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Educational materials for Colonial Roots

In this essay, Lee Ward discusses the controversies within the natural law tradition in the years leading up to the American Revolution. Almost all political thinkers at the time were influenced by earlier theories of natural law, but they had developed these theories into distinct liberal and conservative strains, which led to very different views of the rights of the American colonies within the British Empire. William Blackstone represented the conservative school of thought, according to which Parliament's power of legislation was virtually unlimited. On the other hand, American thinkers such as [James Otis](#), [Thomas Jefferson](#), and [Thomas Paine](#) represented a more liberal interpretation, according to which the colonies had the natural right to manage many of their own affairs. The earliest of these liberal thinkers did not go so far as to call for rebellion, and many maintained an admiration for Britain; over time, however, these arguments were gradually radicalized into the [calls for American independence](#) that led to the Revolutionary War. In the source readings associated with this section, you will be able to consider a variety of arguments on the subject of natural law and colonial self-government. As you read, try to determine how these thinkers relate to each other and to earlier ideas about natural law, and observe how the arguments for American independence emerge from the natural law tradition.



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JAMES OTIS

James Otis, Jr. was born February 5, 1725 in Barnstable, Massachusetts. The son of a prominent lawyer, Otis graduated from Harvard in 1743, and married in 1755. After leaving Harvard, Otis took up law, and was extremely successful. His most famous case concerned the British "Writs of Assistance," which were meant to help enforce the Navigation Acts. Otis delivered a five-hour long oration in court opposing the writs and explaining how they violated the unwritten English constitution. This case made him very popular among the emerging patriot movement.

Otis's wife and children were loyalists, and Otis himself, though considerably more liberal than the rest of his family, did not openly advocate revolution. He did, however, compose a number of political tracts, including [The Rights of the British Colonies Asserted and Proved](#). His writings were extremely influential among the revolutionary generation. Late in life, Otis suffered from mental illness, possibly schizophrenia, and was killed by a lightning bolt on his own doorstep in 1783.

To read more about James Otis's life and works, please click [here](#).

WILLIAM BLACKSTONE

William Blackstone was born in London on July 10, 1723. He studied at Pembroke College, Oxford and afterwards practiced law, though his career was undistinguished until he began a lecture course on the history and principles of English common law in 1753. He was among the first thinkers to attempt a comprehensive understanding of the common law, and his [Commentaries on the Laws of England](#) became an essential text for lawyers both in England and in the American colonies, bringing their author fame and fortune, and laying the foundation for Blackstone's successful political career as an MP and jurist. Blackstone died on February 14, 1780.

As the authoritative treatise on English common law, the *Commentaries* had a great influence on the American Founders' understanding of law and continued to inform this country's fledgling legal system for many years.

To read more about William Blackstone's life and works, click [here](#).



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benign neglect:

the British policy of avoiding strict enforcement of Parliamentary laws in the colonies. Under this policy, the colonies developed their own independent laws. When Britain eventually tried to enforce Parliamentary laws in the 1760s, the colonists resented what they saw as an encroachment on their traditional liberties.

Glorious Revolution:

the events of 1688-9 in England, in which Parliament colluded with the Protestant Dutchman William of Orange to expel the Catholic King James II. Parliament installed William as King William III, meanwhile increasing their own power relative to the monarchy.

Grotius, Hugo:

(1583 - 1645) a Dutch philosopher who laid out the framework for international law, taking the natural law as its basis. For more information on Grotius, please see the section of this website on [“Natural Law and the Law of Nations.”](#)

Hobbes, Thomas:

(1588 - 1679) an English philosopher who developed a theory of absolute sovereignty based on natural rights. For more information, please see the section of this website on [“Hobbes: Natural Law to Natural Rights.”](#)

inchoate:

newly begun; incomplete; not fully formed

Locke, John:

(1632 - 1704) an English philosopher who was among the first to advocate the theory of government by the consent of the governed. For more information, please see the section of this website on [“Locke and the Natural Rights Tradition.”](#)

Pufendorf, Samuel von:

(1632 - 1694) a German jurist and political philosopher who further developed the natural law theories of Grotius and Hobbes. He had a great influence on subsequent political thinkers. For more information on Pufendorf, please see the section of this website on [“Natural Law and the Law of Nations.”](#)

Stamp Act:

a highly controversial tax on printed matter levied on the colonies in 1765 by the British Parliament to defray the costs of the French and Indian War. It met with vehement opposition in the colonies, and was repealed in 1766.

Townshend Duties:

a series of taxes levied on the colonies by Parliament in 1767. In the face of fierce colonial opposition, most of the Townshend duties were repealed in 1770, though a tax on tea was retained.

Wilson, James:

(1742 – 1798) Born in Scotland, Wilson emigrated to America in 1766, where he established a law practice. He was an advocate of American independence, and served in the Pennsylvania Militia during the revolution. He was appointed by George Washington as one of the six original justices of the

Supreme Court. For more information on James Wilson, please see the section of this website on "[James](#)

[Wilson and Natural Rights Constitutionalism: The Influence of the Scottish Enlightenment.](#)"

Westminster:

Westminster Palace, the meeting-place of the British Parliament; which came in time to signify the Parliament itself.



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I. Introduction: Both Americans and Britons inherited the Western tradition of natural law thinking. In the years leading up to the American Revolution, their diverging interpretations of this tradition eventually led to incompatible understandings of the British Empire.

II. By the 17th century, natural law philosophy had two distinct strains: a conservative strain emphasizing authority and sovereignty, and a liberal strain emphasizing individual rights.

A. The conservative strain.

1. This strain was born of the British response to the Glorious Revolution (1688 – 1689). The radical principles that had been part of the movement to replace King James II were soon marginalized by a conservative emphasis on the institutional sovereignty of the British state.

2. In this vein, Blackstone's [Commentaries](#) emphasize the absolute, unchecked sovereignty of a Parliament that consists of king, lords, and commons together.

3. The *Declaratory Act* (1766), confirming Parliament's authority over the colonies, indicated the British allegiance to this view.

B. The liberal strain.

1. This strain emphasized individual rights and maintained that government ought to be representative.

2. In early years, however, these thinkers did not want to reject British control. Even if Parliamentary taxation was controversial, British control of imperial trade policy was roundly accepted.

III. The years before the Revolution were marked by a transition from a moderate to a radical theory of empire.

A. The moderate theory of empire.

1. James Otis [argued](#) (1764) that Parliament could not tax the unrepresented colonies, and that natural law placed some limits on the authority of Parliament vis-à-vis colonial assemblies.
2. Nevertheless, he did not attempt to challenge Parliamentary sovereignty, and he denied that the colonists had any authority to compel Parliament to recognize their claims.
- B. The radical theory of empire.
 1. James Wilson argued (1774) that because the colonies were not represented in Parliament, Parliament had no right to legislate for the colonies in any matter whatsoever.
 2. Thomas Jefferson [argued](#) (1774) that natural law required that the colonies govern themselves, and that the king's law was sovereign over the colonies only because the colonists freely chose to accept him as their chief executive.
 3. Thomas Paine further [radicalized](#) this position (1776).
 - a. Unlike earlier authors, he openly attacked the British Constitution for its complexity and its acceptance of monarchy, which he argued went against natural law.
 - b. Continuing Jefferson's argument, he stated that all societies have the right to govern themselves independently from all other societies.
- IV. Conclusion. The Americans reinterpreted the common natural law tradition to oppose British claims of Parliamentary sovereignty. After the Revolution, further developments in natural law thinking built on this groundwork to produce the constitutions and laws of the newly independent States.



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I. Basic Interpretation

If you are interested in learning more about this topic after reading Lee Ward's essay, please go to the [Primary Source Documents](#) to read some of the texts mentioned in the essay. Biographies of James Otis, [Algernon Sidney](#), and William Blackstone are also available. As you go back to the primary sources, keep in mind the following questions:

1. What differences were there between the liberal and conservative strains of the natural law tradition in the years leading up to the American Revolution?
2. Why does Ward suggest these differences developed? What historical and political reasons might have motivated them?
3. Why was it important to the British (and to many Americans) to uphold the ideal of Parliamentary sovereignty? Why were the British unable or unwilling to accept the American conception of natural law?
4. What were the differences between the moderate and radical theories of empire mentioned in Ward's essay? How are these theories expressed in the primary source texts?
5. What did Jefferson believe united the colonies to each other and to Britain?
6. Why did many of the thinkers discussed in this section argue that there was a difference between Parliament's power to tax the colonies and its power to regulate their trade?
7. How did Thomas Paine modify and develop the ideas of earlier American thinkers about the relationship between Britain and her colonies?

II. Connections to Other Thinkers

1. According to [Aristotle](#), there is naturally a maximum size for polities, above which political life begins to break down. The polis, he argues, must be a concrete community; its government must be an integral part of it. Two thousand years later, Thomas Paine argued that "'tis not in the power of Britain to do this continent justice," and that "a government of our own is a natural right." Is the resemblance between Aristotle's arguments and Paine's merely superficial? Is there anything Paine's political views have in common with Aristotle's? Where do they differ?
2. [Thomas Aquinas](#) argues that a government gains its legitimacy by promulgating laws that accord with the natural law. Paine, like most representatives of the "radical strain" of natural law thinking, believes that governments gain legitimacy from the consent of the governed. How much common ground is there between these positions? In your opinion, what would Thomas have thought of the American Revolution?
3. When describing how British law applies to the colonies, Blackstone says that much of British positive law does not automatically apply to the colonies, and that the laws of countries conquered by Britain, "unless such as are against the law of God," remain in effect. Compare this with the "law of nations" described by [Grotius, Pufendorf, and others](#). Is Blackstone arguing that Britain and its colonies are, in effect, separate nations?
4. The American thinkers discussed in this section all endorse the idea of self-government, to a greater or lesser extent; they think political communities ought to be able to make laws for themselves. In his debates with [Lincoln](#), Stephen Douglas argued that each territory should be allowed to make its own rules on slavery, i.e., that they should be allowed to govern themselves. In Lincoln's opposition to this idea, and in his later defense of the Union by arms, was he contradicting the thinkers discussed in this section? Does the rhetoric of self-government in the texts discussed in this section allow for any universal standards, even on an issue such as slavery?
5. For Renaissance political thinkers like [Machiavelli and Guicciardini](#), what matters is not whether political authority is justified, but rather whether it can be maintained. Obviously, then, they would not share Jefferson's or Otis's concern over Parliament legislating for the colonies. But what might they conclude about Britain's management of its American empire? Would they have approved of the approach taken by Parliament?
6. Blackstone, when describing the powers of Parliament, argues that even if Parliament should enact an immoral law, there is no power but Parliament that could undo it. Should this view be classified as legal positivism, like that of [Hobbes](#) or [Justice Holmes](#)? What would it mean to say that a law is wrong, if there is no political authority that can judge or overturn unjust laws? What are the implications of his view that the Parliament has the power to "alter the established religion of the land"?

III. Critical Interpretations

1. How was it possible that the natural law tradition should develop into two very distinct branches in the 18th century? Were there common elements that held together the "conservative" and the "liberal" strain of natural law thinking? Based on your understanding of natural law, which strain do you think is more consistent with the premodern natural law tradition?
2. In his essay, Ward gives historical and political reasons to explain why Americans and Britons came to differing interpretations of natural law. Neither group, however, understood their interpretation to be historically contingent: proponents of both views believed they had reasoned their way to the truth. Does the existence of a plausible historical explanation for their positions make you more or less likely to be convinced by their arguments? Why?

3. Before the American colonies took to open rebellion, many thinkers proposed compromise positions that avoided the radical conclusions of [Thomas Paine](#) and the [Declaration of Independence](#). James Otis, for example, argued that Parliament could legislate about trade, but not about internal colonial matters, and Jefferson argued that the King was the sovereign of the colonies, even if they maintained him only by their free choice. Do you think these compromises could ultimately have been tenable? Can these positions be defended in themselves, or do they lead inevitably towards rebellion?

4. Thomas Paine, though one of the most influential advocates for the American Revolution, concluded in the end that it had not been a radical enough break with the past. He traveled to France, became a strong partisan of the revolution there, where he was almost guillotined for his views, before returning to America, where he was largely spurned for his radicalism. In your reading of his pamphlet *Common Sense*, do you see any evidence of principles more radical than those of the American Revolution? To what extent does our current régime correspond to Paine's recommendations?

5. In his [Summary View of the Rights of British America](#), Jefferson dismisses the idea that Parliament has any authority to legislate for America. As the other texts in this section indicate, Parliament's sovereignty over the colonies was a widely accepted fact at the time, both in England and in America. Why do you think Jefferson did not discuss this idea in his *Summary View*? Whom was he trying to convince? Is this text a petition or an ultimatum?

6. Imagine for a moment that you are a member of the British Parliament in the late 18th century. What might you think about the American documents discussed in this section? How would you respond to their claim that Americans had a natural right to legislate for themselves? Would you find any of their arguments persuasive?

IV. Connections to Contemporary Concerns

1. In modern American politics, those calling for smaller government and lower taxes usually claim to be continuing the legacy of the thinkers discussed in this section. Is there actually anything in common between the "Tea Partiers" of today and the Boston Tea Party of 1773? If so, what is it? How is your conclusion affected by the difference between America's status as an imperial colony in 1773, and as a representative democracy today?

2. To a greater or lesser extent, all of the thinkers you have read in this section believed the colonies had the right to make their own laws, even as they were subject to the laws of the Empire. How similar is this to the situation of American states, which enact their own laws while remaining subject to federal law? Today, many political thinkers call for "federalism" or "subsidiarity," by which they mean that as many governmental decisions as possible ought to be made on a state or local level. Is this argument supported by the texts discussed in this section? Why or why not?

3. In his essay, Ward mentions that there were "liberal" and "conservative" strains of natural-law thought in the years before the American Revolution. There is an analogous divide today. Some people, for example, argue that abortion violates the natural rights of the unborn, while the Supreme Court has maintained that the natural right to privacy demands that abortion rights be protected. Do this and other modern disagreements about natural rights have anything to do with the disagreements mentioned by Ward? Can that 18th-century debate shed any light on present-day controversies?

4. At the time of the American Revolution, most Britons argued that Parliament enjoyed unlimited power to pass whatever laws it wanted. The first Americans viewed this as a problematic arrangement, and tried to avoid it while drafting the [Constitution](#). Both at the time and today, however, some people worry that the American Constitution gives the Supreme Court almost unlimited power to overturn laws or to demand policy changes. Do you think these fears are justified? How well do you think the American Constitution succeeds at insuring that all branches of government are held to account?

5. Thomas Paine [observes](#) that "the constitution of England is so exceedingly complex, that the

nation may suffer for years together without being able to discover in which part the fault lies.” For him, this is one of the reasons why it would benefit the colonies to break off from Britain. The current American government is at least as complicated as the British government of that time, consisting of hundreds of agencies and departments in a very complex chain of command. In your opinion, is this a problem for America, as Thomas Paine might think, or is it a necessary response to the complex political and social realities of our times?

6. In his *Commentaries*, Lord Blackstone argues that most British laws do not apply in the colonies or other territories held by Britain. Today, there is a similar principle in American law. As the saying goes, “the Constitution does not follow the flag”: the legal rights and protections guaranteed under the Constitution do not necessarily apply to all territories under American control. At the military prison at Guantánamo bay, for example, detainees do not have the rights they would have if they were tried on American soil. Do you think it is appropriate to apply Blackstone’s principle to these cases? Was Blackstone right to argue that British law did not necessarily apply to the colonies?

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