"IN OUR CONTRACTED SPHERE": THE CONSTITUTIONAL CONTRACT, THE STAMP ACT CRISIS, AND THE COMING OF THE AMERICAN REVOLUTION

JOHN PHILLIP REID*

INTRODUCTION

"We have ever supposed our Charter the greatest security that could be had in human affairs," the people of the town of Weymouth, Massachusetts, lamented shortly before the Stamp Act[1] was to become operative. "This was the sentiment of our forefathers—they have told us that they should never have left the land of their nativity, and fled to these ends of the earth, triumph'd over dangers, encountered difficulties innumerable, and suffer'd hardships unparallel'd, but for the sake of securely enjoying civil and religious liberty, and that the same might be transmitted safe to their posterity."[2]

The inhabitants of Weymouth may have been correct when they claimed that their ancestors left Stuart England to secure the enjoyment of "civil and religious liberty." Contemporaries of the first settlers of Massachusetts said as much;[3] contemporaries of the voters of Weymouth agreed;[4] and so do our own contemporaries.[5] We need not, however, dwell on the accuracy of the facts behind this historical argument; what interests us is the legal significance that American Whigs of the prerevolutionary era attributed to the factual argument. They believed that the facts recited in the Weymouth resolve established a constitutional contract that the British Parliament had recently begun to breach, first with the Sugar Act[6] and now with the Stamp Act.

The Stamp Act, a Bostonian told a friend in 1765, "is universally esteemed here as arbitrary and unconstitutional, and as a breach of charter

* Professor, New York University Law School. B.S.S., 1952, Georgetown; LL.B., 1955, Harvard; LL.M., 1960, J.S.D., 1962, New York University.

1. 5 Geo. III, c. 12 (1775).

2. Instructions of the Town of Weymouth, n.d., Boston Evening-Post, Oct. 21, 1765, at 2, col. 2 [hereinafter cited as Instructions].

3. For the argument made the very year Boston was settled *see The Planters Plea Or the Grounds of Plantations Examined, and Usuall Objections Answered. Together with a Manifestation of the Causes Mooving such as Have Lately Undertaken a Plantation in New-England: for the Satisfaction of Those That Question the Lawfullnesse of the Action,* in 2 PETER FORCE, TRACTS AND OTHER PAPERS, RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICA, FROM THE DISCOVERY OF THE COUNTRY TO THE YEAR 1776 #III(1838).

4. Most significant for the thesis of this paper, one of the contemporaries was John Adams. *See, e.g.,* J. ADAMS, *A Dissertation on the Canon and Feudal Law,* in 3 THE WORKS OF JOHN ADAMS 448, 451 (1851). For a contemporary agreement in a Tory newspaper *see* The Massachusetts Gazette, May 8, 1766, at 1, col. 1.

5. For the latest contribution to the thesis *see* Breen, *Persistent Localism: English Social Change and the Shaping of New England Institutions,* 32 WILL. & MARY Q. 3, 4 & 16 (1975).

6. 4 Geo. III, c. 15 (1764).

and compact between K[ing] and subject; and we think we have a right to refuse submission to it."[7] His fellow townspeople agreed. Americans possessed contractual constitutional rights, they resolved, including the right not to be taxed except by their own consent or the consent of their representatives. "These Powers and Privileges," the town of Boston contended, "were secured to our Ancestors by solemn Covenant between them and the King of England, and perpetuated by the Charter to their latest Posterity."[8]

There is little room for doubt. Most prerevolutionary Whigs believed the assertion and were prepared both to act upon the belief and defend the constitutional rights it implied.

I. THE RELEVANCY OF CONTRACT

It will not do to think of John Locke. His theory of the social contract and its influence on the political philosophy of prerevolutionary Whigs has for too long been overemphasized.[9] Historians, contemptuous of legal reasoning and unfamiliar with the British constitution, gloss over arguments drawn from customary jurisprudence encountered in forensic debates by attributing them either to natural law or to John Locke. Whig reliance on a constitutional compact rested on firmer grounds. While in the eighteenth century the belief that people must bargain and contract with their sovereign was thought of as an accommodation with prerogativism,[10] the belief also had roots in the well-established practice of English constitutionalism stretching back beyond legal memory, to the pledge of King Canute to govern by the laws of Edgar,[11] the promise of William the

7. Letter from Boston, Aug. 5, 1765, in A COLLECTION OF INTERESTING, AUTHENTIC PAPERS, RELATIVE TO THE DISPUTE BETWEEN GREAT BRITAIN AND AMERICA; SHEWING THE CAUSES AND PROGRESS OF THAT MISUNDERSTANDING, FROM 1764 TO 1775, at 9 (J. Almon ed. 1777) [hereinafter cited as A COLLECTION].

8. Instructions of the Town of Boston, May 5, 1773, Boston Evening-Post, May 10, 1773, at 1, col. 1.

9. *See, e.g.*, Clark, *Jonathan Boucher's Causes and Consequences*, in I THE COLONIAL LEGACY: LOYALIST HISTORIANS 89, 109 (L. Leder, ed. 1971). *See also* note 143 *infra*.

10. Indeed, the eighteenth century discussion of politics can only be understood in the context of this ancient notion of the Crown's prerogatives, the bundle of rights and powers adhering in the King's authority to rule, set against the rights and liberties of the people, or the ruled, represented in the House of Commons. As long as the idea of prerogative remained meaningful, the distinction between rulers and ruled was clear and vital and the rights of each were balanced in tension. . . . The magistracy, whatever the source of its authority, retained inherent legal rights and remained an independent entity in the society with which the people must bargain and contract in order to protect their own rights and privileges.

G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 19 (Norton Library ed., 1969).

11. *Charter of Canute* [*c. 1020*], in SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 75-76 (8th ed. W. Stubbs, 1895).

Conqueror to continue Anglo-Saxon customs,[12] the coronation charter of Henry I,[13] and most notably the several versions of *Magna Carta*.[14]

Prerevolutionary American Whigs, well versed in English constitutional history[15] and adept at its use as a major tool in constitutional advocacy,[16] knew these precedents and many more besides. Surely there were few unaware of the fact that Charles I, from whom Massachusetts had received its first charter,[17] had been executed for violating his compact with the English and Scottish nations. "There is," he was told on being sentenced to death,

> a contract and a bargain made between the King and his people, and your oath is taken: and certainly, Sir, the bond is reciprocal; for as you are the liege lord, so they liege subjects. . . . This we know now, the one tie, the one bond of protection that is due from the sovereign; the other is the bond of subjection that is due from the subject.[18]

The contract that had been invoked against the father was later breached by the son. James II, the Massachusetts House of Representatives argued,

> broke the original contract of the settlement and government of these colonies; but it proved happy for our ancestors in the end,

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12. *Section 7, The Laws of William the Conqueror*, in SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 7-8 (E. Henderson ed. 1896) [hereinafter cited as SELECT HISTORICAL DOCUMENTS.] There was also William's promise to London. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 13 (5th ed., 1956).

13. *The 'Coronation Charter' of Henry I (5 August 1100)*, in 2 ENGLISH HISTORICAL DOCUMENTS 1042-1189, at 400-02 (D. Douglas & G. Greenway eds. 1953).

> Know that I have granted, and by this present charter confirmed, to all my barons and vassals of England all the liberties and good laws which Henry [I], King of the English, my uncle, granted and conceded to them. I also grant them all the good laws and good customs which they enjoyed in the time of King Edward [the Confessor].

Charter of Stephen addressed generally (probably 1135), *id.* at 402. T. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 57 (10th ed. 1946).

14. *Magna Carta (1215 A.D.)*, in SELECT HISTORICAL DOCUMENTS, *supra* note 12, at 135-48; *The Great Charter, Made in the Nineth Year of King Henry the Third, and confirmed by King Edward the First in the Five and twentieth Year of his Reign*, 1 STATUTES AT LARGE 1-15 (1762); G. ADAMS, THE ORIGIN OF THE ENGLISH CONSTITUTION 178-80 (1912).

> What is the essence of Magna Carta, in virtue of which it has become a landmark in history? Not the fact that a king once again, as so often, admitted certain legal duties, and promised to fulfil them. . . . The only fundamentally new thing in the treaty . . . is the establishment of an authority to see that the king carries out his obligations. . . .

F. KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 128 (Harper Torchbook ed. 1970).

15. For the most complete discussion *see generally* H. COLBOURN, THE LAMP OF EXPERIENCE—WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION (1965).

16. C. ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 39 (1953); Boorstin, *The Genius of American Politics*, in THE AMERICAN REVOLUTION: TWO CENTURIES OF INTERPRETATION 116, 130-31 (E. Morgan ed. 1965). For examples of eighteenth-century uses of history to argue for rights *see* Anon., *A Letter to the People of Pennsylvania (1760)*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1770, at 260-62 (B. Bailyn ed. 1965) [hereinafter cited as PAMPHLETS].

17. *The Charter of Massachusetts Bay—1629*, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1846-60 (F. Thorpe ed. 1909).

18. C. WEDGWOOD, THE TRIAL OF CHARLES I 182 (1964).

that he had also broken the original compact with his three kingdoms.[19]

James II's violation of the compact was the last the crown was allowed to commit. During the Glorious Revolution that drove him from the throne, the national legislature changed the constitution by seizing supremacy. As a result, parliament constitutionally stood in the place of the king. Contracts that had bound the monarch now bound the lords and commons. Under the new constitution existing in 1765, they, rather than the relatively powerless king, would be the responsible party should Great Britain's obligation under the compact be breached.

We need not limit ourselves to English constitutional traditions. The New England colonies had another strong though secondary historical reason to revere the doctrine of the constitutional compact. The founder of Massachusetts Bay, John Winthrop, had based his idea of government upon a covenant between the rulers and the ruled.[20] Indeed, whether theoretical or actual, it had been the dominant secular explanation for civic responsibility among the Puritans—"the intellectual origin and rationale of the New England Way in both church and state."[21]

It would not be correct to think of the notion of the constitutional compact as a relic from the past, resurrected during 1765 to meet the threat to American political autonomy posed by the Stamp Act. It was as relevant and viable to colonial Whigs engaged in the prerevolutionary debate as it

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19. Letter from the Massachusetts House of Representatives to Agent Dennys de Berdt, Jan. 12, 1768, in 1 THE WRITINGS OF SAMUEL ADAMS 140 (H. Cushing, ed. 1904) [hereinafter cited as THE WRITINGS]. In 1688 the existence of the compact permitted the king's subjects to do more than merely charge that the law had been broken. It permitted them to take remedial steps.

> Thus the [Glorious] revolution was justified in the contractual nature of government the authority of which was conditional upon the protection of individual rights. It was not enough to assert that the King was bound by fundamental law. That law must be implemented by the right of resistance. . . .

G. GUTTRIDGE, ENGLISH WHIGGISM AND THE AMERICAN REVOLUTION 6 (1966).

20. Thus, following his acquittal on a charge of official misconduct, Winthrop told the assembled magistrates:

> We account him a good servant, who breaks not his covenant. The covenant between you and us is the oath you have taken of us, which is to this purpose, that we shall govern you and judge your causes by the rules of God's laws and our own, according to our best skill, When you agree with a workman to build you a ship or house, etc., he undertakes as well for his skill as for his faithfulness, for it is his profession, and you pay him for both. But when you call one to be a magistrate, he doth not profess nor undertake to have sufficient skill for that office, nor can you furnish him with gifts, etc., therefore you must run the hazard of his skill and ability. But if he fail in faithfulness, which by his oath he is bound unto, that he must answer for.

2 WINTHROP'S JOURNAL "HISTORY OF NEW ENGLAND" 1630-1649, at 238 (J. Hosmer ed. 1908).

21. D. RUTMAN, WINTHROP'S BOSTON: PORTRAIT OF A PURITAN TOWN 1630-1649, at 278 (1965).

> In the western world, this idea of contract—or compact, or covenant—was ancient, but it was particularly relevent for the religious polemicists of the sixteenth and seventeenth centuries. The French *Vindiciae Contra Tyrannos,* establishing a philosophic basis for Protestants to rebel against a Catholic king, argued for the sovereignty of the people and the contracts which a people, as a people of God, made with God that "it will be and will remain the people of God" and with its ruler "to obey the king truly while he rules truly."

Id. at 11. *See also id.* at 12-13.

had been to the generations of Sir Edward Coke and John Winthrop. When the colonists began to marshal their legal arguments in opposition to the new pretensions of parliament in the 1760's, colonial lawyers found it easy and logical to write of first settlers who "stipulated and solemnly covenanted" with colony proprietors as well as with the king.[22] Town meetings echoed one another as they maintained that local rights were enjoyed not by grace or favor but by the more secure tenure of "purchase."[23] And even in London the parliamentary opposition expected to be understood when it used the idea of contract to explain why it would not support legislation that threatened to alter colonial constitutions. It was almost impossible, the Marquis of Rockingham contended during the debate on the Coercive Acts,[24] to draw a line limiting the extent of parliamentary authority over the colonies. He had hoped to find an answer based on consent or contract. Unable to do so, he would not vote to violate the contract.

> I don't love to claim a right on the foundation of the supreme power of the legislature over all the dominions of the Crown of Great Britain; I wish to find a consent, and acquiscence in the *governed,* and I choose therefore to have recourse to what I think an original *tacit compact,* and which usage has confirmed, until the late unhappy financing project interrupted the union and harmony which had so long prevailed.[25]

II. THE ORIGINAL CONTRACT

The legal theory was easily stated:

> If we suppose the King to act in behalf of the whole English nation, which having, by laws of its own making conferred that

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22. PAMPHLETS., *supra* note 16, at 265. And, it is well to recall, the generations in between also knew of the "Original Contract." *See* note 29 *infra*.

23. American rights, it was argued, were

> Rights, that we are oblig'd to no Power under Heaven for the enjoyment of, as they are primarily the sole purchase and glorious product of the heroic Enterprises of the first Settlers of these American Colonies.

Concord Resolves, Jan. 24, 1774, Boston Evening-Post, Feb. 7, 1774, at 1, col. 3.

> [We must] maintain and secure our own invaluable Rights and Liberties, and that glorious Inheritance which was not the Gift of the Kings or Monarchs, but was purchased at no less Price then the precious Blood & Treasure of our worthy Ancestors. . . .

Instructions of the town of Cambridge, Dec. 14, 1772, Boston Evening-Post, Dec. 21, 1772, at 2, col. 1. Supporters of the royal prerogative, especially before the new British constitution that established parliamentary supremacy, had maintained all colonial "Liberties, Privileges, or Immunities" were derived "from the Grace and Favour of the *Crown* alone" and all rights were owed "only to the Grace and Favour of their Sovereign." J. PALMER, AN IMPARTIAL ACCOUNT OF THE STATE OF NEW ENGLAND (1690), in 1 THE ANDROS TRACTS 23, 39, 40 (Prince Soc'y Pubs. vol. 5, 1868).

24. The Port of Boston Act, 14 Geo. III, c.19 (1774); the Massachusetts Government Act, 14 Geo. III, c.45 (1774); the Administration of Justice Act, 14 Geo. III, c.39 (1774); the Quartering Act, 14 Geo. III, c.54 (1774).

25. G. GUTTRIDGE, ENGLISH WHIGGISM AND THE AMERICAN REVOLUTION 74 (1966). And during the debate on the Declaratory Act, 6 Geo. III, c. 12, General Conway argued "That Powers have by express Compact been granted to and accepted by the Colonists. . . ." Letter from Charles Garth to Ringgold, Murdock, & Tilghman, March 5, 1766, in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766, at 149 (E. Morgan ed. 1959).

> office upon him, is bound to abide by, and acknowledge his actions in their behalf, as their own; then there will be an implied contract virtually subsisting between the King & the nation on one part, & the adventurers for settling the colonies, on the other.[26]

There were two elements providing validity to the constitutional compact: the right of the king to make the contract and the expectations upon which the settlers relied. Having been "invested with authority by the whole nation, which gave a sanction to his action," the king "made a contract with the colonists, on the faith of which they trusted the lives and fortunes of themselves and their posterity."[27] There were, in fact, mutual promises exchanged between monarch and subjects:

> That if the adventurers will hazard their lives and properties in acquiring, according to the rules of justice, possessions in the desert regions of America, far remote from their native land, and encounter all the difficulties and dangers necessarily attending such an enterprise, that then the King and the nation will support and defend them in those possessions. They paying due allegiance to his Majesty, holding the lands of him upon stipulated conditions; and that they shall lose no part of their natural *rights, liberty and property,* by such removal; but that they, *and all their posterity for ever, shall as fully and freely enjoy them, to all intents, constructions, and purposes whatsoever, as if they and every of them were born in England.*[28]

The claim was not a new one. Increase Mather had relied on the mutual-promise argument when seeking the restoration of Massachusetts' charter in 1689,[29] and the Massachusetts House would continue to assert the contention long after the Stamp Act was repealed.[30] Samuel Adams once suggested that the contract arose after settlement.[31] This may have

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26. Boston Evening-Post, July 1, 1765, at 1, col. 2.

27. Boston Evening-Post, March 8, 1773, (supplement), at 1, col. 1 (quoting the New York Journal).

28. Boston Evening-Post, July 1, 1765, at 1, col. 2.

29. D. LOVEJOY, THE GLORIOUS REVOLUTION IN AMERICA 230 (1972). A tract written at the time of the controversy in which Mather was involved contained one of the first uses of the term "original contract" and defined it similarly to the definitions of the 1760's.

> [T]here was *an Original Contract* between the King and the first planters in *New-England,* the King promising them, if they at their own cost and charge would subdue a Wilderness, and enlarge his Dominions, they and their Posterity after them should enjoy such Privileges as are in their Charters expressed, of which that of not having Taxes imposed on them without their own consent was one.

E. RAWSON & S. SEWALL, THE REVOLUTION IN NEW ENGLAND JUSTIFIED, AND THE PEOPLE THERE VINDICATED FROM THE ASPERSIONS CAST UPON THEM BY MR. JOHN PALMER (1691), in THE ANDROS TRACTS 65, 126 (Prince Soc'y Pubs. vol. 5, 1868).

30. The original contract between the king and the first planters here, was a royal promise in behalf of the nation, which till very lately, it was never questioned but the King had a power to make; namely, that if the adventurers would, at their own cost and charge and at the hazard of their lives and every thing dear to them, purchase a new world, subdue a wilderness, and thereby enlarge the King's dominions, they and their posterity should enjoy such rights and privileges as in their charters are expressed; which are, in general, all the rights, liberties and privileges of his Majesty's natural born subjects within the realm.

Letter from the Massachusetts House of Representatives to Agent Dennys de Berdt, Jan. 12, 1768, in 1 THE WRITINGS, *supra* note 19, at 139-40.

31. "Immediately after their Arrival here they solemnly recogniz[e]d their Allegiance to

been historically true for Plymouth, Connecticut,[32] Rhode Island,[33] and the towns of Dover and Exeter in today's New Hampshire[34]—but it was usually assumed that the compact was executed when the first immigrants to each colony disembarked from the mother kingdom.

The first factor making the contract operative was the promise made by the reigning monarch to persuade citizens to emigrate—"a Promise, which they looked upon as sacred."[35] The promise was more implied than stated, and was expressed primarily by official "Encouragement for People to Transport themselves and their families."[36] This "encouragement" was the second operative factor. It was not economic; it was political and was also more implied than stated.[37] The implication was best manifested by the fact that royal rule did not accompany the immigrants. Instead the settlers were permitted local control or home rule,[38] a constitutional condition that induced many additional settlers to follow the original pioneers. The subsequent immigrants, relying on the constitutional contract, were also covered by its terms, as a result of which they

their Sovereign in England & the Crown graciously acknowled'd them. . . ." Letter from Samuel Adams to John Smith, Dec. 19, 1765, in 1 THE WRITINGS, *supra* note 19, at 45.

> [A] number of the King's subjects . . . took shelter in a desert, that they might enjoy their civil and religious liberties, uncontrouled and unmolested; they were then in a state of nature, under no civil government but what they form'd themselves. When they had establish'd their several settlements, out of regard to their mother country, they sent home their several agents to tender their new acquisitions to their mother country, on certain conditions then agreed on by the several parties . . . .

Letter from a London Merchant to a Noble Lord, (n.d.), Massachusetts Gazette, Jan. 2, 1766, at 1, col. 3.

32. John Adams, "Novanglus," No. 7, in THE AMERICAN COLONIAL CRISIS: THE DANIEL LEONARD-JOHN ADAMS LETTERS TO THE PRESS, 1774-1775, at 204 (B. Mason ed. 1972) [hereinafter cited as THE CRISIS]. Connecticut was settled by private enterprise as a result of which

> considerable Addition was made to his Majesty's Dominions and Interest, And that in Consideration of such Purchase . . . Charles the 2d [granted to the settlers and their successors] . . . all Liberties, and Immunities of free and natural Subjects, within any of the Dominions of the said King. . . .

Connecticut Resolves, Oct. 25, 1765, in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766, at 55 (E. Morgan ed. 1959) [hereinafter cited as PROLOGUE].

33. C. ANDREWS, OUR EARLIEST COLONIAL SETTLEMENTS: THEIR DIVERSITIES OF ORIGIN AND LATER CHARACTERISTICS 87-112 (1959).

34. I. MAUDUIT, A SHORT VIEW OF THE HISTORY OF THE COLONY OF MASSACHUSETTS BAY, WITH RESPECT TO THEIR CHARTERS AND CONSTITUTIONS 26-28 (3d ed. 1774).

35. Roxbury Declaration, Dec. 14, 1772, Boston Evening-Post, Dec. 14, 1772, at 2, col. 2.

36. Maryland Resolves, Sept. 28, 1765, Boston Evening-Post, Oct. 21, 1765, at 2, col. 3. For other references to "encouragement" *see* Petition to the King from the Council and House of Burgesses of Virginia, Dec. 18, 1764, Massachusetts Gazette and Boston News-Letter, March 21, 1765, at 2, col. 1 [hereinafter cited as Petition]. *See also,* Argument, Boston Evening-Post, Nov. 4, 1765, at 1, col. 2-3.

37. "These terms and conditions were certainly implied in the original contract . . . ." Boston Evening-Post, July 1, 1765, at 1, col. 2.

38. [T]hese Colonies were Originally Planted by Subjects of the *British* Crown, who, animated with the Spirit of Liberty, encouraged by your Majesty's Royal Predecessors, and confiding in the Public Faith for the Enjoyment of all the Rights and Liberties essential to Freedom, emigrated from their Native Country . . . That for the Enjoyment of these Rights and Liberties, several Governments were early formed in the said Colonies, with full Power of Legislation, agreeable to the Principles of the *English Constitution.*

Petition to the King from the Stamp Act Congress, Oct., 1765, in PROLOGUE, *supra* note 32, at 64.

> entertained the most solid hopes that they were not only entitled to, but had gained by uninterrupted usage, by the concessions of the crown and the *British* parliament, such a civil constitution as would remain secure and permanent, to be transmitted inviolate to their latest posterity.[39]

The form of government granted by the mother country to the first settlers and held out as an inducement to those who followed, was "the Condition"[40] or the "Consideration"[41] for emigration. Once the colonists performed their part of the accord—once they disembarked for the new world—the contract became binding.

III. The Significance Of Performance

Contemporary acceptance of the contract theory is remarkable. Not just Whigs but militant imperial officials as well assumed it had validity. William Bull the Younger, chief executive of South Carolina and future loyalist exile,[42] apparently had no doubts at all. Bull knew why colonial government was "inclined more to the democratical than regal side." It was because of "the great religious and Civil indulgences granted by the Crown to encourage Adventurers to settle in America."[43] Thomas Hutchinson, Chief Justice of Massachusetts, future governor, and destined to be the most controversial loyalist exile,[44] even compared the constitutional contract between the king and the first continental settlers with the compact between England and Scotland promulgated by the Act of Union of 1707.[45] That statute had guaranteed parliament would tax Scotland only in the manner and proportion specified in the treaty.[46] Even though that was a formal, negotiated, legislated agreement, Hutchinson thought it an analogy to the implied constitutional contract. The colonial charters and gubernatorial commissions, granting Americans the privileges and immunities of English subjects, he argued, were an inducement to people to emigrate into the colonies. They were compacts similar to the Act of Union.[47]

Hutchinson should not be misinterpreted. His theory was consistent

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39. Petition to the King from the New York House of Assembly, n.d., Boston Evening-Post, April 17, 1769, at 2, col. 1.

40. Letter from a London Merchant to a Noble Lord, n.d., in Massachusetts Gazette and Boston News-Letter, May 2, 1765, (Supplement), at 1, col. 1 [hereinafter cited as LETTER]. "*New England,*" it had been said many years before, "receiv'd her Charters on this express Condition, of settling Colonies for the Benefit of the Crown." J. DUMMER, A DEFENCE OF THE NEW-ENGLAND CHARTERS 8 (1721) [hereinafter cited as DUMMER].

41. Connecticut Resolves in PROLOGUES, *supra* note 32, at 55.

42. Baker-Crothers, *William Bull,* 3 D.A.B. 252-53 (1929).

43. J. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689-1776, at 1 (1963). *Cf.* Knox, *Considerations on the great Question, what is to be done with America (1779),* in 30 WILL. & MARY Q. 297, 300 (1973).

44. B. BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1975).

45. 2 E. WILLIAMS, A DOCUMENTARY HISTORY OF ENGLAND 127-46 (1965).

46. 5 Ann. c.8.

47. Letter form Lieutenant Governor Thomas Hutchinson to Agent Richard Jackson, July 23, 1764, in B. KNOLLENBERG, ORIGIN OF THE AMERICAN REVOLUTION 175 (rev. ed. 1961).

with everything he ever wrote. He did not suggest that parliament or the king were bound by the contract, certainly not in the area "of what are called English liberties" should it become necessary to suspend those liberties.[48] The contract meant, Hutchinson believed, that Great Britain should not arbitrarily disregard American rights. It was an implied pledge and a moral obligation.

Whigs might have said that Thomas Hutchinson had not gone far enough, but they too argued that the constitutional contract was a moral obligation. Unlike Hutchinson, however, they believed the moral obligation to be part of the original contract and binding on the home government. "No Englishmen in their Wits," Increase Mather had explained more than a half century before the Stamp Act was proposed,

> will ever Venture their Lives and Estates to Enlarge the Kings Dominions abroad, and Enrich the Whole English Nation, if their Reward after all must be to be deprived of their *English Liberties*.[49]

In other words, even if the exchange of mutual implied promises did not make the original contract legally binding, disregard of his own promise on the part of the king would have been an act of bad faith toward subsequent settlers. They presumably relied on appearances, and thinking the contract in force, had emigrated to colonies where they could enjoy English liberties. As a result, the king and his predecessors obtained a vast new empire, the gift of people relying on their apparent promises. After all, the emigration had occurred with "the Permission and Encouragement of the Crown," and for that reason alone Americans

> rather merit Favour, than a Deprivation of those [essential] Rights, by giving an almost boundless Extent to the *British* Empire, expanding its Trade, increasing its Wealth, and augmenting that Power which renders it so formidable to all *Europe*.[50]

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48. Letter from Lieutenant Governor Thomas Hutchinson to Thomas Whately, Jan. 20, 1769, in COPY OF LETTERS SENT TO GREAT-BRITAIN, BY HIS EXCELLENCY THOMAS HUTCHINSON, THE HON. ANDREW OLIVER, AND SEVERAL OTHER PERSONS, BORN AND EDUCATED AMONG US 16 (1773).

49. I. MATHER, A VINDICATION OF NEW ENGLAND 58 (1690), in 2 THE ANDROS TRACTS 21, 76 (Prince Soc'y Pubs. vol. 6, 1869).

> [A]nd what Englishmen in their right Wits will venture their Lives over the Seas to enlarge the Kings Dominions, and to enrich and greaten the English Nation, if all the reward they shall have for their cost and adventures shall be their being deprived of *English Liberties*, and in the same condition with the *Slaves in France and* Turkey!

E. RAWSON & S. SEWALL, *supra* note 29, at 125. William Penn put the argument in even stronger terms:

> Can it Enter the head of any man of Common Sense knowing anything of America that wee came hither to be under a King's Governour that is Mercenary and that has no Interest in the Country. Are we comme 3000 miles into a desert . . . to have only the same privileges we had at home?

Letter from William Penn to Charlewood Lawton, Aug. 15, 1701, in M. HALL, EDWARD RANDOLPH AND THE AMERICAN COLONIES 1676-1703, at 223 (Norton Library ed. 1969). For an argument similar to Mather's made at the time that America was receiving the first rumors of the Stamp Act *see* Letter from Richard Henry Lee to a Gentleman in London, May 31, 1764, in 1 THE LETTERS OF RICHARD HENRY LEE 1762-1778, at 5-6 (J. Ballagh ed. 1911) [hereinafter cited as THE LETTERS].

50. New York Resolves, Dec. 18, 1765, in PROLOGUE, *supra* note 32, at 61.

Charles Thomson, leading Pennsylvania radical and future secretary of the Continental Congress, had a special perspective from which to view the contract. He was an immigrant, a native of county Derry.[51] Americans, Thomson contended,

> cannot bring themselves to believe, nor can they see how England with reason or justice could expect, that they should have encountered the horrors of the desert, borne the attacks of barbarous savages, and, at the expence of their blood and treasure, settled this country to the great emolument of England, and after all quietly submit to be deprived of every thing an Englishman has been taught to hold dear.[52]

Thus the moral obligation was part of the contract. Even if the mutual promises of the original agreement were not enforceable *per se* (a proposition no whig would admit), they became so by subsequent reliance and deceit. For the king or parliament to alter the constitution after 150 years of home rule and local taxation would be deceitful toward settlers who had believed that the customary constitution would continue. To change the imperial arrangement meant that those settlers suffered a detriment which, in the classic definition of *assumpsit,* was a breach of contract.[53] American Whigs may even have believed that the greater the danger and more immediate the enterprise, the more binding the obligation.[54]

No matter how the original contract was defined—as mutual promises executed when the first settlers sailed for America or as a detriment suffered by reliance on deceitful conduct—American Whigs agreed on one fact. "The colonists [had] performed the contract on their parts," and, moreover, they had done nothing since that time "to forfeit their rights," if constitutional rights were, in law, forfeitable.[55] Thus, the new imperial assertion of legislative power during the 1760's was objectionable not only

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51. Burnett, *Charles Thomson,* 18 D.A.B. 481-82 (1936).

52. Letter from Charles Thomson to Benjamin Franklin, Sept. 24, 1765, in THE AMERICAN REVOLUTION: THE ANGLO-AMERICAN RELATION, 1763-1794, at 46 (C. Ritcheson ed. 1969). *See also* H. APTHEKER, THE AMERICAN REVOLUTION 1763-1783, at 24 (1960).

53. In legal theory there were two counts upon which to base enforceability, a detriment suffered and a benefit conferred.

> Are we ready to be enslaved by part of our own community, as a grateful return for the benefits they have derived from the danger and enterprise of our Fathers?

Letter from Richard Henry Lee to Landon Carter, Feb. 2, 1766, in 1 THE LETTERS, *supra* note 49, at 12-13.

54. At least such was implied by the people of a Maine community, who noted that all Americans could assert that their ancestors had settled a howling wilderness and thus had inherited rights under the contract.

> But the People of this Town of Gorham have an Argument still nearer at hand; Not only may we say that we enjoy an Inheritance purchased by the Blood of our Forefathers, but this Town was settled at the Expense of our own Blood! We have those amongst us, whose Blood streaming from their own Wounds watered the Soil from which we earn our Bread! Our Ears have heard the infernal Yells of the native Savage Murderers—Our Eyes have seen our young Children weltering in their Gore, in our own Houses. . . .

Resolves of the town of Gorham, Jan. 7, 1773, Boston Evening-Post, Feb. 15, 1773, at 1, col. 2.

55. Boston Evening-Post, March 8, 1773, (Supplement), at 1, col. 1 (quoting The New York Journal).

because it altered the customary colonial constitutions, but also because it was a unilateral breach of an agreement that could properly be changed only by bilateral negotiation.[56] The logical conclusion was, for Whigs, inescapable. That they and their forefathers had performed their side of the compact meant that the Stamp Act "wholly cancels the very conditions upon which our ancestors settled this country, and enlarged his Majesty's dominions, with much toil and blood, and at their sole expense."[57]

IV. The Second Constitutional Contract

What was obvious to a Whig could be obscure to a Tory. Tories might acknowledge the validity of the constitutional contract in abstract theory, but could neither accept the Whigs' legal conclusion[58] nor agree that the compact had been breached by the Stamp Act. Most doubted that any contract had been made.[59] The Whigs' mistake, they thought, was looking at the wrong evidence. Instead of stressing American hardships and expectations, they asked, why not consider the support that England had provided the colonies during their infancy? Did not that aid entitle England's successor, Great Britain, to obedience or, at the very least, to repayment of the costs?

The argument was especially popular in Great Britain. At the time the Stamp Act was first proposed there was apparently a notion prevalent in London that England had nursed the colonies during their early years.[60] It was Charles Townshend who made the most famous pronouncement of the theme; more famous for the answer he aroused than the way he phrased the claim. The Americans, he asserted during parliament's Stamp Act debate, owed Great Britain a return on the original investment.

> These Children of our own Planting, nourished by our Indulgence, until they are grown to a good Degree of Strength and Opulence, and protected by our Arms, will they grudge to contribute their Mite to relieve us from the heavy load of national Expence which we lie under.[61]

Colonel Isaac Barre, beginning his career as parliamentary champion of the American Whigs' more radical pretensions, answered the factual argument.

56. B. Knollenberg, *supra* note 47, at 156.

57. Answer from the Massachusetts House of Representatives to Governor Francis Bernard, Oct. 23, 1765, Speeches of the Governors of Massachusetts, From 1765 to 1775; And the Answers of the House of Representatives, to the Same; With Their Resolutions and Addresses for that Period 46 (1818). [hereinafter cited as Speeches]

58. I.e., that the contract took precedence over parliamentary supremacy.

59. *E.g.*, Rhode Island lawyer Martin Howard, Jr., A Letter from a Gentleman at Halifax to his Friend in Rhode Island, Containing Remarks upon a Pamphlet, Entitled, The Rights of Colonies Examined 6-9 (1765).

60. Such at least is implied by the fact that the first newspaper discussion in Great Britain of the Stamp Act took issue with the claim. F. Hinkhouse, The Preliminaries of the American Revolution As Seen in the English Press 1763-1775, at 57 (1926).

61. Massachusetts Gazette and Boston News-Letter, May 30, 1765, at 1, col. 3. Townshend's words are quoted variously. *See, e.g.*, 1 J. Froude, The English In Ireland In The Eighteenth Century 133 (1881).

> They planted by your care? No, your oppressions planted them in America. They fled from tyranny to a then uncultivated and inhospitable country. . . . They nourished up by your indulgence? They grew by your neglect of them. As soon as you began to care about them, that care was exercised in sending persons to rule them in one department and another. . . . Men promoted to the highest seats of justice, some of who to my knowledge were glad, by going to a foreign country, to escape being brought to the bar of a court of justice in their own.—They protected by your arms? They have nobly taken up arms in your defense, have exerted a valour, amidst their constant and laborious industry, for the defense of a country whose frontier was drenched in blood, while its interior parts yielded all its little savings to your emolument.[62]

We may admire the remarkable rhetorical skills of Colonel Barre. We should admire even more his accuracy. In the prerevolutionary factual debate drawn from history, there was no other contention so successfully sustained.[63]

Concisely stated the argument was that

> when our Fathers Left their Native Country . . . they came of their Own accord and at their own Expense and took possession of a country they were obliged to Buy or Fight for and to which the [English] Nation had no more Right then the Moon.[64]

Just as concisely stated the historical facts were that, with the exception of Georgia and Nova Scotia,[65] the mainland British colonies had been settled "without the least assistance from the mother state,"[66] or, as Thomas Jefferson later argued,

> No shilling was ever issued from the public treasures of his majesty or his ancestors for their assistance, till of very late times, after the colonies had become established on a firm and permanent footing.[67]

The facts were important and offered more than a refutation of

62. 1 D. RAMSEY, THE HISTORY OF THE AMERICAN REVOLUTION 57 (New ed. 1793).

63. As contemporary scholarship sustains it today. The "colonization of America owed everything to private enterprise and nothing to state support." C. HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION 11 (Panther ed., 1972). The British colonies "had but a loose connection with the crown and grew up in fits of absence of mind." H. JONES, O STRANGE NEW WORLD 98 (1952). *See also id.* at 195-96; W. NOTESTEIN, THE ENGLISH PEOPLE ON THE EVE OF COLONIZATION: 1603-1630, at 256-58 (Harper Torchbook ed. 1962).

64. *Instructions of the Town of Ipswich, Oct. 21, 1765,* in 2 T. WATERS, IPSWICH IN THE MASSACHUSETTS BAY COLONY: A HISTORY OF THE TOWN FROM 1700 to 1917, at 294 (1917) [hereinafter cited as WATERS].

65. "Our ancestors, and we believe the first settlers of every colony, except Nova Scotia and Georgia, occasioned but little, some of them, no expense, and yet have brought an amazing addition of wealth, territory and subjects to the [British] nation." Extract of a Letter from a Committee of the Massachusetts Council and House of Representatives to Agent Mauduit, [1764], in SPEECHES, *supra* note 57, at 25.

66. Petition to the King from the Pennsylvania House, Sept. 22, 1768, The Boston Chronicle, Feb. 13, 1769, at 51, cols. 2-3. "[T]heir Ancestors having settled this Country at their *sole* Expence." Massachusetts Resolves, Oct. 29, 1765, PROLOGUE, *supra* note 32, at 57.

67. T. Jefferson, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA SET FORTH IN SOME RESOLUTIONS INTENDED FOR THE INSPECTION OF THE PRESENT DELEGATES OF THE PEOPLE OF VIRGINIA NOW IN CONVENTION (1774), in 1 THE PAPERS OF THOMAS JEFFERSON 1760-1776, at 122 (J. Boyd ed. 1950) [hereinafter cited as Jefferson].

Townshend's argument that Britain was entitled to a return on the investment it had made at the time America was settled. Once accepted, they furnished colonial Whigs the factual basis for formulating a second contract exempting the colonies from parliamentary taxation.

As a result of the private efforts of the first settlers and succeeding generations, the argument contended,

> the inhospitable Desarts of *America* have been converted into Flourishing Countries; Science, Humanity, and the Knowledge of Divine Truths, diffused through Remote Regions of Ignorance, Infidelity, and Barbarism; the Number of *British* Subjects wonderfully Increased, and the Wealth and Power of Great-Britain proportionably Augmented.[68]

Not only had the mother country obtained all these benefits without any cost to her own taxpayers, but the only reward the colonists had received was the promise of home rule.[69]

Just as the exchange of mutual promises—or, in the alternative, the detriment suffered due to deceitful conduct—gave rise to the original constitutional contract, so the benefit conferred upon Great Britain gave rise to a second contract obliging the king and parliament to respect American rights. If the benefit conferred was not sufficient consideration at law, surely it was in equity.

> This must certainly be esteem[e]d of very great Weight in Point of Equity; for it has always been usual for Mother States, to put themselves to great Expence in settling their Colonys, expecting to reap the Advantage of it in the Extent of Trade & Empire. But Britain reaps all this Advantage without any Expence of her own & solely at theirs.[70]

We can appreciate the exasperation of some members of parliament on being told that Great Britain reaped the advantages of colonization but that taxation was not included among those advantages. "[T]o what purpose," a Londoner asked, "did she lavish away her blood or treasures, in securing to herself only an *ideal* right to a barren country."[71] Perhaps as irritating was to learn that not only did the colonial Whigs insist that American rights were guaranteed by an unwritten document of which few British lawyers had previously heard, but even that the authority of parliament—the very

68. Petition to the King from the Stamp Act Congress, Oct., 1765, in PROLOGUE, *supra* note 32, at 64.

69. The colonial charter was the only Reward the Province ever had for Purchasing at an Infinite Expense of their Own Blood & Treasure their Large Part of New Accession of Empire Wealth & Glory to the British Nation.
Instructions of the town of Ipswich, Oct. 21, 1765, in WATERS, *supra* note 64, at 294.

70. Letter from Samuel Adams to John Smith, Dec. 19, 1765, in 1 THE WRITINGS, *supra* note 19, at 40-41. Earlier, in 1721, Jeremiah Dummer argued that
to strip the Country of their Charters after the Service has been so successfully perform'd, is aborrent from all Reason, Equity and Justice.
DUMMER, *supra* note 40, at 8.

71. "Anti-Sejanus," London Chronicle, Nov. 28-30, 1765, in PROLOGUE, *supra* note 32, at 99 [hereinafter cited as "Anti-Sejanus"].

parliament that had only recently become supreme and unlimited in the mother nation—was both limited and precisely defined by that document.[72] Little wonder that even before the Stamp Act debate began an expert on American affairs would complain that the colonists

> consider themselves as intitled to a greater measure of Liberty than is enjoyed by the People of England, because of their quitting their Native Country, to make Settlements for the advantage of Great Britain in the Wilds of America.[73]

V. The Imperial Contract

The role of historical facts in constitutional advocacy during the eighteenth century may have been settled once it was proven that England's treasury had not financed colonial settlements. Supporters of imperial taxation then ceased to justify their case on the argument that Americans should repay the investment. On the other hand, it may be that they felt little need to pursue the argument. They believed that other facts established the same debt.

As originally stated, the claim that the British were owed support by the colonies—an obligation great enough to justify direct imperial taxation—had two counts. Current British taxes, it was contended, were unusually heavy because

> a great part of the national debt was contracted in establishing them [the American colonies] on a firm foundation, and protecting them from the arbitrary attempts of their implacable enemies.[74]

It was the second premise that eventually dominated the factual aspects of the constitutional debate. Great Britain's huge debt had been contracted during the Seven Years War when imperial forces, driving the French from the Ohio Valley and securing the Plain of Abraham, made the continent safe for British colonists. A war fought for the benefit of Americans surely raised an obligation on them and on their posterity to share at least part of the financial burden thrust upon the British nation as a result of having protected the colonies during the war.

> Has not it cost us upwards of fifty million to defend America from the assaults of foreign enemies, under whom she would have groaned with every kind of oppression and tyranny? And what?

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72. Great Britain could have no pretence to any authority over them, for the right was founded in compact, and the same compact that gives Great Britain any rightful authority over them; which is the *sole right of taxing themselves* by their own representatives, in which all their charters agree.
LETTER, *supra* note 40, at 1, col. 3.

73. W. Knox, Hints Respecting the Settlement of Our American Provinces (ms., 1763), in Barrow, *A Project for Imperial Reform,* 34 WILL. & MARY Q. 113, 117 (1967).

74. "William Pym," London Evening Post, Aug. 20, 1765, in Boston Evening-Post, Nov. 25, 1765, at 1, col. 2 [hereinafter cited as "William Pym"].

> Will she refuse to pay a small part of the burden; and must the British landholders be saddled with an additional tax, upon Her account, with two shillings in the pound?[75]

It was a question of self-interest as well as fairness,[76] which together with the changed circumstances resulting from the war and the unprecedented national debt, altered the constitutional contract and justified the imposition of direct imperial taxation. It was also a matter of equity.

> If we reap emoluments from the existence of the colonies, the colonies owe every thing to our encouragement and protection. As therefore we share in the same prosperity, we ought to participate in the same distress; and nothing can be more inequitable, than the least disinclination to bear a regular portion of these disbursements, which were applied to support the general interest both of the mother-country and themselves.[77]

Again we must follow these arguments carefully. American Whigs did not wish to irritate British public opinion unnecessarily. They readily acknowledged the fact of the military debt. What they could not admit was the legal conclusion. Events, they insisted, had to be placed in historical perspective. If Great Britain was generous, she had only recently become generous. There was a time not so long ago when the colonies were left to defend themselves.[78] In fact, generosity might not be the best word. The mother country had not offered military aid until the colonies had become commercially valuable. It had then been in London's self-interest, as Jefferson later argued, to protect British North America

> against an enemy who would fain have drawn to herself the benefits of their commerce to the great aggrandisement of herself and danger of Great Britain. Such assistance, and in such circumstances, they had often before given to Portugal and other allied states, with whom they carry on a commercial intercourse. Yet these states never supposed that, by calling in her aid, they thereby submitted themselves to her sovereignty.[79]

In any event, the fact that the national debt was not evenly proportioned could not work as a forfeiture of American rights under the constitutional contract.[80]

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75. "Anti-Sejanus: The ingratitude of the Americans," London Chronicle, Jan. 28, 1766, in PROLOGUE, *supra* note 32, at 132.

76. George Grenville, *The Present State of the Nation,* in the Boston Chronicle, Feb. 13, 1769, at 50, col. 1.

77. "William Pym," *supra* note 74, at 1, col. 2. Another argument of equitable fairness was based on the contention Great Britain lost people by populating the colonies:

> For if the strength and riches of a State depend upon the number of inhabitants, it is manifest that by every *Emigration,* it must suffer in both these respects, unless it derives an equivalent from the country, to which such an Emigration is made.

"Anti-Sejanus," *supra* note 71, at 99-100.

78. "The country has risen, grown, and been defended without any expence to the government at home, till within a few years past." Instructions, *supra* note 2, at 2, col. 2.

79. Jefferson, *supra* note 67, at 122.

80. It was true that some colonies contributed less than others to the war effort, but have they forfeited their essential rights as Englishmen by it: such as their "right of taxing themsleves, and of trial by juries:"—by What law or reason? Boston Evening-Post, Nov. 5, 1765, at 1, col. 2.

The colonial defense was largely factual. A sizeable part of the war debt had been incurred fighting the French on German battlefields, a struggle "in which Americans have no more concern than East Indianmen."[81] Even on this side of the Atlantic the military contest had been commenced to protect British not colonial interests.[82] It had neither been fought for the benefit of Americans[83] nor had it been a defensive war. Had Great Britain, Samuel Adams observed,

> been only on the defensive here, a much less Expence would have been sufficient; there was evidently a View of making Conquests, & by means thereof establishing an advantageous Peace for the Nation, or perhaps advancing her Dominion & Glory.[84]

American Whigs may have depreciated their own role in precipitating the French and Indian War,[85] but they were confident they did not exaggerate the benefits that victory had bestowed on the mother country. Great Britain had conquered lands "equal in value to all the expence she had been at in America."[86] Moreover, the colonies had received nothing from the peace settlement except the departure of the French from the continent. British citizens, not Americans, were enjoying the spoils of Canada, Louisiana, and Florida. The only legal justification the Whigs could think of for such discrimination was that London was entitled to "an indemification for the charges of that war."[87]

It was not an American Whig but a member of parliament who most memorably claimed that Americans defended themselves while Great Britain reaped the profits.[88] And it was the minister who led the war effort, William Pitt, who insisted that the struggle had been for Britain's benefit.[89] Americans had fought hard and had made great contributions to the victory, just as they had in an earlier war when New Englanders took the fortress of Louisbourg, an action that saved the mother country from the

81. New London [Conn.] Gazette, in Boston Evening-Post, Oct. 28, 1765, at 1, col. 3.

82. As to the Ohio, the contest there began about your right of trading in the Indian country, a right you had by the treaty of Utrecht, which the French infringed; they seized the traders and their goods, which were your manufactures; they took a fort which a company of your merchants, and their factors and correspondents, had erected there, to secure that trade. Braddock was sent with an army to re-take that fort (which was looked on here [London] as another encroachment on the King's territory) and to protect your trade. It was not till after his defeat that the colonies were attacked.

Testimony of Benjamin Franklin, in A COLLECTION, *supra* note 7, at 76.

83. Boston Evening-Post, March 24, 1766, at 1, col. 1-2. For Benjamin Franklin's elaboration of this argument in the London Chronicle, April 11, 1767, *see* BENJAMIN FRANKLIN'S LETTERS TO THE PRESS 1758-1775, at 88-89 (V. Crane ed. 1950).

84. Letter from Samuel Adams to John Smith, Dec. 19, 1765, in 1 THE WRITINGS, *supra* note 19, at 41.

85. *But cf.* O. DICKERSON, THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION 157 (1951).

86. Letter from the Massachusetts House of Representatives to Agent Dennys de Berdt, Jan. 12, 1768, in 1 THE WRITINGS, *supra* note 19, at 143. *See also* "A New Englander," Providence Gazette, Aug. 18, 1764, in Boston Evening-Post, Sept. 17, 1764, at 1, col. 2.

87. Boston Evening-Post, Oct. 28, 1765, at 1, col. 3.

88. *See* text accompanying note 62 *supra*.

89. Debate on Repeal of the Stamp Act, in PROLOGUE, *supra* note 32, at 139.

"terrible apprehensions of an invasion by French flat-bottomed boats,"[90] laid "a foundation for restoring peace to Europe,"[91] and thereby repaid with "more than a ballance" whatever protection Great Britain had extended.[92]

Even more convincing, American Whigs thought, was that Great Britain had not incurred all the costs of the French and Indian War. The colonies, they claimed, had "bro't upon themselves a Debt almost insupportable."[93] High imperial officials admitted the truth of this contention. The people of Boston had "chearfully submitted to an amazing burthen of Taxes," Thomas Hutchinson wrote of the war years.[94] The debt was so burdensome, Governor Francis Bernard agreed, that Massachusetts probably could not bear the added weight imposed by the Stamp Act.[95] We may be certain that most New Englanders concurred with Hutchinson and Bernard; that they felt they had made sacrifices in the common cause equal to those of the British people.

The colonial defense deserves special attention. The Massachusetts Assembly took pains to explain it, fearful it might otherwise be misunderstood. The Council and House of Representatives joined forces in 1764 and drafted a statement detailing the "services and expenses" of the colony during the French and Indian War. They had only one purpose in mind, they insisted. It was to defend established rights. They did not

> desire to be distinguished from the other colonies by any new grants and immunities; neither are they seeking any further rewards. They desire only, that the privileges their ancestors purchased so dearly, and they have never forfeited, may be continued to them.[96]

Truly the sacrifices Americans had made during the war, if nothing else, entitled the colonies to a continuation of the constitutional contract without any change or diminution. It was cruel to find that same war cited

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90. Boston Evening-Post, Aug. 1, 1774, at 2, col. 1.

91. Boston Evening-Post, Sept. 23, 1765, at 1, col. 1. *See also* Instructions, *supra* note 2, at 2, col. 2.

92. Boston Evening-Post, Oct. 28, 1765, at 1, col. 3.

93. Instructions of the Town of Boston, Boston Evening-Post, Sept. 23, 1765, at 1, col. 2. *See also* Statement of New England Expenses, SPEECHES, *supra* note 57, at 25-28; Testimony of Benjamin Franklin, in A COLLECTION, *supra* note 7, at 75-76; Letter from Governor Ward to the Earl of Shelburne, Nov. 6, 1766, in A COLLECTION, *supra* note 7, at 119; Letter from Samuel Adams to John Smith, in THE WRITINGS, *supra* note 19, at 41-42; Boston Evening-Post, Aug. 29, 1774, at 2-3.

94. C. BRIDENBAUGH, CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743-1776, at 7 (1971). *See also id.* at 220-21.

95. Letter from Governor Francis Bernard, Nov. 23, 1765, in F. BERNARD, SELECT LETTERS ON THE TRADE AND GOVERNMENT OF AMERICA; AND THE PRINCIPLES OF LAW AND POLITY, APPLIED TO THE AMERICAN COLONIES 30-31 (1774); Letter from Governor Francis Bernard to Secretary at War Lord Barrington, Nov. 23 1765, THE BARRINGTON-BERNARD CORRESPONDENCE 94-95 (E. Channing & A. Coolidge eds. 1912).

96. *Extracts from the statement of services and expenses . . . to furnish arguments why the colony should not be taxed, &c,* Dec. 17, 1764, SPEECHES, *supra* note 57, at 27; Boston Evening-Post, Aug. 29, 1774, at 3, col. 2.

as evidence of changed circumstances that abrogated the contract and replaced it with another.

> We verily tho't we merited at least continuance of privileges; if not additional favors. But I trust, not one in a million, ever tho't, we should be requited, with dishersion, and disenfranchisement, for our filial affection and services.[97]

The fact of unselfish contribution to the war effort, both in money and manpower, settled the legal issue. Great Britain had failed to prove the equitable consideration necessary to validated an imperial contract and abrogate the original constitutional compact.

VI. THE COLONIAL *quid pro quo*

"Nothing," Alexander Hamilton was to complain, "is more common than to hear the voltaries of parliament urge the protection we have received from the mother country, as an argument for submission to its claims."[98] George Grenville, the author of the Stamp Act, had been one of the first to state the proposition. "Protection and obedience are reciprocal," he told parliament. "Great Britain protects America; America is bound to yield obedience."[99] American Tories agreed.[100] American Whigs did not. Hamilton thought the answer lay in the original contract. It had made allegiance, not obedience, the consideration for protection.[101]

Hamilton's answer was too legalistic, too theoretical to have carried the argument. Grenville had made an important point. Following the war, the British ministry found it necessary to maintain a more extensive military establishment than had been previously known during peace time. The cost was enormous[102] and part of the expense was devoted to maintaining fleets and armies in the colonies as protection against future wars.[103] The benefit "was mutual; and consequently the disadvantage should be mutual too."[104]

American Whigs might have answered that the troops and ships were

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97. Boston Evening-Post, Oct. 28, 1765, at 1, col. 1.

98. A. HAMILTON, THE FARMER REFUTED: OR A MORE IMPARTIAL AND COMPREHENSIVE VIEW OF THE DISPUTE BETWEEN GREAT-BRITAIN AND THE COLONIES, INTENDED AS A FURTHER VINDICATION OF THE CONGRESS (1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 81, 91 (H. Syrett ed. 1961) [hereinafter cited as HAMILTON].

99. Debate on Repeal of the Stamp Act, in PROLOGUE, *supra* note 32, at 137.

100. Allegiance and protection are reciprocal. It is our highest interest to continue as part of the British empire, and equally our duty to remain subject to the authority of parliament.
Leonard, "Massachusettensis," in THE CRISIS, *supra* note 32, at 37.

101. The colonies were planted and settled by the Grants and under the Protection of English Kings, who entered into covenants with us for themselves, their heirs and successors; and it is from these covenants, that the duty of protection on their part, and the duty of allegiance on ours arise.
HAMILTON, *supra* note 98, at 90-91.

102. George Grenville, *The Present State of the Nation,* in the Boston Chronicle, Feb. 13, 1769, at 50, col. 1.

103. O. DICKERSON, *supra* note 85, at 54.

104. "William Pym," *supra* note 74, at 1, col. 2.

not maintained in the colonies for their benefit. They had been stationed in America only because the burden would have been too heavy on Ireland had they been garrisoned in that kingdom, and the British people would not allow them in the home island.[105] A standing army was an unconstitutional imposition which American Whigs could truly say the people neither wanted[106] nor needed.[107]

These answers were given but they are not the answers upon which American Whigs rested their case. Rather they turned to a doctrine of international law stated by Baron de Montesquieu, a French jurisprude whose work was known in America. "The disadvantage of a colony that loses the liberty of commerce," Montesquieu wrote, "is visibly compensated by the protection of the mother country, who defends it by her arms or supports it by her laws."[108]

The thesis that control of colonial trade was the compensation paid Great Britain for defense was widely accepted. It was, Chief Justice Hutchinson argued, a "reasonable" price "for the Protection received against foreign Enemies,"[109] and many other Tories echoed his words.[110] A decade before the prerevolutionary controversy began, Benjamin Franklin had called the regulation of trade a tax,[111] but that soon became an unwise term for an American Whig to use. A decade after the con-

105. J. SHY, TOWARD LEXINGTON: THE ROLE OF THE BRITISH ARMY IN THE COMING OF THE AMERICAN REVOLUTION 73 (1965). Also, Samuel Adams argued, if troops were needed at all in America it was to defend Britain's newly-conquered lands, and as Britain obtained all the benefits she should pay the entire expense. Boston Gazette, Jan. 9, 1769, in 1 THE WRITINGS, *supra* note 19, at 282-84. Finally, as everyone knew, the navy had been sent to American waters to aid the customs service, hardly an activity colonial Whigs could support.

106. Boston Evening-Post, Nov. 4, 1765, at 2, col. 1. *See also* Boston Evening-Post, Dec. 2, 1765, at 1, col. 2.

107. "The militia of the colonies is doubtless sufficient to defend us from the violences of the Indians in times of peace. . . . They were so in the days of our fathers, when their enemies were near ten times as many, and their militia an hundred times less." Boston Evening-Post, Nov. 4, 1765, at 1, col. 2. And it is true that Massachusetts did not seek imperial aid during King Philip's War, when for a year the fate of the colony seemed in doubt. D. LOVEJOY, *supra* note 29, at 134. South Carolina had to fight the fearful Yamasee War alone. J. REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT 52-73 (1976).

108. 2 DE SECONDAT, THE SPIRIT OF LAWS, Book XXI, Chap. XVII, at 54 (1751).

109. Letter from Chief Justice Thomas Hutchinson to Agent Richard Jackson, Aug., 1764, in KNOLLENBERG, *supra* note 47, at 155. *See also* Letter from Chief Justice Thomas Hutchinson to Agent Richard Jackson, July 23, 1764, in *id.* at 175-76.

110. *See* various statements quoted *id.* at 155-56.

111. We are restrain'd in our Trade with Foreign Nations, and where we would be supplied with any Manufactures cheaper from them, but must buy the same dearer from Britain, the Difference of a Price is a clear Tax to Britain. We are oblig'd to carry a great part of our Produce directly to Britain, and where the Duties there laid upon it lessens its Price to the Planter, or sells it for less than it would in Foreign Markets, the Difference is a Tax paid to Britain. Some Manufactures we could make, but are forbid, and must take them of British Merchants; the whole Price of these is a Tax paid to Britain. By our greatly increasing the *Consumption* and *Demand* of British Manufactures, their Price is considerably rais'd of late Years; the Advance is clear Profit to Britain, and enables its People better to pay great Taxes; and much of it being paid by us is clear Tax to Britain.

Letter from Benjamin Franklin to Governor William Shirley, Dec. 4, 1754, in 2 CORRESPONDENCE OF WILLIAM SHIRLEY GOVERNOR OF MASSACHUSETTS AND MILITARY COMMANDER IN AMERICA 1731-1760, at 106 (C. Lincoln ed. 1912).

troversy began, Alexander Hamilton preferred to speak of "tribute"—"the exclusive regulation of our commerce, for her own advantage, is a sufficient tribute to Great Britain for protecting it."[112]

No matter what the power of regulating colonial trade was called, it was a valuable privilege.[113] William Pitt estimated its worth at two million pounds a year. "This is the fund that carried you triumphantly through the last war," he told the House of Commons. "This is the price that America pays you for her protection."[114]

The legal theory was that Great Britain's military and naval protection of the colonies did not create a contract obliging Americans to submit to imperial taxation as consideration for that contract. Rather the theory was that the mother country's protection created an obligation more analogous to *debt* than to *assumpsit,* which they satisfied not by furnishing consideration but by paying a *quid pro quo.* The *quid pro quo* was the regulation of trade[115] to which Americans "chearfully" consented.[116]

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112. HAMILTON, *supra* note 98, at 124.

113. America, it was claimed, purchased "one-third at least of all British manufactures" and "the colonies by that purchase, paid a full third of all the British taxes." Americus, "To the Printer of the Public Ledger, London, Nov. 22, 1765," in the Massachusetts Gazette, Feb. 6, 1766, at 1, col. 1.

114. Pitt's Speech on Repeal of the Stamp Act, in PROLOGUE, *supra* note 32, at 140.

> He observed, in answer to the common objection of the colonies contributing towards the expence incurred in their defence, that Great Britain had surely more in view than a generous motive.

"Extract of a Letter from London, Jan. 18, [1766]," in the Massachusetts Gazette, April 10, 1766, (Supplement), at 2, col. 2. Sir Robert Walpole had been Pitt's greatest predecessor as first minister and the man who laid the foundations for free trade and the current colonial policy. When he was advised to tax Americans he replied that the regulation of trade produced larger amounts. "This is taxing them more agreeable both to their own Constitution and to ours." The Massachusetts Gazette, Feb. 27, 1766, (Supplement), at 1, col. 1.

115. KNOLLENBERG, *supra* note 47, at 155.

> We do not however mean to underate those [military] aids, which to us were doubtless valuable, on whatever principles granted: but we would shew that they cannot give title to that authority which the British parliament would arrogate over us; and that they may amply be repaid, by our giving to the inhabitants of Great Britain such exclusive privileges in trade as may be advantageous to them, and at the same time not too restrictive to ourselves.

Jefferson, *supra* note 67, at 122.

116. John Adams preferred to put the right of Great Britain to regulate American trade in terms of the colonists' "free chearful consent." Adams, "Novanglus," in THE CRISIS, *supra* note 32, at 206. "This is founding the authority of parliament to regulate our trade, upon *compact* and *consent* of the colonies, not upon any principle of common or statute law, not upon any original principle of the English constitution, not upon the principle that parliament is the supream and sovereign legislature over them in all cases whatsoever." *Id.* at 193. Adams' views are important for it was he who drafted proposition #4 at the first Continental Congress, modifying John Sullivan's virtual call for independence from parliament by conceding that,

> from the necessity of the case, and a regard to the mutual interest of both countries, we chearfully concent to the operation of such Acts of the British Parliament, as are *bona fide,* restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its repective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America, without their consent.

The Declaration of Colonial Rights and Grievances, Oct. 2, 1774, in 9 ENGLISH HISTORICAL DOCUMENTS: AMERICAN COLONIAL DOCUMENTS TO 1776, at 807 (M. Jensen ed. 1964).

VII. The Terms of The Contract

Once they had established the existence of the constitutional contract, at least to their own satisfaction, American Whigs had little difficulty agreeing on its terms. Thanks to the original compact,

> [t]he inhabitants of the colonies, then, are as much a part of the English nation, as if they had remained at home; and are, with respect to their natural rights, no way inferior to their brethren in England.[117]

Their ancestors had obtained

> the promise of a King for himself and Successors, that they and theirs should enjoy all the Liberties and Immunities of natural-born Subjects within the Realm of England.[118]

Above all else, American Whigs would cling to the assertion that the compact guaranteed the constitutional doctrine that lay at the heart of their defense against the Stamp Act. "The principal privilege implied" in the "original contract," as the Massachusetts House explained, "is a freedom from all taxes, but such as they shall consent to in person, or by representatives of their own free choice and election."[119] Put in terms of the contract, it was

> their ancient and inestimable Right of being governed by such Laws, respecting their internal Polity and Taxation, as are derived from their own Consent, with the Approbation of their Sovereign or his Substitute: A Right, which as Men and the Descendants of *Britons* they have ever quietly possessed, since first by Royal Permission and Encouragement they left the Mother Kingdom to extend its Commerce and Dominions.[120]

Beyond such general statements, the constitutional compact was never documented. An obvious source of its terms could have been the charters granted to the ancestral settler by the monarchs of England.[121] Occasionally charters were cited to prove specific obligations under the original contract,[122] but such evidence was seldom pressed. One reason why they

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117. Boston Evening-Post, July 1, 1765, at 1, col. 2.

118. Roxbury Declaration, Dec. 14, 1772, Boston Evening-Post, Dec. 14, 1772, at 2, col. 2. That is, to

> enjoy, all Liberties, and Immunities of free and natural Subjects, within any of the Dominions of the said King . . . as if they and every of them, were born within the Realm of England.

Connecticut Resolves, in Prologue, *supra* note 32, at 55.

119. Letter from the Massachusetts House of Representatives to Agent Dennys de Berdt, Jan. 12, 1768, in 1 The Writings, at 139-40.

120. Petition, *supra* note 36, at 2, col. 1.

121. Except in the case of Georgia which was granted by Great Britain.

122. Thus Maryland pointed to the words in Lord Baltimore's charter:

> We do Covenant and Grant . . . that we our heirs and Successors shall at no time herafter Set or make or cause to be Set any Imposition Custom or other Taxation Rate or Contribution whatsoever in or upon the Dwellers and Inhabitants of the Province for their Lands Tenements Goods or Chattels within the said Province or in

were not often used as proof of the negotiated terms of the contract was that charters were instruments of incorporation rather than organic acts; they paid slight heed to political rights, almost none to personal rights.[123] Another was the insecurity of charters, making them a poor foundation upon which to rest claims of privileges.[124] They could, as every newspaper reader knew, be easily annulled, revoked, or changed.[125] The first Massachusetts charter had been seized by judicial action pursuant to a writ *quo warranto,*[126] and the second would be drastically altered by a statute enacted by parliament in 1774.[127] Better, John Adams contended, to acknowledge that the charter was not the contract, it was "only evidence of a Contract."[128] As a result, Massachusetts Whigs saw nothing inconsistent, much as the practice might annoy Tories,[129] in citing the first charter, long ago revoked, as evidence of the original compact as they wanted it interpreted in contemporary constitutional law. The current charter might be operative as an act of incorporation, but as proof of what had been originally intended, and therefore of what was still binding on Great Britain, it was not the best evidence.[130]

VIII. The Irrelevancy Of Parliament

Imperialists who supported taxation by parliament of American colonies had an easy answer to Whig claims of an original constitutional contract: it was constitutionally irrelevant. After all, if there was any

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or upon any Goods or Merchandizes within the said Province to be laden or unladen within any the Ports or Harbours of the said Province.

Maryland Resolves, Sept. 28, 1765, in PROLOGUE, *supra* note 32, at 53. *See* Adams, "Novanglus," in THE CRISIS, *supra* note 32, at 203.

123. For a Tory's discussion *see* H. Howard, A *Letter From a Gentleman at Halifax, to his Friend in Rhode-Island* (1765), in 1 PAMPHLETS, *supra* note 16, at 535.

124. *See* J. R. Jones, *The Clegate Case,* 90 ENG. HIST. REV. 262, 263-64 (1975).

125. F. HINKHOUSE, THE PRELIMINARIES OF THE AMERICAN REVOLUTION AS SEEN IN THE ENGLISH PRESS 1763-1775, at 94 (1926).

126. I. MAUDUIT, *supra* note 34, at 45; A. BRADFORD, HISTORY OF MASSACHUSETTS FOR TWO HUNDRED YEARS: FROM THE YEAR 1620 TO 1820, at 84-85 (1835). For the opinion of a contemporary prerogative lawyer *see,* J. PALMER *supra* note 23, at 32-34.

127. 14 Geo. III, c. 45.

128. Adams, in THE CRISIS, *supra* note 32, at 262.

129. The Province of *Massachusetts Bay* . . . in their public Proceedings, as well as in their private Writings, have been constantly holding out to us their first Charter Rights, and the original Terms of their Colonization.

I. MAUDUIT, *supra* note 34, at 1-2.

130. For example:

That by a Charter, granted by King *Charles* the Second, in the fifteenth Year of His Reign, it is declared and granted unto the Governor and Company of this Colony, and their Successors, that all and every the Subjects of His said Majesty . . . which were then planted within the said Colony, and all and every of their Children . . . should have and enjoy all liberties and immunities of free and natural subjects within any of the dominions of his said Majesty, his heirs or successors; to all intents, constructions, and purposes whatsoever, as if they and every of them were born within the realm of England.

Instructions of the Town of Providence, Aug. 13, 1765, Boston Evening-Post, Aug. 19, 1765, at 2, col. 3. The notion that the revoked charter was still evidence of the original compact reflected contemporary legal theory. American Tory lawyers also cited the first charter and quoted its terms to sustain their case. *See, e.g.,* Leonard, "Massachusettensis," in THE CRISIS, *supra* note 32 at 40-43.

doctrine in current British constitutional law that was clear, unambiguous, and accepted by legal experts, it was that parliament was supreme and that parliament was sovereign.[131] It followed therefore, that a king could not grant a constitutional contract as "no Grant of the Crown can supersede the Authority of an Act of Parliament."[132] Thus,

> whatever those kings who claimed high prerogatives, might think, or do, is now out of the question; for that all parts of the British dominions are now subject to the British legislature as established at the [Glorious] revolution.[133]

The argument may not impress us but it should. By raising the one issue on which Great Britain's lawyers and statesmen could not bend,[134] it would close the prerevolutionary debate and lead directly to war. Once parliamentary supremacy was asserted, the controversy became legal in the most fundamental sense; it focused on the concept of sovereignty and not on political realities. In effect, the controversy was too legal to be resolved within the current constitution.[135] The alternatives were now too drastic for either side to accept. The British had to change their organic law or the Americans had to retreat. There was no other course except an appeal to arms.

The colonists had an answer but, like the doctrine of parliamentary supremacy, it was too legal to solve the constitutional dilemma. All charters,[136] they pointed out, had been granted before parliament became supreme and sovereign in Great Britain.[137] That the British legislature was also supreme in America was precisely the issue in contention. Since London could not adjust to legal realities, the Second Continental Congress had no option but to proclaim the colonies independent in legal theory as well as legal fact.

That the constitutional contract would flounder on the doctrine of parliamentary supremacy must not distract us. All American arguments met the same fate, as did all efforts of the British ministry to compromise the differences. The Americans were appealing to the "old" English constitution; parliament said that that constitution was no longer viable. What may surprise us is that, as the prerevolutionary debate wound its way

131. 1 BLACKSTONE, COMMENTARIES 142-43, 156 (1766); 10 W. HOLDSWORTH, THE HISTORY OF ENGLISH LAW 526-31 (1938).

132. I. MAUDUIT, *supra* note 34, at 2. *See also* Leonard, "Massachusettensis," in THE CRISIS, *supra* note 32, at 47.

133. Boston Evening-Post, April 11, 1774, at 1, col. 1.

134. C. MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 116-19 (1923); *See* R. VAN ALSTYNE, EMPIRE AND INDEPENDENCE: THE INTERNATIONAL HISTORY OF THE AMERICAN REVOLUTION 56-57 (1965).

135. 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 123-29 (1938).

136. Excepting that of Georgia.

137. Discussion whether the King had authority to issue charters on terms claimed by American Whigs was often colored by looking at the problem through the later constitution of parliamentary supremacy rather than the constitution as it existed at the time of Charles II. For the opinion of a contemporary prerogative lawyer *see* J. PALMER, *supra* note 23, at 38-40.

toward Lexington and Concord, the theory of an original contract, put forward to combat the Stamp Act, was found equally serviceable against the doctrine of parliamentary supremacy. While it did not solve the dilemma, it did furnish one of the best legal excuses by which the British could have avoided the imperial shipwreck.

Noting that the various colonial contracts had not been negotiated with parliament[138] and that Americans had never consented to the constitutional innovations that had made parliament supreme,[139] the Whigs interposed the original compact between themselves and parliamentary supremacy.

> [A]lthough the British parliament is the grand legislature of the nation, yet according to the original compact, solemnly made and entered into between the King of England and our ancestors, at the first coming into this country, and the present Royal Charter, no legislative authority can be exercised in or over this province, but that of the Great and General Court or Assembly consisting of the King or his representative, his Majesty's Council, and the House of Representatives.[140]

The most remarkable aspect of the argument was the American Whigs' use of the constitutional compact to avoid having to prove that parliament was not supreme in the colonies. As they saw it, the theory of the original contract shifted the burden of proof from them and placed it on parliament.

> [I]f the Parliament of Great-Britain, which is called a free Government, have a Right to tax the Province of the Massachusetts, . . . it must proceed as we conceive from Agreement (or Compact) made between said Parliament and the first of our Predecessors, at or after their Settling in this Province, or from some later Parliament of Great-Britain and the General Court of this Province, the which Compact must not be by ambiguous Words, that may be taken either Way, nor by dark Riddles, nor by Explanation made by one Side of the Question only: But such Compact must be plain and easily understood, it being of such vast Consequence.[141]

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138. And as it doth not appear that any Parliaments have been Parties to any Contracts made with the European Settlers in this once howling Wilderness, now became a pleasant Field, we look on our RIGHTS too dearly bought to admit them now, as Tax-Masters, since we have Parliaments of our own.
Dover Resolves, Jan. 10, 1774, Boston Evening-Post, Jan. 31, 1774, at 1, col. 3.

139. The British people had consented by participating in the Glorious Revolution. The Americans were presented with an accomplished fact. They were not asked to consent. On one side of the argument was the known fact that William III and his parliament did not favor extending the Glorious Revolution to America. D. LOVEJOY, *supra* note 29, at 231-33. On the other hand, when parliament in 1696 did assert supremacy no colonial assembly took issue with the assertion of legislative sovereignty. 12 L. GIPSON, THE TRIUMPHANT EMPIRE: BRITAIN SAILS INTO THE STORM 1770-1776, at 101 (1965). *See also* Message of the Council and Assembly to Governor [Francis] Bernard, acknowledging their submission to Acts of Parliament, &c. Jan. 27, 1761, in 3 T. HUTCHINSON, THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 331 (1936 ed.).

140. Pembroke Resolves, Dec. 28, 1772, Boston Evening-Post, Jan. 11, 1773, at 2, col. 2.

141. Proceedings of the Town of Bellingham, May 19, 1773, Boston Evening-Post, Oct. 18, 1773, at 1, col. 1 [hereinafter cited as Proceedings].

> Why the KING'S Subjects in Great-Britain should frame Laws for his Subjects in America, rather than the reverse, we cannot well conceive; as we do not admit it to be drawn from an PACT made by our Ancestors, or from the Nature of the British Constitution, which makes Representation essential to Taxation.

Dover Resolves, *supra* note 139, at 1, col. 3.

From the imperial perspective the argument was doubly irritating as it placed a greater burden of proof on parliament than American Whigs had sustained when claiming they had proved the existence of the original contract. Once the validity of the compact theory was accepted, the Americans had an advantage. There were facts relating to their contract, such as reliance, that they could have proven more easily than the British could prove for the imperial contract. Indeed, it is likely the British had no proof. It is hardly surprising, therefore, that some Whigs demanded it.

> If there [is] any such Compact between the Parliament of Great-Britain and our Predecessors, or the General Court of this Province; when was it made, in what Year, or in what King's Reign, or in what Book is it recorded?[142]

The parliament, the American Whigs told themselves, was not only not supreme, it was irrelevant. It was made irrelevant by the constitutional compact. The contract theory had been one of their earliest arguments, and from it they never departed. That they adhered so consistently may help explain why, in the Declaration of Independence, George III was indicted rather than the British parliament. From the legal perspective it seems pointless for them to accuse the relatively powerless king for constitutional abuses that were the ultimate responsibility of parliament. Yet on further consideration the indictment, while lacking political reality to sustain it, made sense in legal theory. The king may have been only a symbol, but he was important and it was the constitutional contract that made him so. The compact had been negotiated with his predecessors, and although broken by parliament, parliament had been constitutionally able to do so only because it had succeeded to some of the crown's authority. It is that substitution of Parliament for the crown that the American Whigs would not constitutionally accept. They had to indict the king rather than parliament as, under the premises of their constitution, it was he alone against whom they could legally rebel because he alone could breach the contract.[143]

There was no new law in the Declaration of Independence, only the statement that allegiance to the king was terminated. The American Whigs had all along denied the supremacy of parliament, although they had not emphasized that contention during the Stamp Act Debate. It would have been unwise to have done so as the dynamics of constitutional advocacy dictated reliance on arguments less calculated to annoy parliament, such as

142. Proceedings, *supra* note 141, at 1, col. 1.

143. Carl Becker was perhaps correct in suggesting that "a compact" was the reason the king rather than parliament was indicted. C. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 22 (Vintage Books ed. 1958). He is wrong, however, in attributing the compact to natural law rather than a doctrine that was part of the old English constitution as well of the existing colonial customary constitutions. Becker and writers like him invent a natural law that did not exist in the minds of the Whigs and make an argument, such as the compact, appear to be a strategem intended to render the Declaration more acceptable. The compact was always based on British law, not on "the rights of man" or natural law.

the colonists' rights under the British constitution, their rights under the customary colonial constitutions, and their rights under the original contract. But the principle was implied no matter what defense sound advocacy might require that American Whigs assert. At first it was stated occasionally, but unofficially,[144] and when the debate shifted in 1769 to an assertion by parliament of its supremacy, it was stated officially as well. A colonial assembly, it was claimed,

> lawfully and constitutionally has and enjoys an internal legislature of its own, in which the crown and the people of this colony are constitutionally represented, and . . . the power and authority of the said legislature cannot lawfully or constitutionally be suspended, abridged, abrogated or annulled by any power, authority or prerogative whatever (the prerogative of the crown ordinarily exercised for prorogations or dissolutions only excepted.).[145]

CONCLUSION

The American Whigs never felt a need to articulate every aspect of the constitutional contract. There was no reason to develop many facts, as for example whether the original settlers refused to emigrate without the guarantees implied in the compact or just what the grantor king understood he was promising or intended to promise.

The argument was more legal than historical, more theoretical than factual. Like all legal doctrines it could not be expounded in isolation, but went hand in glove with other defenses marshalled by American Whigs against the Stamp Act. An appeal to "contract", after all, was not fundamentally different from an assertion that the colonists were entitled to the ancient English constitutional right of "consent"—to be bound by no legislation except that to which they themselves or their lawful representatives had consented. It was related as well to the defense that Americans were protected by a customary constitution that had developed and become binding through 150 years of usage. All strands could run together at times, as they did during the Stamp Act debate.[146] The Stamp Act, American Whigs said, was a basic change in the established, traditional, constitu-

144. The Parliament which represents the People of England [sic], who choose them, have no Right of Sovereignity over us; but the King has a constitutional Right and that we have always submitted to, and always shall.

Quoting extracts from letters written by Americans in London, December, 1765. The Massachusetts Gazette, Feb. 27, 1765, at 2, col. 3.

145. Resolution of the New York Assembly, The Boston Chronicle, Jan. 12, 1769, at 15, col. 2.

146. For example, in the argument of "AEUUS" who contended that if the right of the colonists to be taxed only by their elected assemblies

> be now considered by any after-thought as a reversible error; be it remembered, that at first it was so delegated by *solemn acts* of government [*i.e.*, the charter]; that it proved the means of their vast increase and cultivation, and by consequence of these immense profits and advantages which have thence accrued to us; that it is sanctified by successive usage, grounded upon a generous reliance on English Faith and Compact, and that usage—ratified by repeated authoratative acquiescence.

The Massachusetts Gazette, March 6, 1766, at 2, col. 2.

tional relationship between Great Britain and the colonies. Any alteration, especially one so drastic as the imposition for the first time of internal taxation, was illegal without the "consent" of both sides to the imperial connection, a unilateral action that was a breach of "contract."

During an age when many more political leaders were familiar with legal principles than is true today,[147] there was little need to explain the theory of a constitutional contract. It slipped as easily into the satirical literature as into official debate.[148] It was on the minds of nonlawyers as well as of lawyers. The voters of a small New England town might refer to it almost unconsciously, assuming its existence when framing statements defending their rights on grounds other than that their ancestors had once made a contract with a king long since dead.

> [W]e are fully persuaded that Liberty is a most precious Gift of God our Creator, to all Mankind. . . . And we think it our indespensable duty as Men, Englishmen and Christians, to make the most public declaration in our Power on the side of Liberty; we have indeed an ambition to be known to the World, and to Posterity as friends to Liberty, and we desire to use all proper means in our contracted Sphere to promote it.[149]

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147. KNOLLENBERG, *supra* note 47, at 15.

148. The 7th of Feb. 1765, died of a cruel *Stamp* on her Vitals, the Lady N--th Am---can Liberty. . . . Her father John Bull, Esq; married her, agreeable to her own Desire, to a worthy Gentleman of noble Blood, tho' of no large Fortune, whose name was TOLERATION, and gave her in Dower a certain Tract of uncultivated Land, . . . with this additional Grant, that she, her Children and dependents, should enjoy all the Liberties and Immunities of natural-born Subjects of the said John Bull.

Though the daughter conducted herself "in the most dutiful Manner," a former suitor of her mother's, named "COMMERCE," began to court her. Jealous, the mother

> issued out Orders that her Servants should take her and *stamp* her in so barbarous a Manner that she should not survive the Wounds; which orders were accordingly executed on the 7th Day of February, 1765.

She left a son named "I-d-p--d--ce, and on him the Hopes of all his disconsolate Servants are placed for Relief . . . when he shall come of Age." Boston Evening-Post, Aug. 19, 1765, at 2, col. 1, quoting the American Chronicle.

149. Statement of the Town of Fitchburg, Dec. 15, 1773, Boston Evening-Post, Jan. 17, 1774, at 2, col. 2.