"STUNN'D. . .[BY] THE [MYSTICAL] WORD *UNCONSTITUTIONAL":* AMERICANS AND DEFINITIONS OF UNCONSTITUTIONALITY IN THE 1770S

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"We have been almost stunn'd with the Noise of the Word *Unconstitutional,"* wrote "Observator" in an essay in the *Massachusetts Gazette* in February 1773; "our News-Prints and some of our Towns Resolves ring with the Noise of it as if something were in that Word very mystical." A month earlier, another author had commented in a Philadelphia newspaper, "Had the objectors [to British tax policy] defined what they meant by 'unconstitutional,' I should better understand them."[1]

Both writers accurately noticed the rise of a neologism in American political discourse. Both were also prescient in offering their observations in early 1773, because the true explosion in Americans' use of the novel term did not occur until the following year. The word *unconstitutional,* the *Oxford English Dictionary* records, was first employed in England in 1735, defined as "not in harmony with, or authorized by, the political constitution; at variance with the recognized principles of the state." Until 1765, though, the term appeared only rarely in American imprints, and then almost exclusively in items reprinted from the British press.[2]

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[1] "Observator" to Mr. Draper, *Massachusetts Gazette,* 25 February 1773; "To the Good People of Pennsylvania," *Pennsylvania Packet,* 11 January 1773.
[2] *Oxford English Dictionary,* q.v. *unconstitutional;* and see the following reprints: a quotation from Ireland in the *Boston Evening Post,* 3 June 1754; and a comment from the House of Commons on the Jamaica assembly, in the *New York Gazette or Weekly Post Boy,* 17 September 1757.

I can make this assertion confidently because of the useful keyword-searching capabilities of the nearly comprehensive databases *America's Historical Newspapers* and *Early American Imprints.* I say "nearly comprehensive" because they do not include every issue of every newspaper, nor every imprint; and because the search engines sometimes miss examples of the words for which one searches. The numbers are therefore not necessarily precisely accurate, but—even incomplete—they reveal general trends (see Table 1).

The clustering of uses of *unconstitutional* in 1765-66 and 1768-70 correctly suggests to any historian of Early America the context in which the word was initially employed in the colonies: to challenge Parliament's right to tax the colonies in first, the Stamp Act; and then later in the Townsend Duties.[3] Several of the uses located in 1765, for example, were reprints of Patrick Henry's resolves in opposition to the Stamp Act debated by the House of Burgesses. Newspapers reported inaccurately that the Burgesses had declared that vesting the power to tax Virginians in any body other than their assembly "is illegal, unconstitutional and unjust." (The Burgesses had first passed but then quickly rescinded that resolve, a fact not revealed to newspaper readers.)[4]

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[3] I also did a keyword search for *constitutional* and discovered that, unsurprisingly, uses clustered around the same dates, although with higher numbers (for example, 285 in 1774). The *OED* lists the political origin of *constitutional* (other meanings had earlier origins) as 1765 in Blackstone, which is clearly erroneous. (I contacted the *OED* about this point; an editor replied with the information that the listing for *constitutional* remains unrevised since the first edition.)

[4] See, for example, *Boston Evening Post,* 24 June 1765; *Boston Post Boy,* 1 July 1765; *Pennsylvania Gazette,* 29 August 1765. But John Dickinson did not employ it in *Letters from a Farmer in Pennsylvania* (1768), the most frequently reprinted critique of the Townsend Acts.

TABLE 1

USES OF 'UNCONSTITUTIONAL' IN *AMERICA'S HISTORICAL NEWSPAPERS*

YEAR	NUMBER RECORDED
1764	6
1765	56
1766	51
1767	18
1768	48
1769	82
1770	60
1771	22
1772	31
1773	68
1774	162
1775	70

Note: *Early American Imprints* records very few uses of the word in any year. After 1776 (19 recorded uses in *AHN*) no year of *AHN* saw more than single-digit numbers until 1782. Not until 1799 was there a triple-digit usage (127).

Throughout the 1760s and early 1770s, many of the recorded uses of *unconstitutional* in colonial newspapers occurred in reprints of English documents—for instance, repeated comments on John Wilkes's many conflicts with successive British ministries; or, in 1769, the frequent republication of a House of Lords report on the "unconstitutional" activities of the Massachusetts Assembly in the affair of the Massachusetts Circular Letter.[5] That last meaning of *unconstitutional*—as in *extralegal*—would also emerge later among colonial opponents of the resistance movement. In American usage, the word continued most often to be employed as a challenge to Parliament's power to tax the colonies, but in 1773 it began to appear in other contexts as well. Indeed, the rhetorical expansion to encompass objections to more than Parliamentary taxation probably elicited the comments with which I opened this paper. For example, the special commission set up to investigate the *Gaspée* affair—when Rhode Islanders attacked a British revenue cutter while it was aground in Newport harbor—attracted charges of *unconstitutionality,* as did the payment of judges' salaries in Massachusetts Bay by Townsend Act revenues.[6]

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[5] See, e.g., on Wilkes, *New York Gazette,* 30 January 1769, and *Pennsylvania Gazette,* 8 February 1770. For the first American printing of the House of Lords declaration: *Boston News-Letter, Supplement,* 23 March 1769.

[6] See, e.g., on the *Gaspée* commissioners, *Boston Gazette,* 4 January 1773; and on judges' salaries, *Boston Evening Post, supplement,* 11 January 1773. That battle continued into 1774 as the Massachusetts assembly impeached Chief Justice Peter Oliver for accepting such a salary, which it deemed *unconstitutional* (e.g., *Essex Journal,* 2 March 1774). The Massachusetts Council and Governor Thomas Hutchinson engaged in an often-reprinted dialogue on the constitutionality of Parliament's authority over the colonies, which involved the use of the term *unconstitutional* as well; see, e.g., *Massachusetts Spy,* 4 February 1773.

Not until 1774, though, did the usage of *unconstitutional* broaden significantly beyond the charge of "taxation without representation" that had been a commonplace of American political discourse since the Stamp Act crisis of 1765.[7] Unsurprisingly, Parliament's adoption of the Coercive Acts led Americans to widen their definition of "unconstitutional" actions and to dramatically increase their employment of the term. In response to Boston's destruction of the East India Company's tea in mid-December 1773, Parliament passed first the Boston Port Act and later the Massachusetts Government and Administration of Justice Acts, all of which attracted the designation "unconstitutional." I will deal with Americans' reactions to each in turn (for they led to somewhat different arguments about unconstitutionality) and with a few efforts to turn the colonists' contentions against themselves.

Many of the 1774 assertions of *unconstitutionality* must have frustrated the anonymous Pennsylvanian who sought its meaning in January 1773, because those who advanced such a contention often failed to define it. They simply declared that one or the other act of Parliament was *unconstitutional,* commonly linking that word to others, such as *unjust, oppressive, cruel, unwarrantable,* or *arbitrary,* as though their reasoning was self-evident to readers.[8] And perhaps it was, when it could be related to taxation by what the Americans in 1774 came to call the *British*

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[7] And in March 1774 an unincorporated district in Berkshire County used that argument against the Massachusetts government when its people refused to pay taxes because they were not properly represented; see "At a Meeting of the Inhabitants of East Hoosuck," *Massachusetts Gazette,* 15 April 1774.

[8] See, for instance, "At a meeting of the freeholders and others. . .of the county of Chesterfield," *Virginia Gazette* (Rind), 21 July 1774; "By the Eastern Mail," *Connecticut Gazette* (New London), 4 February 1774.

Parliament (my emphasis). The colonists adopted that locution to stress their position—more commonly accepted then than it had been in 1765—that only their own assemblies could tax them. In 1774, such taxation linked the provisions of the Tea Act of 1773 to the objectionable laws of the previous decade. Thus in January the Providence, Rhode Island, town meeting vowed to take "a resolute Stand, as well against every other unconstitutional Measure, calculated to enslave America, as the Tea Act in particular," but did not elaborate further. One of the few entities that explained why the Tea Act fit the definition was the town of Greenland, New Hampshire, which that same month insisted

> That whereas all Authority originates from the People, therefore every Attempt by the Ministry to infringe the natural Rights and Privileges of the Subject, are unconstitutional, and ought to be discountenanc'd. That laying a Duty upon TEA (for the express Purpose of raising a Revenue to the Crown, and supporting Ministerial Administration) payable in America upon landing, without the Consent of the People, either by themselves or Representation, is an Infringement of the natural Rights and Privileges of the Subject.[9]

Not all New England towns concurred, although the vast majority did. In March, the town of Hinsdale (also in New Hampshire) complained about men who did not fully understand their "rights and privileges" and who "artfully" protested the Tea Act. In fact, the Hinsdale residents declared, the act's provision that only consignees of the East India Company could legally sell tea had probably aroused the anger of existing tea merchants. They accused men "who pretend to be patriots

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[9] "At a Town-Meeting . . .," *Providence Gazette,* 22 January 1774; "Greenland Resolves," *New-Hampshire Gazette,* 21 January 1774. For another explanation of why the tea duty was unconstitutional, see "A Constitutional Catechism," reprinted frequently in American newspapers after its initial appearance in *Rivington's New York Gazetteer,* 9 December 1773.

and declaim loudly in defence of their country" of being "bound by no ties, but those of partial passion and private interest." Other acts, they insisted, threatened the colonies more directly (for example, customs laws and the molasses tax). They then used *unconstitutional* satirically, applying the term to the "unhealthy" tea itself rather than to the tax.[10]

Colonists gave varied reasons why the Coercive Acts—none of which levied taxes on British America—were unconstitutional. For the residents of Isle of Wight County, Virginia, the Boston Port Act appeared to be "unconstitutional tyrannical and unjust" primarily because it was intended to force obedience to the tea tax. To those in Southampton, Long Island, the "unconstitutional" Port Act tended "to subvert all Property," whereas the citizens of metropolitan New York found the act was "highly unconstitutional" because it attempted to "extort a reparation of private injuries" and was "subversive of the commercial rights" of Americans. The Virginian Robert Carter Nicholas deemed it to be an "*ex post facto* [law] in the most odious Sense of the words," one that punished the innocent as well as the guilty.[11] As for the Administration of Justice Act, "commonly called the murdering bill," declared the inhabitants of York County, Virginia, It was "not only unconstitutional, but shocking

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[10] "Hindsdale Resolves,--for fashion sake," *Essex Gazette,* 22 June 1774. For another satirical use of *unconstitutional* in 1774, see the broadside debate on dividing Orange County, New York, 1774, Early American Imprints #13239.

[11] Untitled draft, committee of Isle of Wight County, Virginia, n.d., box 258, Brock Collection, Henry E. Huntington Library, San Marino, Cal. [hereafter cited as HEHL]; (see also "Proceedings of the County of Spotsylvania," 24 June 1774, *New-York Journal,* 7 July 1774, and "Proceedings of the [New York] Committee of Correspondence, 19 July 1774, ibid., 21 July 1774, for the same contention); "Proceedings of Southampton, Long Island," 20 June 1774, in *Connecticut Gazette* (New London), 8 July 1774; "At a numerous meeting. . .on Wednesday the 6th of July, 1774," *New-York Journal,* 7 July 1774; Robert Carter Nicholas, *Considerations on the Present State of Virginia Examined* (Williamsburg: no pub., 1774), 26.

to human nature," in that it seemed designed "to privilege the soldiers to commit with impunity the most cruel outrages even against the lives of Americans, whilst it cuts off from an accused American every hope of being acquitted."[12]

By mid-summer, colonists were conflating the three Coercive Acts in their statements, recognizing (as the "General Meeting" in Charles Town, S.C., declared on July 7) that the "unconstitutional" acts represented "most dangerous Precedents" that "tho' leveled immediately at the People of Boston, very manifestly and glaringly shew. . .that the like are designed for all the Colonies." A meeting of deputies from the colony of Pennsylvania produced an especially widely reprinted set of resolves that addressed the acts in turn, deeming each "unconstitutional." The Port Act was "oppressive to the inhabitants of that town" and "dangerous to the liberties of the British colonies"; the Administration of Justice Act was also "oppressive and dangerous"; and the Massachusetts Government Act was "dangerous in its consequences to the American colonies." The Pennsylvanians and others furthermore began to remind colonial readers of the 1766 language of the Declaratory Act, challenging Parliament's assertion of authority over the colonies "in all cases whatsoever." Such power, the deputies insisted, was "unconstitutional; and therefore the source of these unhappy differences."[13]

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[12] Address of York County, Virginia, freeholders and other inhabitants, 18 July 1774, *Virginia Gazette* (Rind), 21 July 1774. In May, before the provisions of the act were known in the colonies, the Connecticut House of Representatives declared (with reference to the powers of the *Gaspée* commission) that taking Americans "beyond the sea" for trials was "unconstitutional and subversive of the rights of the free subjects of this colony." See "Friday Posts, New London, June 10," *Essex Journal*, 29 June 1774.

[13] "Resolutions unanimously entered into by the Inhabitants of South Carolina," 7 July 1774, *Boston Evening Post,* 25 July 1774; "At a Provincial Meeting of Delegates,"

Although nearly all the evidence I have cited so far comes from published group statements, individual Americans also adopted similar terminology in their personal letters. Not surprisingly, the wealthy South Carolina planter Henry Laurens, resident in London through much of 1774, regularly employed such language, previously more commonly used in Britain than in America. Dr. Joseph Warren of Massachusetts asked with respect to Governor Thomas Gage's pronouncements that "if the *people* think them unconstitutional of what importance are their determinations"? And Charity Clarke, a remarkable teenager in New York, exuberantly told her English cousin in September, "what care we for your fleets & armies. . .they will supply our manufacturers and labourers with their deserters, and enable us to do better without ye manufactors [sic] of England; all unconstitutional Acts of Parliament will be treated here in much the same manner." She promised that laws drafted without proper authority would be "laughed at" and Americans would "persue their accustomed course with the Laws, Justice, reason, Virtue of [sic] their side."[14]

By the autumn of 1774 the rhetoric of unconstitutionality had become a club that each side could wield in attacking the other. To those known as "Friends of

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Philadelphia, 15 July 1774, *New-York Journal,* 28 July 1774 (reprinted many times). For other references to the unconstitutionality of the claim of Parliamentary authority "in all cases whatsoever," see "At a General Meeting of the Committees. . .of New-Jersey," 21 July 1774, *New-York Gazette,* 8 August 1774; and "Virginia Instructions," ibid., 29 August 1774. It is noteworthy, though, that the colonists evidently did not attach the word *unconstitutional* to either the Quartering Act or the Quebec Act, both also adopted by Parliament in the summer of 1774.

[14] For example, Philip M. Hamer, et al., eds., *The Papers of Henry Laurens* (Columbia, S.C.: University of South Carolina Press, 1968-2003), 9:353, 414, 552; Joseph Warren to the Norwich, Ct., committee, 27 August 1774, HM 8143, HEHL; Charity Clarke to her cousin Joe (draft), 10 September 1774, Charity Clarke Moore and Clement Clarke Moore Papers (MS 1290), Columbia University.

Government," the congresses and committees formed by opponents of British policies were "unconstitutional Assemblies of men" who in forcing others to acquiesce in their economic boycotts had adopted measures that were "severe in the extreme, unjust, unconstitutional, and directly repugnant to the Principle and Spirit of the Opposition to Parliament." Governor Gage accused the Massachusetts Provincial Congress of "unconstitutional Proceedings," pointing out that although its members had complained of alterations in their charter by the Massachusetts Government Act, "you are yourselves subverting that Charter, and now acting in direct Violation of your own Constitution." Yet with a seemingly straight face the Provincial Congress resolved that Gage himself had violated the charter by his "unconstitutional and wanton Prevention of the [meeting of] the General Court," thus necessitating their assembling in another capacity.[15]

It remained for a colonial governor—one elected from a charter colony, not appointed, as Thomas Gage was—to develop the full implications of the dangers posed to the American colonies by the Coercive Acts and especially by the act that altered the Massachusetts charter. In an address to the Connecticut Assembly in March 1775, Jonathan Trumbull revealed his vision of a calamitous future in which colonial governments would all be changed to resemble that of Britain more closely:

> Our Enemies, looking with a depraved, Malignant
> aviricious and haughty mind, on the happy Constitution

[15] "An Association," *Essex Gazette,* 27 December 1774; Y.Z., untitled essay addressed to the printers, *Boston Post Boy,* 20 June 1774; "Boston, Octo. 20," *New-York Gazette,* 31 October 1774; "Boston, October 10, 1774," *Boston Evening-Post,* 10 October 1774. For more on the competing claims of unconstitutionality in Massachusetts, see "Boston, November 10," *Dunlap's Pennsylvania Packet,* 21 November 1774; and "From the *Pennsylvania Journal*. To General Gage," *New-York Journal,* 24 November 1774.

> & Liberty of these English Colonies Have craftily suggested and insinuated, That, Every American Government is capable of having its Constitution altered for the better. The Grants of the Powers of Government to the American Colonies by Charters, cannot be understood to be intended for other than their infant or growing States, and not for Perpetuity. . . .That there is no Government in America at present, whose Powers are properly ballanced. . .America. . .is now capable of a Nobility for Life. . . .This is a brief View of the political Scheme of our internal Enemies, to change our present form of Government, to abrogate all Charters, to Subjugate the people and to become themselves our American Nobility.[16]

As we know, but of course Trumbull did not, just a few weeks after his address fighting broke out at Lexington and Concord, and so America's future differed greatly from that he envisioned in what must have been his worst nightmare. Yet I would contend that the concerns that he and his contemporaries voiced in the 1760s and especially the early 1770s carried over into the new republic as they developed its government in the Constitution of 1787.

Even though many other well-known and often-studied events of the Revolutionary era contributed significantly to the provisions of the eventual U.S. Constitution, this brief excursion into the definition of *unconstitutionality* within the context of the British Empire suggests that historians seeking to understand the Constitution's origins need to pay attention to what I might term "pre-republican" history. Our keynote speaker, Pauline Maier, and others—most notably, Stanley Elkins and Eric McKitrick—have shown that "the old revolutionaries" of the 1760s and 1770s were not same men who drafted the Constitution, yet few of the storied

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[16] Jonathan Trumbull, Address to the Connecticut House of Representatives and Council, March 1775 (draft), Jonathan Trumbull Papers, 20:101a-b, Connecticut State Library, Hartford.

"young men" of the Constitutional Convention were so young that they failed to experience the political exchanges of 1774-1775 as adults. To take a prominent example, James Madison first ventured into politics as a member of his local county committee during those years.[17]

In the light of this analysis, what Constitutional provisions appear to have originated in (or for which the delegates' movement to include might well have been bolstered by) the "prehistory" of conceptions of unconstitutionality that I have laid out today?

First, and most obviously, the insistence that all tax bills must originate in the House of Representatives, the branch most fully in accordance with the assertion, going back to 1765, that taxes must be levied only by the people or their elected representatives.

Second, the provision in Article III, section 2, that all crimes must be tried in the state in which they were committed.

Third, the provision in Article I, section 9, that the United States cannot grant titles of nobility to any person, nor can any American citizen accept such a title from any other country without congressional consent, which assuaged the fears that Trumbull voiced.

Fourth, if others shared Robert Carter Nicholas's insistence that the widely excoriated Boston Port Act was an *ex post facto* law (something I admittedly have

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[17] http://memory.loc.gov/cgi-bin/ampage?collId=mjm&fileName=01/mjm01.db&recNum=56&itemLink=%2Fammem%2Fcollections%2Fmadison_papers%2Fmjmser1.html&linkText=6

not researched), the provisions in sections 9 and 10 of Article I that neither nation nor states could enact such measures.

Fifth, and finally, the many barriers to amendment established in Article V.

Having insisted in the 1770s that altering colonial charters, trying people in other jurisdictions, adopting *ex post facto* laws, and taxing citizens without their consent, were all *unconstitutional,* the framers thus crafted their own Constitution to avoid those problems. Exploring the ways in which they utilized the neologism of the 1770s in the context of the British empire accordingly helps to expose the roots of today's constitutional government.