people. Massachusetts in her third effort at constitution making in 1780 became the first state to propose and adopt a constitution by the process outlined by the Concord Town Meeting. The process satisfied the requirements of a fundamental law and the social contract theory of the origin of the state—a corollary of the doctrine of natural law.

By 1784 the constitutional convention was recognized as a firmly established body separate and distinct from the legislature and as the true agent of the people in their constituent capacity. The constitutions of Pennsylvania (1776), Vermont (1777), Massachusetts (1780), and New Hampshire (1784) provided for the future use of conventions. The discovery of the constituent convention, says McLaughlin, "is the most significant fact of the American Revolution."92

While the discovery of the constituent convention completed the process for the establishment of a fundamental law, there still remained the important matter of its interpretation. As Madison said, there is the problem of obliging the government to control itself. While a dependence of the government on the people, he said, was the primary means of its control, "experience has taught mankind the necessity of auxiliary precautions."93 By "auxiliary precautions" as means of obliging the government to control itself, Madison had in mind the principles of separation of powers and

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checks and balances. The latter he called a "partial agency" of each department in the exercise of the powers of the other two.

When Gouveneur Morris of Pennsylvania was leaving Independence Hall after the Constitution of the United States had been drafted and signed, a lady said: "Mr. Morris, have you given us a good constitution?" "That depends, Madame, on how it will be construed." Interpretation of a document is undoubtedly more important than the writing of it. While the Bible called for exegesis, a fundamental law requires an expounder. Who was to interpret American Constitutions? Legislative bodies or the courts? While continental Europe had adopted our method of creating a fundamental law, by conventions and recently in France by popular approval, it has pursued the policy of allowing legislative bodies to interpret the constitution and thereby to be judge of their own powers. Latin America and the English Dominions, however, have adopted the American practice of judicial review—the most widely copied feature of our constitutionalism.

The adoption of the principle of judicial review as one of the "auxiliary precautions," as a means of obliging the government to control itself and to preserve the principle of a fundamental law and a limited government, was undoubtedly the most significant contribution that our forefathers made to constitutionalism. It culminated the movement for the establishment of constitutional government. The story of its adoption has been too well told to bear repeating.94

This principle was forged in the heat of the great constitutional debate between American and English statesmen over the nature of the British constitution. In his argument in the Writ of Assistance case in 1761, James Otis, "a flame of fire" according to John Adams, said that "An act (of Parliament) against the constitution is void," and "the executive courts must pass such acts into disuse."95 Sam Adams in 1768 said: "It is the glory of the British Prince and the happiness of all his subjects, that their constitution hath its foundations in the immutable laws of nature, and as the supreme legislature as well as the supreme executive derives its authority from that constitution, it should seem that no laws can be made or executed that are repugnant to any essential law in nature."96 Again he said: "The supreme Legislature, in

95. 8 Viner 118.
96. Writings (Cushing ed.) I, 190.
every free state, derives its powers from the constitution; by the fundamental rules of which, it is bounded and circumscribed."\textsuperscript{97} No government according to Locke has a right to do as it pleases. He said that "The law of nature stands as an eternal rule to all men, legislators as well as others."\textsuperscript{98} Blackstone said, "This law of nature is of course superior in obligation to any other. It is binding all over the globe in all countries and at all times. No human laws are of any validity, if contrary to this."\textsuperscript{99} "A Constitution," said Hamilton, "is, in fact, and must be regarded by the judges, as a fundamental law."\textsuperscript{100}

\begin{footnotesize}
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\item \textsuperscript{97} Ibid., I, 134-135.
\item \textsuperscript{98} Two Treatises on Civil Government, Ch. XI, Sec. 135.
\item \textsuperscript{99} Commentaries (1768 ed.) I, 41, 91.
\item \textsuperscript{100} The Federalist (Bourne ed.) II, 101.
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