subtopic

Colonial Roots

NATURAL LAW *and the* COLONIAL ROOTS
***of* AMERICAN CONSTITUTIONALISM**
Lee Ward, University of Regina

This essay explores the role of natural law philosophy in the imperial crisis between Britain and the American colonies in the twelve years leading up to the Declaration of Independence in 1776. Both the British governments and the colonial champions during the crisis were the inheritors of a complex tradition of natural law philosophy dating back centuries. At its core, this tradition revolved around the proposition that there is a standard of natural justice that exists independently of human contrivance, and which acts as a measure for the legitimacy of civil laws and political institutions. Natural law thinking profoundly shaped the way American and British leaders approached issues involving rights, sovereignty, and constitutional government. However, the imperial authorities and their colonial opponents often appealed to different, and even conflicting, strains of the natural law tradition. The tension between the various understandings of natural jurisprudence involved in the imperial dispute would have serious implications for the evolving, and ultimately incompatible, British and American conceptions of the Empire.

In order to understand the intellectual context surrounding the imperial crisis, it is important to appreciate the pervasive influence of natural law philosophy in early-modern Europe and America. Educated Britons and Americans were the products of a rich intellectual heritage spanning from medieval to modern times. St. Thomas Aquinas founded the Christian natural law tradition in the 13th century by articulating a conception of natural justice rooted in reason and God's rule over the created world. By the 17th century, natural law philosophy had developed into a multifarious body of thought with distinct conservative and radical strains.[1] The conservative natural law school exemplified by such thinkers as Hugo Grotius, Thomas Hobbes, and Samuel Pufendorf drew decidedly authoritarian political implications from the natural law principle of natural liberty and equality. They tended to emphasize a strong, and even absolute, version of political sovereignty and generally rejected popular self-government and the right of revolution. For their part, radical natural law theorists such as John Locke, Benedict Spinoza, and Algernon Sidney built an argument for popular sovereignty on the bedrock principles of individual rights, especially the right to property and the right of conscience, as well as a natural right of revolution. It was to this complex natural law inheritance that both Britons and Americans appealed in their quarrel during the imperial crisis. However, their different interpretations of this philosophic tradition are what account in large measure for their divergent arguments and attitudes throughout the crisis.

Eighteenth-century Britain witnessed the emergence of conservative natural law principles adapted to the unique conditions of parliamentary rule. In the decades following the Glorious Revolution, the British political nation adopted a conservative interpretation of the events of 1688–89, which emphasized continuity, the legal fiction of King James' "abdication," and most importantly asserted the institutional sovereignty of the tripartite Parliament including king, lords, and commons. The radical principles of popular sovereignty and individual natural rights were for the most part rejected. By the middle of the eighteenth century, the doctrine of parliamentary sovereignty was the dominant political and constitutional ideology in Britain. This hardening of the orthodoxy of parliamentary sovereignty can be seen in the influential writings of Sir William Blackstone published at the start of the imperial crisis. With clear echoes of the conservative natural law conception of sovereignty championed by Grotius, Hobbes, and Pufendorf, Blackstone insisted that in every constitution there had to be a "supreme, irresistible, absolute, uncontrolled authority in which . . . the rights of sovereignty reside."[2] The implications of this commitment were obvious. British efforts to tighten control over the colonies

through taxation rested on the philosophical premise that Parliament is the highest law-making body in the empire and is thus in the legal sense absolute and irresistible inasmuch as colonial legislatures are subordinate vis-à-vis Westminster. The depth of the British commitment to this conservative conception of sovereignty was crystallized in the *Declaratory Act* of 1766, which followed the repeal of the Stamp Act. While the Ministry repealed the stamp tax on prudential grounds, the Parliament asserted its right in principle to legislate for the colonies "in all cases whatsoever."[3] As parliamentary sovereignty was the governing philosophy of Britain, so too by extension must it logically be the organizing principle of the British Empire.

The colonial position in the imperial crisis was also informed by natural law philosophy; however, supporters of the American cause interpreted this tradition rather differently from the British. Most importantly, the radical natural law theory of Sidney and Locke, long *déclassé* in Britain, flourished in the colonies alongside typically conservative philosophical commitments. With the radicals, Americans insisted that some element of popular control over government was vital to secure liberty—a condition impossible in a distant parliament in which the colonies were not represented. As such, Americans defended the principle that only the colonial legislatures could legitimately tax the colonists. However, in the early stages of the crisis most supporters of the colonial cause also expressed deep admiration for the British balanced constitution produced in the Glorious Revolution and its replicas in the colonial governments (in which the Crown appointed governors who shared rule with the elected assemblies). Moreover, many early colonial champions conceded the British point that Parliament is sovereign in the empire, although they disputed the rightness of its taxing the colonies directly as opposed to merely regulating imperial trade policy. While accepting the theoretical principle of parliamentary sovereignty, Americans had not actually experienced their political life as being subject to Parliament in the century of benign neglect prior to 1764. In practice, they felt that assertions of parliamentary sovereignty were a dangerous innovation in imperial relations.

The intellectual development of American natural law thinking in the imperial crisis can be divided into two stages: a moderate and a radical theory of empire. In the early stages of the crisis, the moderate theory of empire was the dominant position in the colonial response to the *Stamp Act* (1765) and the *Townshend Duties* (1767). This theory of empire tried to harmonize the conservative principle of parliamentary sovereignty in the empire with the radical idea of colonial self-government with respect to taxation. One of the earliest colonial champions was James Otis whose Rights of the British Colonies Asserted and Proved (1764) was deeply influenced by the Anglo-American natural law tradition. Otis opposed efforts to tax the colonies on the radical grounds of individual rights and the natural law limits on legislative power. Echoing Locke, Otis insisted that without colonial representation in Parliament, that body had no right to tax the colonies, for "if a shilling in the pound may be taken from me against my will, why may not twenty shillings; and if so, why may not my liberty and my life?"[4] Otis also appealed to natural law as a rule of reason placing limits on any legislature: "The Parliament cannot make 2 and 2, 5."[5] In the imperial context, Otis modified Locke's argument for natural limits on the legislature by adding an additional limit, which held that a supreme legislature lacks the authority to alter or to abolish subordinate legislatures.[6] In other words, Otis constructed from Locke's philosophy an argument that the colonial assemblies have rights that Parliament must respect.

There was, however, a deep ambiguity in Otis's formulation of the moderate theory of empire. The grounds of colonial self-government derive from the natural rights of the colonists, yet Otis also accepted the conservative principle of supreme sovereignty, even as it applied to the empire. Parliament is sovereign over the empire because it is the highest law-making authority. Thus, Otis conceded that there is no legal way to make Parliament recognize colonial self-government: "The power of Parliament is uncontrollable but by themselves, and we must obey. They can only repeal their own acts."[7] In the early stages of the imperial crisis, colonial spokesmen simply could not conceive that natural law supported independence, nor could they imagine severing their deep attachment to Britain and British constitutional principles. As John Dickinson, another proponent of the moderate theory of empire, admitted: "If once we are separated from our mother country, what new form of government shall we adopt, or where shall we find another Britain to supply our loss? Torn from the body . . . we must bleed at every vein."[8]

The radical theory of empire emerged in the latter stages of the imperial crisis (1774–76). Thinkers such as Thomas Jefferson and James Wilson reconceived the imperial connection by arguing that the only legal relationship between the American colonies and Britain was through the Crown, not Parliament. At this stage there also first appeared in the colonies arguments that asserted the natural right of revolution as a theoretical justification for American independence. The radical theory of empire rested on the proposition that American membership in the empire was purely a matter of choice rather than a moral obligation to a sovereign power. For instance, in the *Considerations on the Authority of Parliament* (1774) James Wilson went beyond Otis to claim that the lack of colonial representation in Westminster meant that any form of parliamentary legislation, even regarding imperial trade policy, was incompatible with colonial self-government. As Wilson argued: "It is repugnant to the essential maxims of jurisprudence, to the ultimate end of all governments, to the genius of the British Constitution, and to the liberty and happiness of the colonies, that they should be bound by the legislative authority of the Parliament of Great Britain."[9]

However, the classic statement of the natural law principles informing the radical theory of empire is Thomas Jefferson's Summary View of the Rights of British America (1774). Jefferson rejected any parliamentary authority over the colonies, and insisted that the colonists only retained the British monarch as their chief executive by virtue of the "right which nature has given to all men" to organize their government as they see fit.[10] Moreover, the British King is not an absolute monarch, but rather is "no more than the chief officer of the People, appointed by the Laws, and circumscribed with definitive Powers."[11] For Jefferson, the empire must be seen as a collection of self-governing societies, including the thirteen American colonies, which are united solely by the fact that they each have the British monarch as their chief executive. In this view of the empire, legislative power is exclusively domestic and cannot be applied uniformly across the empire because natural law requires that each society have full control over its own legislative process: "From the nature of things, every society must at all times possess within itself the sovereign powers of legislation."[12] The radical theory of empire propounded by Jefferson foreshadowed the modern British Commonwealth, but it was not an argument ever likely to get a sympathetic hearing in Britain at the time. In the latter stages of the imperial crisis we see not only growing acceptance among Americans of the radical principle of popular sovereignty, but also their willingness to apply this argument to the imperial connection with Britain.

Thomas Paine's Common Sense (1776) represents the logical culmination of the radical theory of empire. Paine expanded upon and radicalized Jefferson's argument in two key areas. First, he openly displayed the hostility to the British constitutional tradition that was largely latent in the *Summary View*. Paine's opposition to monarchy and his advocacy of republicanism injected a new and explosive dynamic into the polemics of the imperial crisis. Notably, Paine appealed to natural law as the basis of his critique of monarchy and balanced constitutionalism. Of monarchy, he claims, there is a distinction "for which no truly natural or religious reason can be assigned, and that is, the distinction of Man into Kings and Subjects."[13] Not only does natural law contradict monarchy, Paine insists that natural equality suggests that the best form of government is a simple democracy based on the republican principle of popular control over a unicameral legislative assembly. For the much-vaunted British balanced constitution, Paine had little but scorn: "The Constitution of England is so exceedingly complex, that the nation may suffer for years together without being able to discover in what part the fault lies."[14] Second, Paine's argument for popular sovereignty also radicalized the features of Jefferson's loose imperial organization. He insisted that by the law of nature, society is a more fundamental moral reality than government, and thus every society has the natural right to form a government that enjoys complete independence from any other society on earth. Insofar as the colonies comprise one unique society that is distinct from Britain, then for Americans: "A government of our own is our natural right."[15] With Paine we see the total rejection of both the intellectual principle of parliamentary sovereignty and the emotional attachment felt by many colonists to the mother country. The logical trajectory of Jefferson's radical theory of empire is the call for independence that first appears with Paine.

In the transition from the moderate to the radical theory of empire, the colonial position shifted

gradually from opposition to specific parliamentary efforts to tax the colonies toward an eventual appeal for full independence. At each stage of the crisis Americans had recourse to the theoretical resources of natural law philosophy to counter British claims about parliamentary sovereignty. While the British philosophical commitment to the conservative view of sovereignty and rights remained stubbornly, and self-destructively, constant throughout the imperial crisis, American champions of the colonial cause gradually worked through the tensions and contradictions in their natural law inheritance. The *Declaration of Independence* (1776) is a classic statement of the radical natural law philosophy of revolution and popular sovereignty that signifies the triumph of one strain of this inheritance in America. However, while the immediate thrust of the *Declaration's* claim that whenever government injures these rights the people can alter or abolish it and "institute new Government" is clearly directed toward the goal of independence, the political and constitutional implications of the principles justifying independence were comparatively inchoate. Over time, Americans would develop new insights about the practical application of natural law philosophy with remarkable acumen and dexterity. In the period of constitution-making in the states immediately after 1776 and later in Philadelphia in 1787, the former colonists would make their own impressive contribution to the natural law tradition with a distinctively American conception of constitutional government resting on innovative ideas of written constitutions, separation of powers, bills of rights, and federalism. In this respect, the Anglo-American imperial crisis of 1764–76 set the stage for the writing in the New World of an unprecedented chapter in the great natural law tradition of the West.

---

[1] For comprehensive treatments of the differences between the radical and conservative strain of natural law philosophy in the Anglo-American tradition, see Lee Ward, *The Politics of Liberty in England and Revolutionary America* (Cambridge: Cambridge University Press, 2004) and Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1994).

[2] Sir William Blackstone, "Commentaries on the Laws of England" in *Colonies to Nation, 1763-1789*, Jack P. Greene, ed. (New York: Norton, 1975), pp. 86-88, esp. 87.

[3] *The Declaratory Act* (1766) in Greene, *Colonies to Nation*, p. 85.

[4] James Otis, "Rights of the British Colonies Asserted and Proved" (1764) in *Pamphlets of the American Revolution, 1750-76*. Bernard Bailyn, ed. (Cambridge, MA: Harvard University Press, 1965), pp. 419-70, esp. 461.

[5] Otis, "Rights of the British Colonies," 454.

[6] Compare Otis, "Rights of the British Colonies," 444 and John Locke, *The Two Treatises of Government*. Peter Laslett, ed. (Cambridge: Cambridge University Press, 1988), *Second Treatise*, section 134.

[7] Otis, "Rights of the British Colonies," 448-9.

[8] John Dickinson, "The Letters from a Farmer in Pennsylvania," (1767-68) in *Empire and Nation*. William E. Leuchtenberg and Bernard Wishy, eds. (Englewood Cliffs, NJ: Prentice-Hall, 1962), pp. 3-85, esp. 18.

[9] James Wilson, "Considerations on the Authority of Parliament," (1774) in *Colonies to Nation, 1763-1789*, Jack P. Greene, ed. (New York: Norton, 1975), pp. 220-27, esp. 222.

[10] Thomas Jefferson, "Summary View of the Rights of British America" (1774) in *Colonies to Nation, 1763-1789*, Jack P. Greene, ed. (New York: Norton, 1975), pp. 227-38, esp. 228.

[11] Jefferson, "Summary View," 228.

[12] Jefferson, “Summary View,” 235.

[13] Tom Paine, “Common Sense” (1776) in *Colonies to Nation, 1763-1789*, Jack P. Greene, ed. (New York: Norton, 1975), pp. 270-83, esp. 273.

[14] Paine, “Common Sense,” 272.

[15] Paine, “Common Sense,” 282.

Published 2011 by the Witherspoon Institute