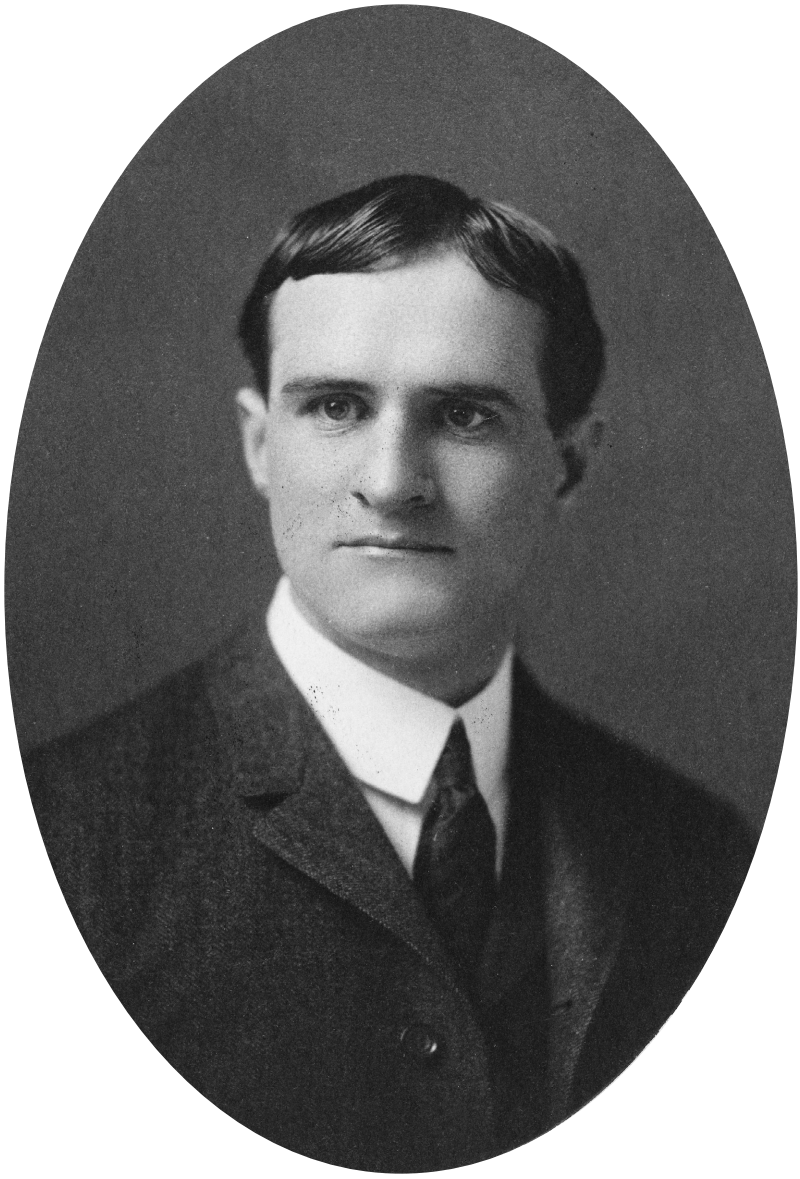
Constitutionalism: Ancient and Modern



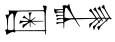
Charles Howard McIlwain

Constitutionalism: Ancient and Modern

Charles Howard McIlwain

Liberty Fund
Indianapolis

Amagi books are published by Liberty Fund, Inc.,
a foundation established to encourage study of the
ideal of a society of free and responsible individuals.



The cuneiform inscription that appears in the logo and
serves as a design element in all Liberty Fund books is the earliest-known
written appearance of the word "freedom" (*amagi*), or "liberty."
It is taken from a clay document written about 2300 B.C.
in the Sumerian city-state of Lagash.

First published in 1940 by Cornell University Press.

Printed in the United States of America

P 10 9 8 7 6 5 4 3 2

Library of Congress Cataloging-in-Publication Data

McIlwain, Charles Howard, 1871–1968.
Constitutionalism: ancient and modern / Charles Howard McIlwain.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-86597-696-2 (pbk.: alk. paper) 1. Constitutional
history. 2. Democracy. 3. Comparative government. I. Title.
JF51.M448 2007
342.02′9—dc22 2007017196

LIBERTY FUND, INC.
8335 Allison Pointe Trail, Suite 300
Indianapolis, Indiana 46250-1684

To the members of the Telluride Association of Cornell University in lasting remembrance of their friendliness and hospitality.

Contents

In its original form this book consists of six lectures which the author delivered at Cornell University in the academic year 1938–39, namely, the Messenger Lectures on the Evolution of Civilization. That series was founded and its title was prescribed by the late Hiram J. Messenger, B. Litt., Ph.D., of Hartford, Connecticut, who directed in his will that a portion of his estate be given to Cornell University and used to provide annually "a course or courses of lectures on the evolution of civilization, for the special purpose of raising the moral standard of our political, business, and social life."

Preface

This volume, it is hardly necessary to say, does not pretend to be a comprehensive account of the growth of constitutionalism. In the course of a few lectures nothing could be attempted beyond the tracing of a very limited number of salient principles, and even these could be dealt with only for those countries where their development is most obvious and most directly related to the political problems facing us here and now. The history of constitutionalism remains to be written.

To the committee in charge of the Messenger Lectures I wish to express my deep appreciation of the honor and the opportunity of presenting this subject in this distinguished series, and to the Cornell University Press and Mr. Woodford Patterson its Director my thanks for valued advice and assistance in the preparation of the manuscript of these lectures for the press.

C. H. McIlwain

Belmont, Massachusetts
March 2, 1940

In this revised edition many additions have been made in the notes and an appendix has been added further to justify or to illustrate some of the statements in the text.

C. H. M.

Princeton, New Jersey
May 1947

Constitutionalism: Ancient and Modern

I

Some Modern Definitions of Constitutionalism

The time seems to be propitious for an examination of the general principle of constitutionalism—our own Anglo-Saxon brand of it in particular—and an examination which should include some consideration of the successive stages in its development. For perhaps never in its long history has the principle of constitutionalism been so questioned as it is questioned today, never has the attack upon it been so determined or so threatening as it is just now. The world is trembling in the balance between the orderly procedure of law and the processes of force which seem so much more quick and effective. We must make our choice between these two, and it must be made in the very near future. If we are to make that choice intelligently it would seem reasonable, whether in the end we decide for law or for force, that we should retrace the history of our constitutionalism—the history of force is plain enough—should try to estimate its past achievements, and should consider the nature and effects of the forces which have been arrayed against it. This I propose to try briefly to do and as dispassionately as I can, though it is only fair that I should frankly confess at the outset that my own personal convictions are overwhelmingly on the side of law and against force.

In 1792 Arthur Young mentions with contempt the French notion of a constitution, which, he says, "is a new term they have adopted; and which they use as if a constitution was a pudding to be made by a receipt."[1] To Thomas Paine, writing at the same time, the recent American written constitutions are "to liberty, what a grammar is to language." In another place, speaking of constitutions in general, he says:

1. Quoted in the Oxford Dictionary *s.v.* "constitution."

"A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right." "A constitution is a thing *antecedent* to a government; and a government is only the creature of a constitution." It seems probable that Paine means by "constitution" nothing less than the written constitutions of America or France. For, he says, "the continual use of the word 'constitution' in the English parliament shows there is none; and that the whole is merely a form of government without a constitution, and constituting itself with what power it pleases." "The act by which the English parliament empowered itself to sit for seven years, shews there is no constitution in England. It might, by the same authority have sate any greater number of years, or for life."[2]

For Arthur Young, a constitution in this sense of a "written" constitution is "a new term"; for Thomas Paine it seems to be the only kind of constitution worthy of the name. Such "puddings," "made by a receipt," were to Edmund Burke apparently as repulsive as to Arthur Young. He says little or nothing about the new American constitutions, but in his opinion nothing could be worse than the French one. "What in the result is likely to produce evil, is politically false," he says; and "that which is productive of good, politically true."[3] Certainly, in his view, nothing but evil had come or could come from "that monstrous thing, which, by the courtesy of France, they call a constitution."[4]

These statements express very clearly the contrast between the new conception of the conscious formulation by a people of its fundamental law, the new definition of "constitution"; and the older traditional view in which the word was applied only to the substantive principles to be deduced from a nation's actual institutions and their development. The older view was probably never better indicated than by Bolingbroke, when he said in 1733:

> By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived

2. *Rights of Man,* in *The Complete Works of Thomas Paine* (London), pp. 302–3, 370.

3. *An Appeal from the New to the Old Whigs* (1791), in *The Works of the Right Honourable Edmund Burke* (1855), III, p. 81.

4. Ibid., p. 13.

> from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed. . . . We call this a good government, when . . . the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.[5]

One noteworthy difference between Paine's conception and Bolingbroke's is that for the former a governmental act contrary to the constitution is an act of "power without right"; for the latter it only warrants us in saying that that government is not a good one.

Bolingbroke in fact is only restating views as old as the *Politicus* of Plato when he says that governments may be compared and estimated by their conformity to reason, and that a nation's actual customs and laws are probably the safest actual criterion of what that reason is. If a government fails so to conform, it is a bad government, but he does not say it is without right. He does not imply, as Paine does, that it may be disobeyed, except by way of revolution. It is curious that Bolingbroke gives the same illustration as Paine of what we might call an "unconstitutional" enactment, the English Septennial Act of 1716. That statute Paine considered a conclusive proof that "there is no constitution in England." Bolingbroke's remarks about the same statute are interesting both for what he says and for what he does not say:

> If it had been foretold to those patriots at the revolution, who remembered long parliaments, who still felt the smart of them, who struggled hard for annual, and obtained with much difficulty, at the end of five or six years, triennial parliaments, that a time would come when even the term of triennial parliaments would be deemed too short, and a parliament chosen for three years would choose itself for four more, and entail septennial parliaments on the nation; that this would happen, and the fruits of their honest labors be lost, in little more than twenty years; and that it would be brought about, whilst our government continued on the foundations they had then so newly laid: if all this had been foretold at the time I mention, it

5. *A Dissertation upon Parties* (1733–34), in *The Works of Lord Bolingbroke* (1841), II, p. 88.

would have appeared improbable and monstrous to the friends of the revolution. Yet it hath happened; and in less than twenty years, it is grown, or is growing, familiar to us.[6]

6. Ibid., p. 105. The Septennial Act was defended by its supporters as the exercise of an extraordinary rather than an ordinary power of parliament. The Jacobite rising in 1715, it was held, had created a national emergency in which the very safety of the state depended upon the postponement of a parliamentary election. As the judges of Charles I had justified the royal prerogative in the levy of ship money, so the Whigs now justified an extension of parliament's power by misquotation of Cicero's *Salus populi suprema lex esto,* turning his *esto* into an *est,* and perverting the mere exhortation addressed to the commander of an army in the field into a general maxim of arbitrary government. The argument for emergency powers is not an unsound one—far from it; but it becomes a grave menace to individual liberty when "the sole judge, both of the danger, and when and how the same is to be prevented, and avoided," is a king; and may be such even when the sole judge is a representative assembly; the more so if only a partisan, a corrupt, or an "unreformed" one. John Selden noticed this substitution of *est* for the *esto* of Cicero's maxim and deplored its misuse in his day to justify absolutism under pretext of national emergency. He mistook it, however, for an extract from the XII Tables. "There is not any thing in the World more abus'd then this Sentence *Salus populi suprema lex esto,* for wee apply it, as if wee ought to forsake the knowne law when it may bee most for the advantage of the people, when it meanes no such thing: for first, tis not *salus populi lex est,* but *esto* . . ." (*Table Talk, s.v.* "People," folio 56b). Selden's strictures would probably have been even more severe if he had known that the maxim was applied originally by Cicero to a military commander alone, and then only when he was actually in the field: *militiae,* but never *domi* (Cicero, *De Legibus, lib.* III, cap. 3, sec. 8).

Others besides Selden in his time made the same mistake of attributing this important maxim to the XII Tables instead of to Cicero. See, for example, Richard Zouche's *Elementa Jurisprudentiae* (Oxford, 1636), part IV, p. 55; William Fulbecke, *A Direction or Preparative to the Study of the Laws* (London, 1620), folio 2; Bacon, *Essays, Of Judicature.* Bacon, as many others, omits the verb altogether, but evidently implies an *est,* not an *esto.* Serjeant Maynard, a century after Bacon, has *esto* instead of *est,* but still thinks it comes from the XII Tables (*Parliamentary History,* vol. V, col. 125).

Arbitrary government, possible under the Tudors as an ordinary power, became impossible under the Stuarts except as an extraordinary power warranted only by the doctrine of emergencies. This was one of the most momentous of the results of "the winning of the initiative" by the House of Commons, but in the later use of the phrase it was in process of becoming a justification of arbitrary government by a parliament as it had formerly justified royal absolutism.

When Burke appealed from the new to the old Whigs in 1791 it was the conservatism of 1689 to which he would have returned, in place of the more radical views of Fox. When Bolingbroke in 1733 says that

---

The Septennial Act of 1716 is no doubt the first important application of the theory of parliamentary omnipotence after the Revolution, but within a dozen years of that event there are indications that the House of Commons is already beginning to think of itself not merely as the "full and free Representative of this nation," which the Declaration of Rights in 1689 had declared it to be, but as a body with an inherent authority independent of the people who had chosen it. This appears as early as 1701 in the imprisonment by the House of the Kentish petitioners. That such a view was not shared by all, however, is indicated in many contemporary tracts, especially the remarkable "Legion's Memorial," so-called, probably written by Defoe (*Parliamentary History,* V, 1252; *Later Stuart Tracts,* ed. George A. Aitken, pp. 179–86), which closes with the significant warning, "Englishmen are no more to be Slaves to Parliaments, than to Kings." As the rhyming pamphleteer of the same year said,

> Posterity will be ashamed to own,
> The actions we their ancestors have done,
> When they for ancient precedents enquire,
> And to the Journals of this age retire,
> To see one tyrant banish'd from his home,
> To set five hundred traitors in his room.
> (*The History of the Kentish Petition* [*Somers Tracts,* XI, 254; *Parliamentary History,* vol. V, app. xvii, col. 188; *Later Stuart Tracts,* p. 178] probably also by Defoe.)

The fundamental cleavage between such views as these and the new temper of the House of Commons appears clearly in the answer to these "Legion" pamphlets made by Sir Humphrey Mackworth (*Somers Tracts,* XI, p. 176ff.) in which he declared "that the King, lords, and commons, united together, have an absolute supreme power to do whatever they shall think necessary or convenient for the public good of which they are the only judges, there being no legal power on earth to controul them. . . . The king, lords, and commons, therefore, as supreme, have superior powers, and the liberty of exercising them (according to the nature and constitution thereof) as they in their respective wisdoms and discretion shall think most conducing to the public good, without rendering any account for the same" (pp. 282–83). To this Defoe replied: "The people of England have delegated all the executive power in the King, the legislative in the King, Lords, and Commons, the sovereign judicative in the Lords, the remainder is reserved in themselves, and not committed, no not to their representatives: all powers delegated are to one great end and purpose, and no other, and that is the public good. If either or all the branches to whom this power is delegated invert the design,

the Septennial Act would have seemed "monstrous" to the Whigs of the Revolution, it is in reaction against the arbitrariness of the growing notion of the omnipotence of parliament. To the one the new Whigs

---

the end of their power, the right they have to that power ceases, and they become tyrants and usurpers of a power they have no right to" (*The Original Power of the Collective Body of the People of England Examined and Asserted* [London, 1701], in *The Works of Daniel DeFoe,* by William Hazlitt [London, 1843], III, p. 9). It is the English form of the old controversy of the early glossators, whether the *populus* had conferred on the Emperor all its *imperium* and *potestas* unconditionally and irrevocably or not. For references to some further contemporary statements, see "The Theory of Balanced Government," by Stanley Pargellis, *The Constitution Reconsidered* (New York, 1938), pp. 37–49.

The same conflicting views are brought out again in 1704–5 in the great case of *Ashby v. White* (Howell's *State Trials,* XIV, col. 697ff.) in which the Lords declared, "It could not then [in 1628, when the Petition of Right was framed by the Commons] have been imagined, that the successors of those men would ever have pretended to an arbitrary and unlimited power of depriving their fellow subjects of their liberties" (col. 869). And they add, "This is the first time a House of Commons have made use of their having given the People's money, as an argument why the prince should deny Writs of Right to the subject, obstruct the course of justice, and deprive them of their birth-rights" (col. 871).

Thus, as Bolingbroke said in 1733, the new conception of parliament's power, "in less than twenty years," "is grown or is growing familiar to us." From this it was but a step to the denial, in the reign of George III, of the right of the electors of Middlesex to choose their own representatives; to that statement of the Lord Chancellor in 1766 that "every government can arbitrarily impose laws on all its subjects"; and to the assertion made about the same time in the Commons that that body alone in the enacting of law "constitutes the only people of England which the law acknowledges." In these things Burke had ample warrant for his declaration in 1770, in his *Thoughts on the Cause of the Present Discontents,* that "the Distempers of monarchy were the great subjects of apprehension and redress, in the last century; in this, the distempers of parliament." "This change from an immediate state of procuration and delegation to a course of acting as from original power, is the way in which all the popular magistracies in the world have been perverted from their purposes." "To be a Whig on the business of an hundred years ago, is very consistent with every advantage of present servility." For all the rest of the people of England, outside the Commons, there seemed no remedy left for such "distempers" and their deprivation of these ancient "birth-rights" except the resort to force; for from the fact that there was no appeal from their jurisdiction in controverted elections, the Commons were implying, as Burke says, that they

had moved too far toward the left, as we should say; to the other they were already moving too far toward the very absolutism their predecessors had fought against. Bolingbroke's statement is interesting in more ways than one. He offers no legal remedy for the abuse of which he complains, but he does see, as some modern historians have not seen, that between the Whig doctrine of 1689 and that of the reign of George III, or even of George I, a great gulf yawns. The opponents of James II had declared that the throne was vacant only by virtue of the fact that their voice was assumed to be the voice of the nation. In 1766 Lord Chancellor Northington said in course of the debate on the repeal of the Stamp Act: "Every *government* can *arbitrarily* impose laws on all its subjects; there must be a supreme dominion in every state; whether monarchical, aristocratical, democratical, or mixed. And all the subjects of each state are bound by the laws made by government."[7]

In 1791 Burke, though opposing the extreme doctrines of the radicals, expressly reiterated his earlier belief that the Americans in their rebellion against England had stood "in the same relation to England, as England did to King James the second, in 1688."[8]

Illustrations of the changing conceptions of sovereignty and of the constitution could be multiplied indefinitely from the materials of the seventeenth and eighteenth centuries. In contrasting the "monstrous" theory of the Septennial Act with that of the original Whig instigators of the Revolution, Bolingbroke implies that the latter, in the Convention Parliament, were acting not as a body with inherent, arbitrary, sovereign authority; but merely as the voice of the whole people. In the Whig pamphlets of the revolutionary period there is a good deal

---

were bound by no rule but their own discretion. That ultimate remedy of force the authors of the "Legion's Memorial" had threatened to use as early as 1701; its actual use came first in 1775 by Englishmen in the colonies of North America; Englishmen were "no more to be slaves to Parliaments, than to Kings." In England itself the threat of such slavery finally became a thing of the past through the reforms of the nineteenth century, the gradual growth of truly "responsible" government, and the adoption in law and practice of the principle of Sir John Holt's dissenting opinion in the case of *Ashby v. White.*

7. *Parliamentary History,* XVI, p. 170. The italics are mine.

8. *An Appeal from the New to the Old Whigs, Works,* III, p. 30.