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The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law

M. E. Bradford

When in 1787 a carefully chosen body of distinguished citizens from twelve of the original British colonies in North America met to consider how they should go about improving or replacing their existing bond of “perpetual union” in the Articles of Confederation, they enjoyed as a basis for their deliberations an agreement on what they meant by a constitution: a “fundamental law.” Both for the outlines and for the details of that concept they went primarily to the example they knew best: to the history of the British constitution, in whose name they had recently achieved an independence ironically outside of the protection of the authorizing authority. Contrary to what Sir Henry Maine observes in his Popular Government, the Constitution of the United States is not “a modified version of the British Constitution . . . which was in existence between 1760 and 1787.”¹ For its prototype is the minimal constitution put aside with the passage of the Stamp Act, the constitution of 1688. It was a bond by way of inheritance, shaped more by corporate memory than by first principles: a legal bond, composed of a few texts, favored glosses upon these texts, and a disposition or habit of mind most easily identified with the Whig magnates of eighteenth-century England—magnates whose spokesmen put text, gloss, and memory together.

Because it is the current fashion to read history backwards, tracing the records of actions and attitudes back from our time through 1763 instead of forward from, shall we say, the Norman Conquest, it is predictable that this generation should persist in construing the United States Constitution in a vacuum, that they should forget how most of our American forefathers cherished the English constitution and did not change their opinion of its merits just because Parliament and the ministers of King George III failed to observe some of its provisions. When we see the framers in proper historical context, it becomes clear that their handiwork, like its prototype, “was the result not merely of philosophy, but of an historical upgrowth.”² Sir Herbert Butterfield, in


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remarking the difference between the political spirit of Western man since the French Revolution and how he had once, long before 1789, responded to the intractable difficulties of human coexistence and social order, has observed that “men make gods now, not out of wood and stone, which though a waste of time is a comparatively harmless proceeding, but out of abstract nouns, which are the most treacherous and explosive things in the world.” Because they came out of the American version of the English experience still admiring the nonideological British constitution, because (in most cases) they pled no larger arguments for revolution than the law, and at worst spoke of no authority beyond its text (saving only the right of self-preservation), the members of the Great Convention divinized no abstractions, avoiding with conscious intent the now familiar language of multitudinous “rights” and thus the idolatry of which Butterfield has written.

In an era that urges us from every quarter to accept the notion of the United States Constitution as a bundle of general propositions about the a priori purpose of government and its function in fulfilling the expectations generated by a universal human nature; in an age that recognizes in the fundamental sovereign law little more than a set of anterior, programmatic social, economic, and political goals to be achieved by inventive constructions of the silences of the framers, it is difficult to over-emphasize the English constitutional inheritance of the American people. For, as its enemies obliquely proclaim in noisy denials of its importance, a public memory of that inheritance has heretofore stood almost alone in obstructing the way toward certain kinds of chaos. It is a memory that precludes mischief already in motion and other mischief (judicial and legislative) soon to be attempted in the name of “constitutional principles”—misnomers extrapolated from the “sacred text” by people who know next to nothing about its origins and have no intention of correcting what they find to be, for their own purposes, a useful ignorance.

The Whig legalists who authored and then ratified the American Constitution did not, however, proceed at so great a remove from the spirit of modernity out of ancestral piety or by reason of the British constitution’s overall impact on their lives (though it had been clearly beneficent). Instead, they were moved to emulation by its specific virtues which they had come to value more and more as they fought to protect them during the Revolution and then struggled to institutionalize them as part of American law once the fighting had ended. Perpetuation was their objective, even sometimes when they modified the British original—as in making their Constitution entirely a thing written down.

It has been argued that as much as three-fourths of the document approved by the several states (including the Bill of Rights) makes no sense apart from an intimate familiarity with British legal history.
Studies of the Constitution written before 1930 emphasized these continuities.\(^4\) I will in passing mention only a few.\(^5\)

From the English Bill of Rights we derive our guarantees of regular sessions of Congress, our rules prescribing that money bills originate in the House of Representatives, our protections for the privileges of Congress to regulate itself, many limitations on the president's power, and the elaborate provisions for the impeachment of government officers of every description, including judges. The language in the Constitution protecting the writ of habeas corpus comes from the English Act of 1679 (31 Chas. 2, c. 2, 27) and before that from Magna Carta. The English Bill of Rights is also reflected in the First, Second, Fifth, Sixth, and Eighth amendments to the United States Constitution. The First and Third amendments also derive from the glorious Petition of Right (3 Chas. 1, c. 1, 1) of June 1628, which King Charles I made law by giving his assent to it while sitting in the midst of his Parliament. The definition of treason is, of course, from Edward III's 1352 Statute of Treasons—and a protection of the subject against political prosecutions. For protection of the right to petition and assemble and of the particular right not to be amerced except through a judgment of one's peers, according to the law of the land, the source is antiquity itself, the Great Charter, especially Chapter 39 in the original text signed by King John. There the Latin of 1215 declares:

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlageretur, aut exulter, aut aliquo modo distratur, nec super eum ibimus nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae.\(^6\)

Sir Edward Coke, in *The Second Part of the Institutes of the Laws of England*, renders this most widely accepted declaration of our most fundamental guarantees of the liberties (as opposed to *Liberty*) of the subject in these terms:

that no man be taken or imprisoned but *per legum terrae*, that is, by Common Law, Statute Law or Custume of England... No man shall be disseised... unless it be by lawful judgment, that is, verdict of his equals (that is men of his own condition) or by the Law of the Land (that is to speak it once for all) by the due course, and processe of Law.\(^7\)

Attached to Coke's rendering of the essential passage are others linking the king's majesty and the necessities of the royal purse with the orderly processes through which a free people tax themselves. Finally, in the matter of the authority of the law over the will of princes and parliaments, the ground for even thinking of the possibility of a constitution, there are the Jacobean digests which, together, presuppose a sovereign law. In the language of Dr. Bonhams's Case (8 Co. Rep. 107a, 114a [C.P. 1610]), we are assured with respect to any positive law or judgment "against common right and reason [that]... the common law

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will control it and adjudge such act to be void." From this matrix of promulgations, charters, customs, cases, and prescriptions emerges most of the particular properties, features, and provisions of the United States Constitution, except for those that have to do with the specific shortcomings of the Articles of Confederation, specific problems of the newly independent nation, republicanism, or federalism. And even the latter had its origins in the operations of the British constitution among Englishmen in North America, as had (according to Madison) the idea of judicial review as a way of preserving the Constitution whenever it was threatened—a procedure inspired by the examination given to the acts of American legislatures and governors by the Board of Trade or the ministry in power. To approach the text of the framers' Constitution without knowing the history of the Domesday Book, the Wars of the Roses, the attainder of the Earl of Strafford, or the Glorious Revolution; to read it without some introduction to the English Civil War of the 1640s and the eighteenth-century debate about the nature of rightful authority over free Englishmen is to misconceive the purpose embodied in the new American Constitution as it stood in 1791, especially where the document embodies improvements on its model, improvements that British statesmen had been talking about and proposing for generations: privileges and immunities, and proscriptions of ex post facto laws, bills of attainder, and the like.

What unites this partial survey of connections and derivations is precisely that they concern primarily discrete, particular commitments, not generalized positions. Contained in these guarantees is no equal protection or general welfare or necessary and proper fanfare; yet the commitments are most valuable precisely because they are not subject to distortion by construction and extrapolation into whatever judges or legislatures, for extraconstitutional reasons, might make of them. But the most important of these established reasons for the framers' honoring and valuing the inherited constitution made over time by their ancestors was its protection of the political liberty of the subject, the freeholder, in the exercise of his customary, inherited, and chartered rights of self-government. The hope of the members of the Philadelphia Convention of 1787 was to frame a document that would do the same for themselves and for succeeding generations of Americans.

Consideration of the impact of the British constitution on the workings of the Great Convention should not begin with the subject proper, however, but with the hundred and fifty years of colonial history of British North America as an extension and completion of an antecedent identity. Americans, we must remember, had a long and unbroken experience of adapting the British original to their peculiar purposes before they undertook to replace the prototype with a unifying, homemade substitute. As no less a critic than Edmund Burke maintained, the
original United States Constitution has the virtue of being a version of the British constitution “well adapted to its circumstances.” By preserving what was useful from the inherited structure of English government as it stood in 1787, by utilizing the “republican education” achieved in the process of governing themselves in colonial British America, the framers authored a revision of the total system that connected them as countrymen. It is a revision that has the merit of not attempting to “conquer absolute and speculative liberty,” being satisfied with a lesser and more durable ambition. That lesson Englishmen had learned before they reached these shores. They relearned it thoroughly in governing themselves in all but a few respects as overseas subjects of the Crown in the New World, under various royal charters. Led by appointed and elected chief magistrates, Americans enjoyed a version of self-government that provided for no taxes but such as they put upon themselves. The lack of a resident nobility and a complete religious establishment, along with the remoteness of the king and his imperial machinery, made them a different sort of Englishmen. But not too different. For even three thousand miles from Land’s End, the British constitution was their context for thinking about politics—a constitution already (according to John Adams) “republican,” but given an even more republican flavor by distance, diminution, and distinctions of circumstance in the New World.

English colonials in North America, as has been demonstrated in recent scholarship, developed a great interest in constitutional questions during the Glorious Revolution and took sides in the significant disputes about the relation of prince to fundamental law within the larger English tradition. They preserved their place within the patrimony of an inherited political system by transplanting and applying the common law of England to their own unique situations and by deriving, theoretically, the legitimacy of their own local systems of government from their origins in the acts of the Crown in Parliament or the antecedent exercises of unquestioned royal prerogatives. Their laws were the outworks of a general constitution, provisions of which applied only to them. Other components made outside the mother country might be applicable only to Scots or Canadians or Irish—with the ancient constitution itself resting underneath them, linking into oneness all such local variety. In the days of the Stamp Act Crisis, during 1765–66, all freemen on this side of the Atlantic invoked the quintessentially English idea of a sovereign law that personified the national character by being derivative of the entire national experience: the law of Henry de Bracton, which both makes and unmakes princes, a power “superior” to the king, “through which he has been made king.” All of the British colonies in North America invoked the constitution against Parliament’s unsanctioned claims of supremacy. They insisted that Parliament could not vote as it wished if in violation of fundamental law. If the English constitution
were to be strictly observed by all who had authority, Americans had nothing to fear. So said John Dickinson and Daniel Dulany and other protesting pamphleteers. Their professed loyalty was to a legal inheritance and to the institutions designed to give it force—incidentally, conditionally, according to the cases—so long as those institutions served the ends for which they came into being. The British constitution meant mixed government and a separation of powers with a local legislature for all local issues: a little Parliament with courts attached, supported by American taxes. Therefore, it meant a check upon despotism, which everyone deplored as a condition to be avoided, the antithesis of the rule of law. The Crown would sometimes be represented by governors, by the Board of Trade, or various ministers. The King’s Bench (his judges) either enforced the constitution or forfeited their authority. Out of these adaptations emerged a fully-developed notion of a fundamental law, logically prior to the assertion of legislative supremacy or the royal prerogative or even abstract principle. In arguing against the Sugar Act, the Stamp Act, and subsequent assertions of a remote, hostile, and arbitrary power, Americans prepared themselves to envision a particular constitution of their own, a fundamental law that would preclude such errors; and they also developed an idea of what it would be like to observe such a law.

While it shaped their side of the argument with Whitehall and George III’s ministers, propelling them toward pressing that case to its logical conclusion in an assertion of the right of independent self-preservation within the British constitution as it stood after the abdication of James II (minus monarch, and much else besides), the version of this constitution, preserved among its American apologists, also acted as a check on how much their “struggle” might attempt or signify in the way of radical change in the local operations of their laws, their economic and political systems, and the rest of their culture. A revolution on these grounds could be revolutionary only up to a point; and once independence had been formalized in the September 1783 Treaty of Paris, the same reverence for the English constitutional achievement surrounded, conditioned, and provided a language for reflection on their own legal necessities. Of course, there were radicals at the fringes of the American body politic—even a few close to the center—and a number of them would have been pleased to believe with Patrick Henry (though for very different reasons) that what distinguished the new American government was that it had “not an English feature in it.” But among those capable of coherent, consistent political thought (as opposed to mere protest), there were not many radicals, and those few who did enjoy a temporary influence worried other patriots no end, since the characteristic concern regarding constitutions had to do with setting limits on change.
As a sample of the operation of these restraints, we should consider the 1774 speech of James Duane of New York in which he recommends, as opposed to some teaching on natural equality, "grounding our rights on the laws and constitution of the country from whence we sprung." Facing the prospect of independence, Duane declares, "Let us hope... to rise in time to a perfect copy of that bright Original [the British constitution], which is the envy of the world!" An equivalent to Duane's Old Whiggery can be found in the eloquence of Carter Braxton of Virginia, who in May of 1776 urged independence upon the citizens of the Old Dominion from the example of 1688—but no more than independence:

However necessary it may be to shake off the authority of arbitrary British dictators, we ought nonetheless to adopt and perfect that system, which England has suffered to be so grossly abused, and the experience of ages has taught us to venerate. . . .

This constitution and these laws have also been those of Virginia and let it be remembered that under them she flourished and was happy. The same principle which led the English to greatness animates us. To that principle our laws, our customs and our manners are adapted, and it would be perverting all order to oblige us, by a novel government, to give up our laws, our customs, and our manners. . . .

The testimony of the learned Montesquieu is very respectable. "There is," he writes, "one nation in the world that has for the direct end of its constitution political liberty."

John Jay of New York, at this stage in his career, sounds very like his ally from Virginia. First he objects to any rush toward independence because he doubts "that all government is at an end"—that George III and his ministers have broken all bonds between Great Britain and its colonies on these shores as James II had forfeited his royal authority in the mother country almost ninety years earlier. Before the Continental Congress he declares that the "measure of arbitrary powers is not yet full and I think it must run over before we attempt to frame a new Constitution." Later, when that measure had been accomplished, Jay went forward to a secession "in defence of old liberties, not in search of new." Thus, looking back in 1800, he describes not only himself but the entire Continental Congress from 1774 to 1776. In letters of the time he often invokes the law of self-preservation. And in the October 1775 "Address to the People of Great Britain," he appeals to the sanction of inherited rights, following the pattern of other well-respected Whig resistance to tyranny.

Further examples of piety toward English institutions among a people at war with Great Britain are preserved in John Drayton's Memoirs of the American Revolution from Its Commencement to the Year 1776. The 25 June 1775 "Address to His Excellency, The Right Honorable Lord William Campbell" from the Provincial Congress of
South Carolina was probably written by John Drayton’s father, William Henry Drayton, the principal theorist of the Revolution for his very conservative community. Yet what Drayton says here is echoed at other times by John Rutledge, Henry Laurens, Charles C. Pinckney, Edward Rutledge, and Rawlins Lowndes: that Carolinians have, even as they stand ready to fight, “no love of innovation—no desire of altering the Constitution of Government—no lust of independence”; that “Carolinians wish for nothing more ardently than a speedy reconciliation with our mother country, upon constitutional principles”; that Carolinians love the British constitution, even in “taking up arms” as the “result of dire necessity, and in compliance with the first law of nature”.

It is a simple matter to find the same kind of Whig doctrine coming from leading figures in each of the original thirteen states. Edmund Pendleton of Virginia explains to a younger countryman that the leaders of the Revolution wanted only a “redress of grievances, not a revolution of government.” In other words, they wished matters put back as they had been. And James Iredell of North Carolina writes to his angry Loyalist uncle in Jamaica that Americans in 1776 acted only as Englishmen, under an English constitution, even in achieving independence. He continues, “The same principles which led to the steps taken against royal authority [in 1688] would justify any others.” Elsewhere he adds that no oath of allegiance to a prince is binding if it is “not consistent with the safety and liberties of the people.” Political apologetics in this vein are the commonplace matter of thousands of letters to friends and relatives in England written by new Americans who were still proud of being English and protective of their political inheritance under Mr. Burke’s version of a constitution. Their originally English voices were also heard in redefining the relation of American beginnings to the great political traditions of the mother country.

The next stage in this process of perpetuation and re-embodiment belongs to the period when, while fighting out the Revolution with their kinsmen from Great Britain, our forefathers wrote new constitutions for the thirteen former colonies. The notable characteristic of these new constitutions is how little they differed from the charters they emulated and replaced. Willi Paul Adams, the authority on these documents, writes:

The central role played by British constitutionalism in justifying colonial resistance was carried over into American thinking when the colonies began writing their own in 1776. The basic premise of the colonists’ argument was that the political order created in 1688, though formulated only in statutes [which appealed to other statutes, petitions, rulings, and charters], could not be changed, even by a majority decision in Parliament approved by the Crown. This English Constitution, the colonists argued, was a permanent code to which the stewards of government power—the King and Parliament—were subject and that they had no authority to alter.
British Example

Of course, there were bills of rights in some of these constitutions, and some of them spoke (as the British constitution did not) of the generic rights of man—or at least of rights available to all, once they enter into a social condition. Furthermore, a few American radicals had lost their respect for the British constitution before the colonies won their freedom, while others among their countrymen doubted that it was relevant to their problems as citizens of a new republic. The latter opinion was supported even by several members of the Great Convention. Finally, eighteenth-century Americans read the British constitution in several different ways: in the fashion of Blackstone, according to the method of Lord Bolingbroke, or following the manner of David Hume. 22 For some of our forefathers, the British constitution was an illustration of the medieval doctrine of the mixed regime, with the great estates of King, Lords, and Commons interacting with and through each other. Others interpreted the same evidence so as to find in the British tradition an even greater protection against tyranny in the separation of executive, legislative, and judicial power. Yet another, smaller group was convinced that the secret of their inheritance from the mother country was to be found in the balance between “country” and “court” parties. Despite this variety of interpretative strategies employed by the framers, they understood the ancestral constitution and used it in different ways, according to their political assumptions.

There is a temptation to prescind from this spread of evidence an attenuation of British constitutionalism among George III’s erstwhile subjects in North America. Yet even in the first years of their collective existence as part of a new political order (novus ordo seclorum), most thoughtful Americans invoked the British constitution primarily to explain why the Articles of Confederation would not be enough to foster their country’s tenuous internal order, inner strength, and social cohesion. However, they expected even after revisions in Philadelphia that their government, once reformed, would probably continue to preserve the pattern of jealously independent colonies in tension with a distant and high-handed central authority. Though the federal government would not be so far away as Whitehall or, with its power to tax directly, so restricted in its influence, it was perpetually on trial, thanks to the nature of federalism itself and by virtue of its status as the creation of the sovereign people of the sovereign states. Americans in 1783–86 enjoyed spinning out arguments about the justice of their resistance to tyranny and thus about the proper role of British law in their lives while they had been British subjects. Particularly in New England, the great men of law (Theophilus Parsons, Francis Dana, James Bowdoin, Theodore Sedgwick) feared that the Revolution would continue beyond independence into “democratic excesses.” John Adams, especially, admired the fundamental law of Great Britain, describing it as “the most
stupendous fabric of human invention” and a greater source of “honor to human understanding” than any other artifact in the “history of civilization.” In this discourse, over against Captain Shays and his “rebellion,” stands the authority of the stable social teaching of the British constitution. Adams’s opinion of the value of a mixed constitution summarizes his region’s commitment to English continuity, especially as he writes of these subjects in *A Defence of the Constitution of Government of the United States of America.*

References to the British constitution are scattered throughout the records of the Great Convention and in the pamphlet literature surrounding that assembly. Indeed, they occurred so frequently that some of the delegates—who in many respects preferred to emulate the British example—registered complaints about their number. These references are basically of two kinds: those that assume the complete usefulness of comparisons to English originals, even when they are incomplete and partially misleading; and those that object to too much dependence on antique analogies and blind retrospection, even though they recognize their role in the Convention. For John Dickinson, the British constitution was a “singular and admirable mechanism,” a creation of the national experience, which is always of more value than the fruits of a priori rational speculation. Charles Pinckney called it “the best Constitution in Existence.” Edmund Randolph spoke of its “excellent fabric,” which he hoped the framers would copy to the best of their ability. The point is that such sentiments are a major component of the discourse within the Great Convention, not exceptional anglophile outbursts. Forrest McDonald writes, “Whatever their political philosophies, most (though by no means all) of the delegates sought to pattern the United States Constitution, as closely as circumstances would permit, after the English constitution.” What is most clear about affirmative comments on America’s continuing link to a British inheritance is that they focus on the advantages of the mixed regime, with roots reaching all the way back into medieval history, and that they predicate within that inheritance a level of political liberty and shared self-respect not easily preserved in a simple political structure—monarchy, democracy, or oligarchy—of any of the classical varieties. Invariably, whether the speakers were Federalist or Anti-Federalist, the leitmotif in their song of praise for inherited ways, modes, and institutions was preserving a balance of liberty with order that can be sustained against enemies within and without: a balance provided in the eighteenth-century British constitution through a sovereign law, coming down from the Magna Carta, the Forest Charters, the Petition of Right and the Bill of Rights, and a distribution of power between King, Lords, and Commons, mixing the characteristics of various kinds of government.
British Example

In both the Great Convention and in The Federalist, there are extensive comparisons of the American president as chief executive with the functions of the British Crown, and of the House of Representatives with the House of Commons. In these debates and apologetics, differences are developed to show our system as a perfection of its prototype, not as a rejection of the patrimony. In a passage of even more startling applicability to this exposition, John Dickinson of Delaware draws a direct comparison between the United States Senate and the House of Lords—since senators are expected to have a long tenure in office, to represent "rank," property, and establishment, and to check the democratic enthusiasms of a directly elected lower house. According to Dickinson, senators would represent territory, places, as do the peers of England, but not populations, becoming "as near as may be to the House of Lords in England." When the architects of our political identity as a people both one and many set out to define their enterprise, they turned to the constitution of Great Britain as it stood from 1688 to 1750 and to their own colonial experience under that constitution—not to Greek leagues, Holland, Venice, Switzerland, and Genoa; not even (though they respected it immensely) to the Roman constitution under the Republic. Naturally they looked first closer to home and merged the lessons from other quarters into their readings of Anglo-American history. But what they might think and how far they might reach toward a republic of abstract proposition and ideological purposes was greatly limited thereby.

What sounds in all this Old Whig music is, of course, not the individualistic sirens' song of Locke or the French philosophes but the organ tones of Bracton, Fortescue, Sir Matthew Hale, Sir Edward Coke, and the independent gentlemen who preserved Magna Carta, framed the Petition of Right, and required An Answer to XIX Propositions from Charles I: the tradition of the mixed regime, the balanced constitution, in which Lex is Rex: the law (meaning the nation's soul, embodied in customs and charters, expectations and language) as sovereign, rooted in the very nature of things. That kind of law is a continuum, an unfolding harmony which, as Ellis Sandoz has argued recently, identifies the American Revolution and its law-giving aftermath as the last event in Renaissance political history. The beginnings of its modern antitype, of another, more abstract species of law, came a few years later in France with the Rights of Man and Citizen Robespierre. When Gouverneur Morris, Charles Pinckney, Dickinson, Hamilton, Randolph, Pierce Butler, George Mason, and James Madison invoked the British constitution among their fellow framers, they were merely recalling their more speculative colleagues to a known and recognized norm that no amount of theoretical ingenuity could have contrived, and to a
limited, antiabstractionist view of their lawmaker function. So much of the question before them had been settled long before they were born. That such was a view most of them accepted can be proved from the Constitution they assembled—even though they were very proud of how much they had incidentally improved on the original (in such achievements as a solution to the problem of extended republics) and of the way in which they had converted it into a mutually binding text, with a negative on both the states and the central power.

After the United States Constitution had been drafted and sent out for examination by the states, British constitutional history became a major influence on how it was interpreted by both advocates and adversaries. In North Carolina, Massachusetts, and New York (and in assorted pamphlet literature), pointed comparisons between analogous components of each system were commonplace elements of ratification debates. In Virginia, under the watchcare of Patrick Henry, the inherited rights of Englishmen qua Americans, the chartered rights, became the issue in a criticism of what the framers had proposed. Moreover, we can see in the fragments of debate preserved from South Carolina that these rights had an equivalent importance there.

Patrick Henry, the most important of the Anti-Federalists, the man who had set the inertia toward revolution in motion in Virginia as defender of “the spirit of liberty” that Americans “drew . . . from their British ancestors,” called the British constitution “the fairest fabric that ever human nature reared.” Of the Philadelphia instrument he complains, “there is not an English feature in it.”33 Henry frames his objections to the proposed constitution by declaring:

We are descended from a people whose government was founded on liberty: our glorious forefathers of Great Britain made liberty the foundation of everything. That country is become a great, mighty and splendid nation; not because the government is strong and energetic, but, sir, because liberty is its direct end and foundation.34

In the same ratifying convention, in support of the handiwork of the framers, George Nicholas reasoned the other way around: that our Constitution preserves what is of value in the English and also adds improvements. Future president James Monroe, following after Henry’s argument, contended, “The wisdom of the English Constitution has given a share of legislation to each of the three branches, which enables it effectively to defend itself, and which preserves the liberty of that country.”35 Other Virginians contributed to this same set of invocations, honoring the old authority so as to shape the new.

The variety of Henry’s allusions to the British example is extraordinary—almost as if the Revolution had not occurred. But Henry is in
no way more surprising than Patrick Dollard of South Carolina during that state’s ratification convention, or Francis Kinlock, a fellow Carolinian, in a letter written soon after its conclusion. Dollard, living under the Articles of Confederation in a sovereign South Carolina, still speaks of a “birthright” under Magna Carta and of how it has been “made over” by friends of the new constitution.36 And Kinlock, writing to former Lieutenant Governor Bull two days after he had cast his own vote for ratification, summarizes his view of the implications of the new “bond of Union” with “we are getting back fast to the system we destroyed some years ago.”37 These lines represent only a few of many such passages which survive to us in the ratification records of the various states or in the private correspondence of the framers.

If there is one constant in the political discourse of eighteenth-century Americans, it is a generous and undeviating admiration for the British constitution as they knew it. Even the greatest theorist whom they recognized, the Baron de Montesquieu, spoke constantly of the merits of the nontheoretical English system. In everything they attempted from 1765 and the quarrel over the Stamp Act through the drafting and adoption of the original United States Constitution in 1787–90 and the addition to it of the Bill of Rights in 1789–91, our forefathers invoked the authority of that antecedent constitution as it stood in 1689, following the Glorious Revolution. Neither war nor independence diminished this relationship. In the opinion of many scholars, it is an explanation of the essential character of our fundamental law as a sovereign power, expressive of the deliberate sense of the American people, binding them in a lasting way to an inheritance of specific rights and limited governmental authority that runs all the way back to the Great Charter affirmed in 1215 at Runnymede.

It is impossible to understand what the framers attempted with the Constitution of the United States without first recognizing why most of them dreaded pure democracy, judicial tyranny, or absolute legislative supremacy and sought instead to secure for themselves and their posterity the sort of specific, negative and procedural guarantees that had grown up within the context of that (until very recently) most stable and continuous version of the rule of law known to the civilized world: the premise that every freeman should be protected by the law of the land. Sir William Holdsworth, in his History of English Law, contrasts the spirit which we discover in the apologies for the American Revolution and the ideological flavor of what its authors said about making the original United States Constitution. He writes in summary that the latter company “went for inspiration to the eighteenth-century British Constitution, with which they were familiar.” In another context he expands this idea:
[The United States Constitution was] built up by skillful adaptation to a new situation, of sound institutional traditions derived to some extent from the old relations formerly existing between Great Britain and her American colonies and to a large extent from the British Constitution. They [the framers] were not inclined to entrust unfettered powers to a popularly elected legislature; for they recognized that the usurpations of such a legislature would lead to tyranny as quickly as usurpations of the Executive. They were not believers in equalitarian theories. 36

On the basis of the evidence I have found, Sir William cannot be disputed; and his is the general opinion of other British authorities on the subject. 39 For early English constitutional history is a universe of discourse, a structure of values inherent in the language of its expression that is the opposite of metaphysical speech concerning abstract moral principles and ideal regimes. In other words, it is well suited to the articulation and protection of what the English political theorist Michael Oakeshott speaks of as “nomocratic” orders—those better defined by an established way of conducting their business than by a set of goals. 40 The opposite is found in “teleocratic” regimes, which attempt to embody some large idea such as Justice, Liberty, or Equality in an always incomplete, ever more insistent, process. About this kind of government we know more than we would like. Thinking about the difference between the familiar intellectual context of contemporary ideological politics and what the framers intended in the way of limited government, we may, even at the distance of two hundred years, recognize how far we have come from those origins, away from securing “the blessings of liberty to ourselves and our posterity.” How far, and at what cost.

NOTES

2 C. Ellis Stevens, Sources of the Constitution of the United States, Considered in Relation to Colonial and English History (New York: Macmillan, 1894), xi. Stevens also argues that “it is beginning to be realized [contra the enthusiasts of an American radical democracy, the local disciples of Rousseau] that the Constitution of the United States, though possessing elements of novelty, is not, after all, what this [radical idea of an invention ex nihilo] would imply. It is not, properly speaking, the original composition of one body of men, nor the outcome of one definite epoch, . . . it is better than that. It does not stand in historical isolation, free of antecedents. It rests upon very old principles worked out by long ages of constitutional struggle. It looks back to the annals of the colonies and of the motherland for its sources and explanation” (vi–viii).
British Example

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8Doris M. Stenton, After Runnymede: Magna Carta in the Middle Ages (Charlottesville: University of Virginia Press, 1964), 40.


11Quoted in Founders’ Constitution 1:671.


22Adams is quoted as saying in 1775 that the “British constitution is nothing more nor less than a republic, in which the king is first magistrate” (206).

23James Madison, Notes of Debates in the Federal Convention of 1787 (Athens: Ohio University Press, 1966), 447. Madison quotes Dickinson as declaring, “It was not Reason that discovered [this mechanism].” Experience takes the place of reason.

24Ibid., 184.

25Ibid., 46.

26McDonald, Novus Ordo Seclorum, 209; in James Madison, no. 56 of The Federalist, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 382, Madison speaks of the “experience of Great Britain which presents to mankind so many political lessons . . . [as] frequently consulted in the course of these inquiries.”

27See William Henry Drayton, A Letter from Freeman of South Carolina to Deputies of North America, Assembled in the High Court of Congress in Philadelphia (Charleston: Peter Timothy, 1774), 20, 24: “Magna Carta is such a fellow that he will have no other sovereign.” See also Stephen D. White, Sir Edward Coke and the “Grievances of the Commonwealth.” 1621–1628 (Chapel Hill: University of North Carolina Press, 1979), 267. The quotation is an echo of debates in the Parliament of 1628 leading up to the Petition of Right.

28For a comparison of royal and republican executives in Madison’s Notes, see James Wilson, 46, 252, 444; Pierce Butler, 63, 113; Governor Morris, 319, 335–36, 360, 373; George Mason, 64; Benjamin Franklin, 64; James Madison, 80, 305; and Roger Sherman, 527. For a sample of analogies of Parliament, see George Mason, 177, 252; Gunning Bedford, 229; and Roger Sherman, 399.

29Madison, Notes, 82; the same comparison is made by Oliver Ellsworth (223), Edmund Randolph (436), and George Mason (443).


31Elliot, Debates in the Several State Conventions 3:170, 174.

32Ibid., 53–54.

33Ibid., 450–51, 219. Henry Lee argues from the ability of Parliament to contend with a king that Congress will be able to prevent executive tyranny (43).
Ibid. 4:354.


Sir William Holdsworth, The History of English Law, 17 vols. (London: Methuen and Co., 1938), 11:137. Holdsworth adds remarks to the effect that talk of the “equality of men, their inalienable rights . . . [though] such theories might be suited to a period of revolution, [was] of very little help in a period of reconstruction.” See also Sir William Blackstone, Commentaries on the Laws of England, 4 vols. (Chicago: University of Chicago Press, 1979), 1:91, 237, for an idea of the British constitution contrary to the one suggested in Dr. Bonham’s case. Blackstone declares, “if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.” Yet he denies that Parliament is free to exercise a “power precarious and impracticable.”
