

*The Ideological
Origins of the
American
Revolution*
Enlarged Edition

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Chapter II

SOURCES AND TRADITIONS

I give to my son, when he shall arrive to the age of fifteen years, Algernon Sidney's works, — John Locke's works, — Lord Bacon's works, — Gordon's *Tacitus*, — and *Cato's Letters*. May the spirit of liberty rest upon him!

— Last Will and Testament of Josiah Quincy, Jr., 1774

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THE INTELLECTUAL history of the years of crisis from 1763 to 1776 is the story of the clarification and consolidation under the pressure of events of a view of the world and of America's place in it only partially seen before. Elements of this picture had long been present in the colonies — some dated from as far back as the settlements themselves — but they had existed in balance, as it were, with other, conflicting views. Expressed mainly on occasions of controversy, they had appeared most often as partisan arguments, without unique appeal, status, or claim to legitimacy. Then, in the intense political heat of the decade after 1763, these long popular, though hitherto inconclusive ideas about the world and America's place in it were fused into a comprehensive view, unique in its moral and intellectual appeal. It is the development of this view to the point of overwhelming persuasiveness to the majority of American leaders and the meaning this view gave to the events of the time, and not simply an accumulation of grievances, that explains the origins of the American Revolution. For this peculiar configuration of ideas constituted in effect an intellectual switchboard wired so that certain combinations of events would activate a distinct set of signals — danger signals, indicating hidden impulses and

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the likely trajectory of events impelled by them. Well before 1776 the signals registered on this switchboard led to a single, unmistakable conclusion — a conclusion that had long been feared and to which there could be only one rational response.

What were the sources of this world view? From whom, from what, were the ideas and attitudes derived?

Study of the sources of the colonists' thought as expressed in the informal as well as the formal documents, in the private as well as the public utterances, and above all in the discursive, explanatory pamphlets, reveals, at first glance, a massive, seemingly random eclecticism. To judge simply from an enumeration of the colonists' citations, they had at their finger tips, and made use of, a large portion of the inheritance of Western culture, from Aristotle to Molière, from Cicero to "Philoleutherus Lipsiensis" [Richard Bentley], from Vergil to Shakespeare, Ramus, Pufendorf, Swift, and Rousseau. They liked to display authorities for their arguments, citing and quoting from them freely; at times their writings become almost submerged in annotation: in certain of the writings of John Dickinson the text disappears altogether in a sea of footnotes and footnotes to footnotes.¹ But ultimately this profusion of authorities is reducible to a few, distinct groups of sources and intellectual traditions dominated and harmonized into a single whole by the influence of one peculiar strain of thought, one distinctive tradition.

Most conspicuous in the writings of the Revolutionary period was the heritage of classical antiquity. Knowledge of classical authors was universal among colonists with any degree of education,

¹ Most notably in his *Essay on the Constitutional Power of Great-Britain over the Colonies in America* . . . (Philadelphia, 1774), reprinted in *Pennsylvania Archives*, 2d ser., III, 565 ff. See also Josiah Quincy, Jr.'s *Observations on the . . . Boston Port-Bill; with Thoughts on . . . Standing Armies* (Boston, 1774), reprinted in Josiah Quincy, *Memoir of the Life of Josiah Quincy Jun.* . . . (Boston, 1825), pp. 355 ff.

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and references to them and their works abound in the literature. From the grammar schools, from the colleges, from private tutors and independent reading came a general familiarity with and the habit of reference to the ancient authors and the heroic personalities and events of the ancient world. "Homer, Sophocles, Plato, Euripides, Herodotus, Thucydides, Xenophon, Aristotle, Strabo, Lucian, Dio, Polybius, Plutarch, and Epictetus, among the Greeks; and Cicero, Horace, Vergil, Tacitus, Lucan, Seneca, Livy, Nepos, Sallust, Ovid, Lucretius, Cato, Pliny, Juvenal, Curtius, Marcus Aurelius, Petronius, Suetonius, Caesar, the lawyers Ulpian and Gaius, and Justinian, among the Romans"—all are cited in the Revolutionary literature; many are directly quoted. "It was an obscure pamphleteer indeed who could not muster at least one classical analogy or one ancient precept."²

But this elaborate display of classical authors is deceptive. Often the learning behind it was superficial; often the citations appear to have been dragged in as "window dressing with which to ornament a page or a speech and to increase the weight of an argument," for classical quotation, as Dr. Johnson said, was "the *parole* of literary men all over the world." So Jonathan Mayhew casually lumped Plato with Demosthenes and Cicero as the ancients who in his youth had initiated him "in the doctrines of civil liberty"; Oxenbridge Thacher too thought Plato had been a liberty-loving revolutionary, while Jefferson, who actually read the *Dialogues*, discovered in them only the "sophisms, futilities, and incomprehensibilities" of a "foggy mind"—an idea concurred in with relief by John Adams, who in 1774 had cited Plato as an advocate of equality and self-government but who

² Charles F. Mullett, "Classical Influences on the American Revolution," *Classical Journal*, 35 (1939-40), 93, 94. On the classics in general in colonial and Revolutionary America, see Richard M. Gummere, *The American Colonial Mind and the Classical Tradition* (Cambridge, 1963); on the teaching of the classics in the secondary schools, see Robert Middlekauff, *Ancients and Axioms* (New Haven, 1963).

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was so shocked when he finally studied the philosopher that he concluded that the *Republic* must have been meant as a satire.³

Yet Jefferson was a careful reader of the classics, and others too—James Otis, for example, who wrote treatises on Latin and Greek prosody—were thorough scholars of the ancient texts. What is basically important in the Americans' reading of the ancients is the high selectivity of their real interests and the limitation of the range of their effective knowledge. For though the colonists drew their citations from all portions of the literature of the ancient world, their detailed knowledge and engaged interest covered only one era and one small group of writers. What gripped their minds, what they knew in detail, and what formed their view of the whole of the ancient world was the political history of Rome from the conquests in the east and the civil wars in the early first century B.C. to the establishment of the empire on the ruins of the republic at the end of the second century A.D. For their knowledge of this period they had at hand, and needed only, Plutarch, Livy, and above all Cicero, Sallust, and Tacitus—writers who had lived either when the republic was being fundamentally challenged or when its greatest days were already past and its moral and political virtues decayed. They had hated and feared the trends of their own time, and in their writing had contrasted the present with a better past, which they endowed with qualities absent from their own, corrupt era. The earlier age had been full of virtue: simplicity, patriotism, integrity, a love of justice and of liberty; the present was venal, cynical, and oppressive.⁴

For the colonists, arguing the American cause in the con-

³ Mullett, "Classical Influences," pp. 93, 99; Peter Gay, *The Party of Humanity* (New York, 1963), p. 10; Lester J. Cappon, ed., *The Adams-Jefferson Letters* (Chapel Hill, 1959), II, 433, 437. Cf. Gummere, *Classical Tradition*, pp. 178-79.

⁴ Mullett, "Classical Influences," pp. 96 ff. Cf. Harold T. Parker, *The Cult of Antiquity and the French Revolutionaries* (Chicago, 1937), pp. 22, 23.

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controversies of the 1760's and 1770's, the analogies to their own times were compelling. They saw their own provincial virtues — rustic and old-fashioned, sturdy and effective — challenged by the corruption at the center of power, by the threat of tyranny, and by a constitution gone wrong. They found their ideal selves, and to some extent their voices, in Brutus, in Cassius, and in Cicero, whose Catilinarian orations the enraptured John Adams, aged 23, declaimed aloud, alone at night in his room. They were simple, stoical Catos, desperate, self-sacrificing Brutuses, silver-tongued Ciceros, and terse, sardonic Tacituses eulogizing Teutonic freedom and denouncing the decadence of Rome. England, the young John Dickinson wrote from London in 1754, is like Sallust's Rome: "Easy to be bought, if there was but a purchaser." Britain, it would soon become clear, was to America "what Caesar was to Rome."⁵

The classics of the ancient world are everywhere in the literature of the Revolution, but they are everywhere illustrative, not determinative, of thought. They contributed a vivid vocabulary but not the logic or grammar of thought, a universally respected personification but not the source of political and social beliefs. They heightened the colonists' sensitivity to ideas and attitudes otherwise derived.

More directly influential in shaping the thought of the Revolutionary generation were the ideas and attitudes associated with the writings of Enlightenment rationalism — writings that expressed not simply the rationalism of liberal reform but that of enlightened conservatism as well.

Despite the efforts that have been made to discount the influ-

⁵ Adams, *Diary and Autobiography*, I, 63; Mullett, "Classical Influences," p. 102; H. Trevor Colbourn, ed., "A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754-1756," *Pa. Mag.*, 86 (1962), 268. Quincy, *Observations*, in Quincy, *Memoir*, p. 435. American views of corruption in English life are described below, pp. 86-93, 130-138.

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ence of the "glittering generalities" of the European Enlightenment on eighteenth-century Americans, their influence remains, and is profusely illustrated in the political literature. It is not simply that the great *virtuosi* of the American Enlightenment — Franklin, Adams, Jefferson — cited the classic Enlightenment texts and fought for the legal recognition of natural rights and for the elimination of institutions and practices associated with the *ancien régime*. They did so; but they were not alone. The ideas and writings of the leading secular thinkers of the European Enlightenment — reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts like Montesquieu — were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.

The pervasiveness of such citations is at times astonishing. In two most prominent pamphlets James Otis cited as authorities and quoted at length, Locke, Rousseau, Grotius, and Pufendorf, and denounced spokesmen, such as Filmer, for more traditional ideas of political authority. Josiah Quincy, Jr., referred with approval to a whole library of enlightened authors, among them Beccaria, Rousseau, Montesquieu, and the historian Robert Guiscard, and the young Alexander Hamilton, seeking to score points on his venerable antagonist, Samuel Seabury, recommended with such condescension that his adversary get himself at the first opportunity to some of the writings of Pufendorf, Locke, Montesquieu, and Burlamaqui to discover the true principles of politics.

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Examples could be multiplied almost without end. Citations, respectful borrowings from, or at least references to, the eighteenth-century European illuminati are everywhere in the pamphlets of Revolutionary America.⁶

The citations are plentiful, but the knowledge they reflect, like that of the ancient classics, is at times superficial. Locke is cited often with precision on points of political theory, but at other times he is referred to in the most offhand way, as if he could be relied on to support anything the writers happened to be arguing.⁷ Bolingbroke and Hume are at times lumped together with radical reformers, and secondary figures like Burlamaqui are treated on a level with Locke.⁸ Nor were the critical, reforming writings of the Enlightenment, even some of the most radical, used exclusively by the left wing of the Revolutionary movement. Everyone, whatever his position on Independence or his judgment of Parliament's actions, cited them as authoritative; almost no one, Whig or Tory, disputed them or introduced them with apology. Writers the colonists took to be opponents of Enlightenment rationalism — primarily Hobbes, Filmer, Sibthorpe, Mandeville, and Mainwaring — were denounced as frequently by loyalists as by

⁶ James Otis, *Rights of the British Colonies Asserted and Proved* (Boston, 1764: JHL Pamphlet 7), pp. 9, 15, 22-23, 25, 26, 27, 30, 37; [James Otis], *A Vindication of the British Colonies . . .* (Boston, 1765: JHL Pamphlet 11), pp. 10-12; Quincy, *Observations*, in Quincy, *Memoir*, pp. 394, 402, 404, 406, 415, 452; [Hamilton], *The Farmer Refuted . . .* (New York, 1775), reprinted in *The Papers of Alexander Hamilton* (Harold C. Syrett, et al., eds., New York and London, 1961-), I, 86.

⁷ Thus Simeon Howard validates his offhand description of the state of nature with the footnote "See Locke on government." *A Sermon Preached to the Ancient and Honorable Artillery-Company . . .* (Boston, 1773), p. 8.

⁸ Hume was greatly respected in America, but his *History of Great Britain*, though often referred to, was commonly believed to be, in Daniel Dulany's words, "a studied apology for the Stuarts, and particularly Charles I." Elihu S. Riley, ed., *Correspondence of "First Citizen" — Charles Carroll of Carrollton, and "Antilon" — Daniel Dulany, Jr. . . .* (Baltimore, 1902), p. 191; see also note 25 below. On Bolingbroke, see below, and note 22; on Burlamaqui, see Ray F. Harvey, *Jean Jacques Burlamaqui, A Liberal Tradition in American Constitutionalism* (Chapel Hill, 1937).

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patriots; but almost never, before 1776, were Locke, Montesquieu, Vattel, Beccaria, Burlamaqui, Voltaire, or even Rousseau.⁹ Mercy Otis Warren listed the contents of a hypothetical Tory library in her play *The Group*; but with the exception of Filmer none of the authors she mentions there were in fact referred to favorably by the Tories. James Chalmers, the Maryland loyalist, attacked Paine not with Hobbes, Sibthorpe, Wedderburn's speeches, and the statutes of Henry VIII, which, according to Mrs. Warren, he should have done, but with Montesquieu, Hutcheson, even Voltaire and Rousseau. The New York loyalist Peter Van Schaack reached his decision to oppose Independence on the basis of a close and sympathetic reading of Locke, Vattel, Montesquieu, Grotius, Beccaria, and Pufendorf, and in 1777 justified his defiance of the state of New York with reference to "the sentiments of Mr. Locke and those other advocates for the rights of mankind whose principles have been avowed and in some instances carried into practice by the congress." The Pennsylvania loyalist Joseph Galloway also cited Locke and Pufendorf as readily as his antagonists did; and when Charles Inglis looked for the source of Paine's anti-monarchism in order to attack it, he found it not in Enlightenment theory, whose exponents he praised, but in an obscure treatise by one John Hall, "pensioner under Oliver Cromwell."¹⁰

⁹ On those universally despised apologists of Stuart authoritarianism, Robert Sibthorpe and Roger Mainwaring (Manwaring), minor figures of the time of Charles I made famous by the condemnations of Locke, Sidney, and the early eighteenth-century libertarians, see besides Bailyn, *Pamphlets*, I, 696, and below, note 39, Francis D. Wormuth, *The Royal Prerogative, 1603-1649* (Ithaca, 1939), pp. 16, 43, 93-98. The only sustained attack on Locke and systematic effort to justify Filmer in the Revolutionary literature appears to be Jonathan Boucher's remarkable sermon of 1775, "On Civil Liberty, Passive Obedience, and Non-resistance," published in his *View of the Causes and Consequences of the American Revolution . . .* (London, 1797), discussed at length below, chap. VI, sec. 4.

¹⁰ [Mercy Otis Warren], *The Group, A Farce . . .* (Boston, 1775), reprinted in Montrose J. Moses, ed., *Representative Plays by American Dramatists . . . 1765-1819* (New York, 1918), p. 227; [James Chalmers], *Plain Truth . . . Containing Remarks on . . . Common Sense . . .* (Philadelphia, 1776: JHL

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Still another tradition, another group of writers and texts, that emerges from the political literature as a major source of ideas and attitudes of the Revolutionary generation stemmed ultimately from the political and social theories of New England Puritanism, and particularly from the ideas associated with covenant theology. For the elaborate system of thought erected by the first leaders of settlement in New England had been consolidated and amplified by a succession of writers in the course of the seventeenth century, channeled into the main stream of eighteenth-century political and social thinking by a generation of enlightened preachers, and softened in its denominational rigor by many hands until it could be received, with minor variations, by almost the entire spectrum of American Protestantism.¹⁴

In one sense this was the most limited and parochial tradition that contributed in an important way to the writings of the Revolution, for it drew mainly from local sources and, whatever the extent of its newly acquired latitudinarianism, was yet restricted in its appeal to those who continued to understand the world, as the original Puritans had, in theological terms. But in another sense it contained the broadest ideas of all, since it offered a context for everyday events nothing less than cosmic in its dimensions. It carried on into the eighteenth century and into the minds of the Revolutionaries the idea, originally worked out in the sermons and tracts of the settlement period, that the colonization of British America had been an event designed by the hand of God to satisfy his ultimate aims. Reinvigorated in its historical

century scholars by the American pamphleteers, see, besides references indexed in Bailyn, *Pamphlets*, I, Maurice Moore, *The Justice and Policy of Taxing the American Colonies* . . . (Wilmington, N. C., 1765: JHL Pamphlet 16), p. 3; Richard Bland, *An Inquiry into the Rights of the British Colonies* . . . (Williamsburg, 1766: JHL Pamphlet 17), pp. 7, 22; and Riley, *Correspondence of "First Citizen"* . . . and "Antilon," pp. 84-85, 193, 231-232.

¹⁴ Perry Miller, "From the Covenant to the Revival," in *The Shaping of American Religion* (James W. Smith and A. Leland Jamison, eds., *Religion in American Life*, I, Princeton, 1961), pp. 322-334.

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meaning by newer works like Daniel Neal's *History of the Puritans* (1732-1738), his *History of New England* (1720), and Thomas Prince's uncompleted *Chronological History of New England in the Form of Annals* (1736), this influential strain of thought, found everywhere in the eighteenth-century colonies, stimulated confidence in the idea that America had a special place, as yet not fully revealed, in the architecture of God's intent. "Imparting a sense of crisis by revivifying Old Testament condemnations of a degenerate people," it prepared the colonists for a convulsive realization by locating their parochial concerns at a critical juncture on the map of mankind's destiny. Their own history, it was clear, would provide the climax for those remarkable "Connections" from which they liked to quote, Samuel Shuckford's *Sacred and Profane History of the World Connected* (which contains a map fixing the exact geographical location of the garden of Eden) and Humphrey Prideaux's *The Old and New Testament Connected*.¹⁵

But important as all of these clusters of ideas were, they did not in themselves form a coherent intellectual pattern, and they do not exhaust the elements that went into the making of the Revolutionary frame of mind. There were among them, in fact, striking incongruities and contradictions. The common lawyers the colonists cited, for example, sought to establish right by appeal to precedent and to an unbroken tradition evolving from time immemorial, and they assumed, if they did not argue, that the accumulation of the ages, the burden of inherited custom, contained within it a greater wisdom than any man or group of men could devise by the power of reason. Nothing could have been more alien to the Enlightenment rationalists whom the colonists also quoted—and with equal enthusiasm. These theorists

¹⁵ E.g., Benjamin Trumbull, *A Discourse Delivered at . . . the Town of New-Haven* . . . (New Haven, 1773), pp. 7-8; Dan Foster, *A Short Essay on Civil Government, the Substance of Six Sermons* . . . (Hartford, 1775), pp. 23, 61. Miller, "From the Covenant to the Revival," p. 340.

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felt that it was precisely the heavy crust of custom that was weighing down the spirit of man; they sought to throw it off and to create by the unfettered power of reason a framework of institutions superior to the accidental inheritance of the past. And the covenant theologians differed from both in continuing to assume the ultimate inability of man to improve his condition by his own powers and in deriving the principles of politics from divine intent and from the network of obligations that bound redeemed man to his maker.

What brought these disparate strands of thought together, what dominated the colonists' miscellaneous learning and shaped it into a coherent whole, was the influence of still another group of writers, a group whose thought overlapped with that of those already mentioned but which was yet distinct in its essential characteristics and unique in its determinative power. The ultimate origins of this distinctive ideological strain lay in the radical social and political thought of the English Civil War and of the Commonwealth period; but its permanent form had been acquired at the turn of the seventeenth century and in the early eighteenth century, in the writings of a group of prolific opposition theorists, "country" politicians and publicists.

Among the seventeenth-century progenitors of this line of eighteenth-century radical writers and opposition politicians united in criticism of "court" and ministerial power, Milton was an important figure—not Milton the poet so much as Milton the radical tractarian, author of *Eikonoklastes* and *The Tenure of Kings and Magistrates* (both published in 1649). The American Revolutionary writers referred with similar respect if with less understanding to the more systematic writing of Harrington and to that of the like-minded Henry Neville; above all, they referred to the doctrines of Algernon Sidney, that "martyr to civil liberty" whose *Discourses Concerning Government* (1698)

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became, in Caroline Robbins' phrase, a "textbook of revolution" in America.¹⁶

The colonists identified themselves with these seventeenth-century heroes of liberty: but they felt closer to the early eighteenth-century writers who modified and enlarged this earlier body of ideas, fused it into a whole with other, contemporary strains of thought, and, above all, applied it to the problems of eighteenth-century English politics. These early eighteenth-century writers—coffeehouse radicals and opposition politicians, spokesmen for the anti-Court independents within Parliament and the disaffected without, draftsmen of a "country" vision of English politics that would persist throughout the eighteenth century and into the nineteenth—faded subsequently into obscurity and are little known today. But more than any other single group of writers they shaped the mind of the American Revolutionary generation.

To the colonists the most important of these publicists and intellectual middlemen were those spokesmen for extreme libertarianism, John Trenchard (1662–1723) and Thomas Gordon (d. 1750). The former, a west-country squire of ample means and radical ideas, was a 57-year-old veteran of the pamphlet wars that surrounded the Glorious Revolution when in 1719 he met Gordon, "a clever young Scot . . . fresh from Aberdeen University,

¹⁶ George Sensabaugh, *Milton in Early America* (Princeton, 1964), chaps. ii, iii; on Milton cf., e.g., Howard, *Sermon*, p. 28; Quincy, *Observations*, in Quincy, *Memoir*, p. 411; and the Hollis-Mayhew and Hollis-Eliot exchanges, in *MHS Procs.*, 69 (1956), 116, 117, 125, and *MHS Colls.*, 4th ser., IV, 403, 412–413. On Harrington, see especially J. G. A. Pocock, "Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century," *W.M.Q.*, 3d ser., 22 (1965), 549–583; also, H. F. Russell Smith, *Harrington and His Oceana: . . . and Its Influence in America* (Cambridge, England, 1914), chaps. vii, viii; cf., e.g., Otis, *Rights of the British Colonies* (JHL 7), p. 15 and text note 6; John Adams ("Novanglus"), in *Works*, IV, 103–105. On Sidney, see Caroline Robbins, "Algernon Sidney's *Discourses* . . .," *W.M.Q.*, 3d ser., 4 (1947), 267–296; and cf., e.g., [Stephen Hopkins], *The Rights of Colonies Examined* (Providence, 1765; JHL Pamphlet 9), p. 4; William Stearns, *A View of the Controversy . . .* (Watertown, 1775), p. 18; Adams ("Novanglus"), in *Works*, IV, 80 ff.

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[who had come] to London to make his fortune, equipped with little but a sharp tongue and a ready wit." They joined forces to produce, first, the weekly *Independent Whig* to attack High Church pretensions and, more generally, the establishment of religion, fifty-three papers of which were published in book form in 1721; and *Cato's Letters*, a searing indictment of eighteenth-century English politics and society written in response to the South Sea Bubble crisis, which appeared first serially in *The London Journal* and then, beginning in 1720, in book form.¹⁷ Incorporating in their colorful, slashing, superbly readable pages the major themes of the "left" opposition under Walpole, these libertarian tracts, emerging first in the form of denunciations of standing armies in the reign of William III,¹⁸ left an indelible imprint on the "country" mind everywhere in the English-speaking world. In America, where they were republished entire or in part again and again, "quoted in every colonial newspaper from Boston to Savannah," and referred to repeatedly in the pamphlet literature, the writings of Trenchard and Gordon ranked with the treatises of Locke as the most authoritative statement of the nature of political liberty and above Locke as an exposition of the social sources of the threats it faced.¹⁹

¹⁷ Charles B. Realey, *The London Journal and Its Authors, 1720-1723* (*Bulletin of the University of Kansas*, XXXVI, no. 23, Dec. 1, 1935), pp. 1-34; J. M. Bulloch, *Thomas Gordon, the "Independent Whig"* (Aberdeen, 1918); William T. Laprade, *Public Opinion and Politics in Eighteenth Century England* (New York, 1936), pp. 237-269; Caroline Robbins, *The Eighteenth-Century Commonwealthman* (Cambridge, 1959), pp. 115-125, 392-393.

¹⁸ On Trenchard and Walter Moyle's influential *Argument, Shewing, that a Standing Army Is Inconsistent with a Free Government* . . . (London, 1697), see, generally, Lois G. Schwoerer, "The Literature of the Standing Army Controversy, 1697-1699," *Huntington Library Quarterly*, 28 (1965), 189 ff.; on its ideological force, see Pocock, "English Political Ideologies," esp. p. 566; and below, pp. 61-63, 116.

¹⁹ Elizabeth C. Cook, *Literary Influences in Colonial Newspapers, 1704-1750* (New York, 1912), pp. 81-83, 89, 125-126, 129, 137, 139, 159, 257, 265. On the Quaker merchants' interest in these writers, see Frederick B. Tolles, *Meeting House and Counting House* (Chapel Hill, 1948), pp. 178-179. On their influence on William Livingston and others in New York, see William Livingston, *et al.*,

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Standing with Trenchard and Gordon as early eighteenth-century "preceptors of civil liberty" was the liberal Anglican bishop, Benjamin Hoadly. This "best hated clergyman of the century amongst his own order," as Leslie Stephen described him — honored and promoted by an administration that despised him but could not do without him — achieved fame, or notoriety, in England for his role in the elaborate clerical polemics of the "Bangorian Controversy" (1717-1720), in which he had been assisted by Gordon. In the course of this bitter and voluminous debate he had become an object of scorn and vituperation as well as of admiration in England; but in the colonies he was widely held to be one of the notable figures in the history of political thought. Anglicans in America, it was true, like their co-denominationalists at home, could scarcely endorse his extraordinary denial of sacerdotal powers for the Church hierarchy or his almost unbelievable repudiation of the whole idea of the church visible, nor could they, in theory at least, accept his extreme toleration of dissent. But their attention focused not on his views of the Church but on the crucial battles he had fought early in the century against the non-jurors and their doctrines of divine right and passive obedience, and on the extreme statements of Whig political theory in his treatise *The Original and Institution of Civil Government Discussed* (1710) and in certain of his many tracts, especially *The Measures of Submission to the Civil Magistrates Considered*

The Independent Reflector . . . (Milton M. Klein, ed., Cambridge, 1963), pp. 21-28, 365, 450-452. For examples of the use of *Cato's Letters* by the American pamphleteers, besides those that appear below and that are indexed in Bailyn, *Pamphlets*, I, see [Joseph Galloway], *A True and Impartial State of the Province of Pennsylvania* . . . (Philadelphia, 1759), title page; H. Trevor Colbourn, "The Historical Perspective of John Dickinson," *Early Dickinsoniana* (The Boyd Lee Spahr Lectures in Americana, Dickinson College, 1951-1961, Carlisle, Pa., 1961), pp. 13, 14, 18; Jonathan Mayhew to Thomas Hollis, August 19, 1765, *MHS Procs.*, 69 (1956), 176; [John Dickinson], *Letters from a Farmer in Pennsylvania* . . . (Philadelphia, 1768: JHL Pamphlet 23), p. 28n; Chalmers, *Plain Truth* (JHL 64), p. 72. On the importance of *Cato's Letters* in the political controversies of the early and mid-eighteenth century, see Bernard Bailyn, *The Origins of American Politics* (New York, 1968), pp. 54, 117, 137, 141, 143-144.

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(1705). Ultimately, Hoadly came to embody physically the continuity of the conglomerate tradition of English radical and opposition thought, for though he had been active at the end of the seventeenth century, he lived on until 1761, associating in his very old age with the English radicals of Jefferson's generation and establishing contact with such spokesmen of advanced American thought as Jonathan Mayhew.²⁰

²⁰ Leslie Stephen, *History of English Thought in the Eighteenth Century* (London, 1876), II, 152. Hoadly has yet to be excavated from the scorn and abuse Stephen heaped on him, but some indication of his importance emerges from Norman Sykes's essay in F. J. C. Hearnshaw, ed., *Social and Political Ideas of Some English Thinkers . . . 1650-1750* (London, 1928), chap. vi. Hoadly's significantly ambiguous relationship to the government under George II, especially his value as the administration's go-between with the dissenting interests, is revealed in detail in the memoirs of his friend John, Lord Hervey, edited by Romney Sedgwick as *Some Materials Towards Memoirs of the Reign of King George II . . .* (London, 1931), I, 123 ff., 190-92; II, 394-99, 498-500; III, 794-95. For illustrations of the way Hoadly's ideas entered into the mainstream of American Revolutionary thought, see Jonathan Mayhew's *Discourse Concerning Unlimited Submission* (Boston, 1750: JHL Pamphlet 1), Introduction and notes 11 and 12, in Bailyn, *Pamphlets*, I; [William Livingston?], *The Occasional Reverberator*, September 14, 1753; [John Allen], *The American Alarm . . . for the Rights, and Liberties, of the People . . .* (Boston, 1773: JHL Pamphlet 39), 4th sec., p. 10; Gad Hitchcock, *A Sermon Preached before . . . Gage . . .* (Boston, 1774), pp. 23, 27; Howard, *Sermon*, p. 23; [John Dickinson], "Letters to the Inhabitants of the British Colonies," in Paul L. Ford, ed., *The Writings of John Dickinson* (*Memoir of the Historical Society of Pennsylvania*, XIV, Philadelphia, 1895), pp. 494-496n; and R. C. Nicholas' reply to "Hoadleianus" in *Virginia Gazette* (R), June 10, 1773. There is perhaps no better testimony to Hoadly's role in the growth of a Revolutionary frame of mind than the recollection of the arch-Tory Jonathan Boucher, who, hearing that a rival preacher proposed to deliver a sermon against absolute monarchy, concluded that he must have "found such a sermon in Hoadly, and having transcribed it, showed it to the Committee, by whom it was approved, as any and every thing was and would have been, however loose and weak, that but seemed to be against power and for liberty." Jonathan Boucher, ed., *Reminiscences of an American Loyalist . . .* (Boston and New York, 1925), p. 120. Similarly, an anonymous English writer at the end of the century attributed the origins of the French Revolution to the fact that "every class of Frenchman . . . became familiarly acquainted with Sidney, Locke, and Hoadly." *An Historical View of the French Revolution . . .* (Newcastle upon Tyne, 1796), p. 18. (I owe this reference to Mr. John Dunn.) From the earliest years of the century the public prints had depicted Hoadly as "the embodiment of faction, rebellion, and profane Latitudinarianism": M. Dorothy George, *English Political Caricature to 1792* (Oxford, 1959), I, 68.

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With Hoadly, among his contemporaries, though below him in importance to the Americans, was the outstanding opponent in Parliament of Walpole's administration, the leader of a coterie of early eighteenth-century freethinking Whigs, Robert Viscount Molesworth. Friend of Trenchard and Gordon, encomiast of *Cato's Letters* (they were frequently attributed to him), he was known particularly in the colonies for his *Account of Denmark* (1694), which detailed the process by which free states succumb to absolutism.²¹ An opposition leader of another sort who contributed in a more complicated way to the colonists' inheritance of early eighteenth-century thought was the spectacular Jacobite politician, writer, and philosopher, Henry St. John, Viscount Bolingbroke. His *Craftsman*, appearing weekly or semiweekly for a full ten years, from 1726 to 1736, roasted Walpole's administration in crackling fires of ridicule and denunciation. Its savage, bitter, relentless attacks were indistinguishable from *Cato's* polemics on major points of political criticism. *The Craftsman*, in fact, quoted the writings of Trenchard and Gordon freely, and otherwise, in almost identical language, decried the corruption of the age and warned of the dangers of incipient autocracy.²²

²¹ On Molesworth, see Robbins, *Commonwealthman*, chap. iv, pp. 393-394; and Realey, *London Journal*, pp. 4-5. Cf. *Newport Mercury*, July 30, 1764; John Dickinson, *A Speech Delivered in the House of Assembly . . . 1764* (Philadelphia, 1764), in Ford, *Writings*, p. 24; Gilbert Chinard, ed., *The Commonplace Book of Thomas Jefferson* (Baltimore, 1926), pp. 212-213, 225-226; Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain . . .* (New York, 1775), p. 32.

²² On Bolingbroke, whose *Freeholder's Political Catechism* (1733), which originally appeared in the pages of *The Craftsman*, was reprinted in Boston in 1757 and in New London in 1769 and whose *Works* John Adams professed to have read through five times, see, e.g., Colbourn, "Historical Perspective," p. 11; "Dickinson's London Letters," pp. 246-247; H. Trevor Colbourn, *The Lamp of Experience* (Chapel Hill, 1965), pp. 84, 85, 87, 90, 123, 124, 128, 159; *Newport Mercury*, July 30, 1764; Quincy, *Observations*, in Quincy, *Memoir*, p. 386. For a particularly dramatic illustration of the direct use of *The Craftsman* in mid-century America, see Paul S. Boyer, "Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754," *W.M.Q.*, 3d ser., 21 (1964), 328-351. Bolingbroke's importance in the shaping of eighteenth-century opposition ideology has only

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The Scottish philosopher, Francis Hutcheson, and the nonconformist schoolmaster, Philip Doddridge, were also figures of this generation the colonists knew and cited in the same general context, as was Isaac Watts, the hymnologist and writer on questions of church and education.²³

The tradition continued into the Revolutionaries' own generation, promoted by Richard Baron, republican and dissenter, associate and literary heir of Thomas Gordon, who republished in the 1750's political works of Milton and Sidney and issued also an anthology of the writings of the later radicals, including Jonathan Mayhew; and promoted even more effectively by that extraordinary one-man propaganda machine in the cause of liberty, the indefatigable Thomas Hollis, whose correspondence in the 1760's first with Mayhew and then with Andrew Eliot illustrates vividly the directness of the influence of this radical and opposition tradition on the ideological origins of the Revolution. In the

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recently been appreciated, notably by Pocock in "English Political Ideologies," pp. 552, 572, 578, and by Isaac Kramnick in *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole* (Cambridge, 1968). The overlap of Bolingbroke's arguments and attitudes with those of the extreme libertarians continued through the century: just as Bolingbroke had quoted Trenchard on the necessary independence of the House of Commons and "Cato's immortal Letters" on a wide range of topics (*Craftsman*, nos. 198, 179, 268, 269, 271, 272, 275 ["Cato's Letters and the Writings of the Craftsman Compared"], 278, 288, 292, 303, 356, 372, 403, 407), so James Burgh quoted him in his *Political Disquisitions* (1774; reprinted in Philadelphia, 1775) as he had in his *Britain's Remembrancer: or, The Danger Not Over* (1746; reprinted in Philadelphia, 1747 and 1748; in Boston, 1759), and thus conveyed his thought in a radical context to an eager colonial audience. Americans had long been habituated to think of Bolingbroke in a libertarian context. Passages from his *Dissertation on Parties*, for example ("the most masterly performance that ever was wrote upon the British constitution"), were used in Maryland in 1748 to gloss Locke's theory of the contract basis of government. *The Maryland Gazette Extraordinary; An Appendix to No. 162*, June 4, 1748, p. 3. Cf. Colbourn, *Lamp of Experience*, pp. 23, 50; and Bailyn, *Origins of American Politics*, pp. 140-141.

²³All of these figures are discussed in Robbins' *Commonwealthman*, but on the link to America the same author's essay on Hutcheson in *W.M.Q.*, 3d ser., 11 (1954), 214-251, is especially important.

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Revolutionary years proper a group of still younger writers renewed the earlier ideas, extended them still further, and, together with the leading spokesmen for the colonies, applied them to the Anglo-American controversy. Foremost among these later English advocates of reform in politics and religion were Richard Price, Joseph Priestley, and John Cartwright; but the key book of this generation was the three-volume *Political Disquisitions* published in 1774 by the schoolmaster, political theorist, and moralist, James Burgh.²⁴ The republican historian Catharine Macaulay, whose *History of England* has aptly been called "an imaginative work in praise of republican principles under the title of a History of England," was also an important intellectual figure of this generation to the colonists, but among the many Whig historians the Americans knew and referred to—including Bulstrode White-lock, Gilbert Burnet, William Guthrie, and James Ralph—their preference was for the exiled Huguenot, Paul de Rapin-Thoyras. His "inestimable treasure," the vast, radically Whiggish *Histoire d'Angleterre*, published in English between 1725 and 1731, together with his earlier sketch of the whole, *A Dissertation on the . . . Whigs and Tories* (1717; reprinted in Boston in 1773), provided indisputable proof of the theories of all of the radical and anti-establishment writers by demonstrating their validity through a thousand years of English history.²⁵ But all history, not only

²⁴On Baron and Hollis, see Mayhew, *Discourse* (JHL 1), Introduction and references in notes 16 and 17. The Mayhew-Hollis correspondence is published in *MHS Procs.*, 69 (1956), 102-193; the Eliot-Hollis correspondence is in *MHS Colls.*, 4th ser., IV, 399-461. The later radicals are discussed in Robbins' *Commonwealthman*; but see particularly Oscar and Mary F. Handlin, "James Burgh and American Revolutionary Theory," *MHS Procs.*, 73 (1961), 38-57; Nicholas Hans, "Franklin, Jefferson, and the English Radicals at the End of the Eighteenth Century," *Proceedings of the American Philosophical Society*, 98 (1954), 406-426; and Ian R. Christie, *Wilkes, Wyvill and Reform* (London, 1962), chaps. i-iii.

²⁵"Rapin . . . in my opinion . . . carries the palm among the writers of our story, and wants nothing but a reduction of his enormous bulk to about half the present size, and to have his language a little enlivened . . . to render him an inestimable treasure of knowledge": William Livingston to Noah Welles, August

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English history, was vital to the thought of the Revolutionary generation, and it is a matter of particular consequence that among the best, or at least the most up-to-date, translations of Sallust and Tacitus available to the colonists were those by the ubiquitous Thomas Gordon, "under whose hands [Tacitus] virtually became an apologist for English Whiggery"; he prefaced his translations with introductory "Discourses" of prodigious length in which he explained beyond all chance of misunderstanding the political and moral meaning of those ancient historians.²⁶

18, 1759, quoted by Klein in Livingston, *Independent Reflector*, p. 284. For indications of Rapin's great popularity in the colonies, see, besides the passages indexed in Colbourn's *Lamp of Experience*, H. Trevor Colbourn, "John Dickinson, Historical Revolutionary," *Pa. Mag.*, 83 (1959), 277, 281, 282, 289; "Dickinson's London Letters," pp. 448-449; Dickinson, *Farmer's Letters* (JHL 23), pp. 60, 62. [James Wilson], *Considerations on the . . . Authority of the British Parliament* (Philadelphia, 1774: JHL Pamphlet 44), p. 5; John Lathrop, *A Sermon Preached to the Ancient and Honorable Artillery-Company . . .* (Boston, 1774), p. 20; [John Joachim Zubly], *Calm and Respectful Thoughts on the Negative of the Crown . . .* [Savannah, 1772], p. 14. For Jefferson's admiration of Rapin, whom a contemporary of Bolingbroke called "The Craftsman's own political evangelist" (John, Lord Hervey, *Ancient and Modern Liberty . . .*, London, 1734, p. 51) and his widely shared dislike of Hume's *History*, see E. M. Sowerby, ed., *Catalogue of the Library of Thomas Jefferson* (Washington, D.C., 1952-1959), I, 156-157, and Colbourn, *Lamp of Experience*, pp. 177, 179, 181, 86, 104; cf. Dulany's opinion of Hume, note 8 above. For a revealing and characteristic use of Rapin by John Adams, see *Works*, III, 543. Rapin's *Dissertation* is an effort to explain the party structure under George I as the logical outcome of England's entire ideological and constitutional history; its stress on the "formed design" of the Tories to restore Stuart absolutism to the throne made it, for reasons explained in Chapter IV below, of particular relevance to American Revolutionary thought. The characterization of Mrs. Macaulay's *History* is from Christie, *Wilkes, Wyvill and Reform*, p. 17; for examples of the colonists' enthusiasm for the book, see Mayhew's and Washington's rhapsodies, the former in a letter to Hollis, August 8, 1765, in *MHS Procs.*, 69 (1956), 173, the latter in direct correspondence with Mrs. Macaulay, quoted in Colbourn, *Lamp of Experience*, pp. 153-154.

²⁶ Tolles, *Meeting House and Counting House*, p. 189. For examples of the use of these translations, see [Stephen Hopkins'] compliment to the "fine English" of Gordon's *Tacitus*, in his letter to Goddard, *Providence Gazette*, April 8, 1765; Charles Carroll, in Riley, *Correspondence of "First Citizen" . . . and "Antilon"*, p. 48; Colbourn, "Dickinson, Historical Revolutionary," p. 280; H. Trevor Col-

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To say simply that this tradition of opposition thought was quickly transmitted to America and widely appreciated there is to understate the fact. Opposition thought, in the form it acquired at the turn of the seventeenth century and in the early eighteenth century, was devoured by the colonists. From the earliest years of the century it nourished their political thought and sensibilities. There seems never to have been a time after the Hanoverian succession when these writings were not central to American political expression or absent from polemical politics. James Franklin's *New England Courant* began excerpting *Cato's Letters* eleven months after the first of them appeared in London; before the end of 1722 his brother Benjamin had incorporated them into his Silence Dogood papers.²⁷ Isaac Norris I in 1721 ordered his London bookseller to send him the separate issues of *The Independent Whig* as they appeared, and that whole collection was reprinted in Philadelphia in 1724 and 1740. John Peter Zenger's famous *New York Weekly Journal* (1733 ff.) was in its early years a veritable anthology of the writings of Trenchard and Gordon.²⁸ By 1728, in fact, *Cato's Letters* had already been fused with Locke, Coke, Pufendorf, and Grotius to produce a prototypical American treatise in defense of English liberties overseas, a tract indistinguishable from any number of publications that would appear in the Revolutionary crisis fifty years later.²⁹

bourne, "Thomas Jefferson's Use of the Past," *W.M.Q.* 3d ser., 15 (1958), 61-62; Quincy, *Observations*, in Quincy, *Memoir*, pp. 443, 444. See also, David L. Jacobson, "Thomas Gordon's Works of Tacitus in Pre-Revolutionary America," *Bulletin of the New York Public Library*, 69 (1965), 58-64.

²⁷ *New England Courant*, October 2-9, 9-16, 16-23, 23-30, 1721. The ten paragraphs quoted in Silence Dogood no. 8 (July 9, 1722) as well as the two quoted in no. 9 (July 23) were copied by Franklin from *Cato's Letters*, nos. 15 and 31. (I owe this information to Mr. Max Hall.) See Leonard W. Labaree, *et al.*, eds., *The Papers of Benjamin Franklin* (New Haven, 1959-), I, 27-32.

²⁸ Frederick B. Tolles, *Meeting House and Counting House* (New York, 1963 ed.), p. 179. On the *New York Weekly Journal's* use of Trenchard and Gordon, see, e.g., the issues of February 4 and December 10, 1733.

²⁹ [Daniel Dulany, Sr.], *The Right of the Inhabitants of Maryland to the Benefit of the English Laws* (Annapolis, 1728: reprinted in St. George L. Sioussat, *The*

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So popular and influential had *Cato's Letters* become in the colonies within a decade and a half of their first appearance, so packed with ideological meaning, that, reinforced by Addison's universally popular play *Cato*³⁰ and the colonists' selectively Whiggish reading of the Roman historians, it gave rise to what might be called a "Catoic" image, central to the political theory of the time, in which the career of the half-mythological Roman and the words of the two London journalists merged indistinguishably. Everyone who read the *Boston Gazette* of April 26, 1756, understood the double reference, bibliographical and historical, that was intended by an anonymous writer who concluded an address to the people of Massachusetts — as he put it without further explanation — "in the words of Cato to the freeholders of Great Britain."

Testimonies to the unique influence of this opposition literature — evidences of this great "hinterland of belief"³¹ from which would issue the specific arguments of the American Revolution

English Statutes in Maryland, Baltimore, 1903), pp. [i], 7, 10, 19. For further identification of Dulany's sources, which include Henry Care's perennially popular *English Liberties* . . . (London, [1680?]), a combination casebook in law, guide to legal procedures, and Anglophile propaganda piece, the fifth edition of which was reprinted in Boston by James Franklin in 1721, and the sixth in Providence in 1774, see Bailyn, *Pamphlets*, I, 742-743.

³⁰ On the complex political history of the play in England, see John Loftis, *The Politics of Drama in Augustan England* (Oxford, 1963), esp. pp. 57-62; on its enthusiastic reception as a libertarian document in America, where it was reprinted four times after 1766, see Colbourn, *Lamp of Experience*, pp. 24, 153. For characteristic uses of the play in political polemics, see *New York Weekly Journal*, January 28, 1733, and the untitled three-page squib, prefaced and concluded by quotations from the play, on the dangers threatening the New York legislature from the governor's "prudent application of posts and pensions" (Evans 3595 [New York, 1732]).

³¹ W. H. Greenleaf, *Order, Empiricism and Politics . . . 1500-1700* (London, 1964), p. 12: "The great books of an age, it may be suggested, are never fully intelligible without an acquaintance with their intellectual background, with . . . 'the great hinterland' of belief. To understand these notions, which men often saw little need to explain because they were so obvious, means a familiarity with more ordinary opinions whatever their coherence or logical status in modern eyes."

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— are everywhere in the writings of eighteenth-century Americans. Sometimes they are explicit, as when Jonathan Mayhew wrote that, having been "initiated, in youth, in the doctrines of civil liberty, as they were taught by such men . . . as Sidney and Milton, Locke, and Hoadly, among the moderns, I liked them; they seemed rational"; or when John Adams insisted, against what he took to be the massed opinion of informed Englishmen, that the root principles of good government could be found only in "Sidney, Harrington, Locke, Milton, Nedham, Neville, Burnet, and Hoadly"; or again, when he listed the great political thinkers of 1688 as "Sidney, Locke, Hoadly, Trenchard, Gordon, Plato Redivivus [Neville]"; or when Josiah Quincy, Jr., bequeathed to his son in 1774 "Algernon Sidney's works, — John Locke's works, — Lord Bacon's works, — Gordon's *Tacitus*, — and *Cato's Letters*. May the spirit of liberty rest upon him!"³² More often, the evidence is implicit, in the degree to which the pamphleteers quoted from, plagiarized, and modeled their writings on *Cato's Letters* and *The Independent Whig*. Above all, their influence may be seen in the way the peculiar bent of mind of the writers in this tradition was reflected in the ideas and attitudes of the Americans.

The fact is easily mistaken because on the main points of theory the eighteenth-century contributors to this tradition were not original. Borrowing heavily from more original thinkers, they were often, in their own time and after, dismissed as mere popularizers. Their key concepts — natural rights, the contractual basis of society and government, the uniqueness of England's liberty-preserving "mixed" constitution — were commonplaces of the liberal thought of the time. But if the elements of their thought were ordinary, the emphasis placed upon them and the use made of them were not. Pride in the liberty-preserving con-

³² Jonathan Mayhew, *The Snare Broken* . . . (Boston, 1766: JHL Pamphlet 20), p. 35; John Adams, *Thoughts on Government* . . . (Philadelphia, 1776: JHL Pamphlet 65), p. 7; Adams, *Works*, VI, 4; Quincy, *Memoir*, p. 350.

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stitution of Britain was universal in the political literature of the age, and everyone agreed on the moral qualities necessary to preserve a free government. But where the mainstream purveyors of political thought spoke mainly with pride of the constitutional and political achievements of Georgian England, the opposition writers, no less proud of the heritage, viewed their circumstances with alarm, "stressed the danger to England's ancient heritage and the loss of pristine virtue," studied the processes of decay, and dwelt endlessly on the evidences of corruption they saw about them and the dark future these malignant signs portended. They were the Cassandras of the age, and while their maledictions "were used for party purposes . . . what [they] said about antique virtue, native liberty, public spirit, and the dangers of luxury and corruption was of general application" and was drawn from the common repository of political lore. They used the commonplaces of the age negatively, critically. They were the enemies of complacency in one of the most complacent eras in England's history. Few of these writers would have agreed with the sentiment expressed by the Lord Chancellor of England in 1766 and concurred in by the overwhelming majority of eighteenth-century Englishmen: "I seek for the liberty and constitution of this kingdom no farther back than the [Glorious] Revolution: there I make my stand."³³ Few of them accepted the Glorious

³³ So too the New York Tory William Smith, Jr., declared, "I am a Whig of the old stamp. No Roundhead — one of King William's Whigs, for Liberty and the Constitution." William H. W. Sabine, ed., *Historical Memoirs . . . 1776 to . . . 1778 . . . of William Smith . . .* (New York, 1958), p. 278. The earlier quotations in the paragraph are from Alan D. McKillop's revealing study "The Background of Thomson's *Liberty*," *The Rice Institute Pamphlet*, XXXVIII, no. 2 (July 1951), 87, 92, where it is argued that "It can hardly be said that one party in this age is for Gothic liberty, the other against it, any more than it can be said that one coherent group opposed or defended luxury. But it came to be the Opposition, the shifting coalition of Tories and dissident Whigs, that stressed the danger to England's ancient heritage and the loss of pristine virtue; and it was the apologists for Walpole who at this point were likely to belittle primordial liberty in comparison with England's gains since 1688." For further discussion of

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Revolution and the lax political pragmatism that had followed as the final solution to the political problems of the time. They refused to believe that the transfer of sovereignty from the crown to Parliament provided a perfect guarantee that the individual would be protected from the power of the state. Ignoring the complacency and general high level of satisfaction of the time, they called for vigilance against the government of Walpole equal to what their predecessors had shown against the Stuarts. They insisted, at a time when government was felt to be less oppressive than it had been for two hundred years, that it was necessarily — by its very nature — hostile to human liberty and happiness; that, properly, it existed only on the tolerance of the people whose needs it served; and that it could be, and reasonably should be, dismissed — overthrown — if it attempted to exceed its proper jurisdiction.

It was the better to maintain this vigil against government that they advocated reforms — political reforms, not social or economic reforms, for these were eighteenth- not nineteenth- or twentieth-century English radicals³⁴ — beyond anything admissible in Walpole's age, or indeed in any age that followed in England until well into the nineteenth century. At one time or another, one or another of them argued for adult manhood suffrage; elimination of the rotten borough system and the substitution of regular units of representation systematically related to the distribution of population; the binding of representatives to their constituencies by residential requirements and by instructions; alterations in the definition of seditious libel so as to permit full freedom of the press to criticize government; and the total withdrawal of government control over the practice of religion.

this monograph — the most sensitive effort yet made, as far as the present writer is aware, to distinguish opposition themes from the mainstream tradition of eighteenth-century political thought — see note 37 below.

³⁴ See below, pp. 283-284.

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Such ideas, based on extreme solicitude for the individual and an equal hostility to government, were expressed in a spirit of foreboding and fear for the future. For while they acknowledged the existing stability and prosperity of England, they nevertheless grounded their thought in pessimism concerning human nature and in the discouraging record of human weakness. Their resulting concern was continuously deepened by the scenes they saw around them. Politics under Walpole may have been stable, but the stability rested, they believed, on the systematic corruption of Parliament by the executive, which, they warned, if left unchecked, would eat away the foundations of liberty. The dangers seemed great, for they saw, as J. G. A. Pocock has written in outlining "the 'Country' vision of English politics as it appears in a multitude of writings in the half century that follows 1675," that

the executive possesses means of distracting Parliament from its proper function; it seduces members by the offer of places and pensions, by retaining them to follow ministers and ministers' rivals, by persuading them to support measures — standing armies, national debts, excise schemes — whereby the activities of administration grow beyond Parliament's control. These means of subversion are known collectively as corruption, and if ever Parliament or those who elect them — for corruption may occur at this point too — should be wholly corrupt, then there will be an end of independence and liberty.³⁵

This was their major theme, their obsessive concern, and they hammered away at it week after week, year after year, in ringing denunciations of Walpole's manipulation of Parliament and of the dissoluteness of the age that permitted it. The outcries were as loud, the fear as deep, on the "left" of the opposition spectrum as on the "right." So "Cato" warned, again and again, that

public corruptions and abuses have grown upon us; fees in most, if not all, offices, are immensely increased; places and employments,

³⁵ Pocock, "English Political Ideologies," p. 565.

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which ought not to be sold at all, are sold for treble value; the necessities of the public have made greater impositions unavoidable, and yet the public has run very much in debt; and as those debts have been increasing, and the people growing poor, salaries have been augmented, and pensions multiplied.³⁶

Bolingbroke was even more insistent that England was faced with the age-old and associated dangers of ministerial usurpation and political corruption. And the prose of his jeremiads — echoed in the more artistic productions of the great Tory satirists of the age, in the writings of Swift, Pope, Gay, Mandeville, even in the less partisan, critical-patriotic rhapsodies of James Thomson, *Liberty* and *Britannia*³⁷ — was even more vivid, more memorable than that of "Cato." He devised a new terminology to describe the urgent danger. "*Robinocracy*," he wrote, was what was developing under the "prime"-ministry (a term of derogation) of

³⁶ *Cato's Letters*, no. 20, March 11, 1720 (in the London, 1748 ed., I, 140). See also, e.g., no. 17, February 18, 1720 ("What Measures Are Actually Taken by Wicked and Desperate Ministers to Ruin and Enslave Their Country"), and no. 98, October 13, 1722.

³⁷ For the broad literary context of Bolingbroke's pessimism, see particularly Louis I. Bredvold, "The Gloom of the Tory Satirists," in James L. Clifford and Louis A. Landa, eds., *Pope and His Contemporaries* (Oxford, 1949); see also Bonamy Dobrée, *The Theme of Patriotism in the Poetry of the Early Eighteenth Century* (London, 1949). Thomson's *Liberty* (1735-36), a vast, unreadable autobiography of the goddess of that name, detailing the long history of her ancient greatness, her decline in "Gothic darkness," and her ultimate revival in Hanoverian England, proves, in the excellent analysis by Alan McKillop (cited in note 33 above), to be of the greatest importance in the ideological history of the eighteenth century. For not only does this "sweeping synthesis or elaborate piece of syncretism" expose the great array of sources that fed the early eighteenth-century ideas of liberty, but it demonstrates the degree of deviation from the normal pattern that opposition thought involved as it traces the shifts that took place in Thomson's views in the course of writing the poem — from confidence in English politics to concern, from support of the administration to opposition — and that are reflected in it. For the text of *Britannia* (1729), in which Thomson "had already made the transition from 'pointing with pride' to 'viewing with alarm,'" and for a commentary on it, see McKillop's edition of Thomson's *Castle of Indolence and Other Poems* (Lawrence, Kansas, 1961); see also John E. Wells, "Thomson's *Britannia* . . .," *Modern Philology*, 40 (1942-43), 43-56. For references to *Liberty* in the Revolutionary pamphlets, see Index listings in Bailyn, *Pamphlets*, I.

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Robert Walpole. Robinocracy, he explained, was a form of government in which the chief minister maintained the façade of constitutional procedures while he in fact monopolized the whole of governmental power:

The *Robinarch*, or chief ruler, is nominally a *minister* only and creature of the prince; but in reality he is a sovereign, as despotic, arbitrary a sovereign as this part of the world affords . . . The *Robinarch* . . . hath unjustly engrossed the whole power of a nation into his own hands . . . [and] admits no person to any considerable post of trust and power under him who is not either a *relation*, a *creature*, or a *thorough-paced tool* whom he can lead at pleasure into any dirty work without being able to discover his designs or the consequences of them.

The modes of Robinarcial control of a once-free legislature were clear enough. The corrupt minister and his accomplices systematically encourage "*luxury and extravagance*, the certain forerunners of *indigence, dependance, and servility*." Some deputies

are tied down with *honors, titles, and preferments*, of which the *Robinarch* engrosses the disposal to himself, and others with *bribes*, which are called *pensions* in these countries. Some are persuaded to prostitute themselves for the lean reward of *hopes and promises*; and others, more senseless than all of them, have sacrificed their principles and consciences to a set of *party names*, without any meaning, or the vanity of appearing in favor at *court*.

Once in power the Robinarcial ministry feeds on its own corruption. It loads the people with taxes and with debts, and ends by creating a mercenary army ostensibly for the purpose of protecting the people but in fact to perfect its dominance in just those ways, Bolingbroke wrote, that Trenchard had explained years before in his tracts on standing armies.³⁸

Solutions of different forms were advocated by "left" and "right": the former urged those institutional, political, and legal

³⁸ *The Craftsman*, nos. 172, October 18, 1729; and 198, April 18, 1730 (in the London, 1731 ed., V, 152-153, 155, 156; VI, 138 ff.).

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reforms which would finally be realized a full century later in the Reform Acts of the nineteenth century; the latter argued the need for that romantic ideal, the Patriot Prince, who should govern as well as reign, yet govern above parties and factions, in harmony with a loyal and independent commons. But if their solutions were different their basic observations and the fears they expressed were identical. Everywhere, they agreed, there was corruption—corruption technically, in the adroit manipulation of Parliament by a power-hungry ministry, and corruption generally, in the self-indulgence, effeminizing luxury, and gluttonous pursuit of gain of a generation sunk in new and unaccustomed wealth. If nothing were done to stop the growth of these evils, England would follow so many other nations into a tyranny from which there would be no recovery.

But if these dark thoughts, in the England of Walpole and Gibbon, attained popularity in certain opposition, radical, and nonconformist circles, they had relatively little political influence in the country at large. In the mainland colonies of North America, however, they were immensely popular and influential. There, an altered condition of life made what in England were considered to be extreme, dislocating ideas sound like simple statements of fact. There, the spread of independent landholding had insensibly created a broad electorate. There, the necessity of devising systems of representation at a stroke and the presence of persistent conflict between the legislatures and the executives had tended to make representation regular and responsible and had limited the manipulative influence of any group in power. There, the multiplicity of religious groupings, the need for continuous encouragement of immigration, and the distance from European centers of ecclesiastical authority had weakened the force of religious establishments below anything known in Europe. There the moral basis of a healthy, liberty-preserving polity seemed already to exist in the unsophisticated lives of the

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independent, uncorrupted, landowning yeoman farmers who comprised so large a part of the colonial population. Yet there the threat of ministerial aggrandizement seemed particularly pressing and realistic, for there, in all but the charter colonies, the executive branches of government—venal surrogates, it so often seemed, of ill-informed if not ill-disposed masters—held, and used, powers that in England had been stripped from the crown in the settlement that had followed the Glorious Revolution as inappropriate to the government of a free people.³⁹

In such a situation the writings of the English radical and opposition leaders seemed particularly reasonable, particularly relevant, and they quickly became influential. Everywhere groups seeking justification for concerted opposition to constituted governments turned to these writers. When in 1735 John Peter Zenger's lawyer sought theoretical grounds for attacking the traditional concept of seditious libel, he turned for authority to Trenchard and Gordon's *Cato's Letters*. When, four years later, an opposition writer in Massachusetts drew up an indictment of the governor so vehement the Boston printers would not publish it, he did so, he wrote, with "some helps from *Cato's Letters*, which were wrote upon the glorious cause of liberty." When in 1750 Jonathan Mayhew sought to work out, in his celebrated *Discourse Concerning Unlimited Submission*, a full rationale for resistance to constituted government, he drew on—indeed, cribbed wholesale—not Locke, whose ideas would scarcely have supported what he was saying, but a sermon of Benjamin Hoadly, from whom he borrowed not only ideas and phrases but, in abusing the nonjuror Charles Leslie, the Bishop's enemies as

³⁹ The argument that English opposition theory had a special utility and unique attractiveness in early- and mid-eighteenth-century America as a result of the existence of an archaic preponderance of executive power coupled with an almost total elimination of the kind of political "influence" that Walpole was able to exert over opposition forces in Parliament, I have developed in *The Origins of American Politics*.

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well.⁴⁰ When in 1752-1753 William Livingston and his friends undertook to publish in a series of periodical essays a sweeping critique of public life in New York, and in particular to assault the concept of a privileged state, they modeled their publication, *The Independent Reflector*, on Trenchard and Gordon's *Independent Whig*, and borrowed from it specific formulations for their central ideas. And when in Massachusetts in 1754 opponents of a stringent excise act sought models for a campaign of opposition, they turned not only generally to the literature of opposition that had been touched off by Walpole's excise proposal of 1733 but specifically to Bolingbroke's *Craftsman* of that year, from which they freely copied arguments and slogans, even figures of speech.⁴¹ Everywhere in America the tradition that had originated in seventeenth-century radicalism and that had been passed on, with elaborations and applications, by early eighteenth-century English opposition publicists and politicians brought forth congenial responses and provided grounds for opposition politics.

But it did more. It provided also a harmonizing force for the other, discordant elements in the political and social thought of

⁴⁰ Trenchard and Gordon helped similarly to transmit to the Revolutionary generation the reputations of the more notorious clerical absolutists and the belief that "priestcraft and tyranny are ever inseparable, and go hand-in-hand." For their condemnation of Leslie, and of Robert Sibthorpe and Roger Mainwaring, chaplains to Charles I who advocated passive obedience to royal authority and threatened damnation to opponents of crown taxation, see *Cato's Letters*, nos. 128, May 11, 1723; and 130, May 25, 1723 (in the London, 1775 ed., IV, 192, 213).

⁴¹ Leonard W. Levy, *Legacy of Suppression* (Cambridge, 1960), pp. 115-121, 129-137; Stanley N. Katz, ed., *A Brief Narrative of the Case and Trial of John Peter Zenger* (Cambridge, 1963), pp. 15, 9, 10. [Americanus, pseud.], *A Letter to the Freeholders and Other Inhabitants of the Massachusetts-Bay . . .* ([Newport], 1739), p. 1. Mayhew's use of Hoadly's *Measures of Submission to the Civil Magistrates* is detailed in the Introduction to his *Discourse Concerning Unlimited Submission* (JHL 1) in Bailyn, *Pamphlets*, I. On Livingston's reliance on Trenchard and Gordon, see Klein's comments in Livingston, *Independent Reflector*, pp. 21-28, 450-452; and Livingston's quotation, p. 365. On *The Craftsman* and the Massachusetts excise controversy, see Boyer, "Borrowed Rhetoric," cited in note 22 above.

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the Revolutionary generation. Within the framework of these ideas, Enlightenment abstractions and common law precedents, covenant theology and classical analogy — Locke and Abraham, Brutus and Coke — could all be brought together into a comprehensive theory of politics. It was in terms of this pattern of ideas and attitudes — originating in the English Civil War and carried forward with additions and modifications not on the surface of English political life but in its undercurrents stirred by doctrinaire libertarians, disaffected politicians, and religious dissenters — that the colonists responded to the new regulations imposed by England on her American colonies after 1763.

Chapter III

POWER AND LIBERTY: A THEORY OF POLITICS

In Europe, charters of liberty have been granted by power. America has set the example and France has followed it, of charters of power granted by liberty. This revolution in the practice of the world may, with an honest praise, be pronounced the most triumphant epoch of its history and the most consoling presage of its happiness.

— James Madison, 1792

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that emerges from the political literature of the pre-Revolutionary years rests on the belief that what lay behind every political scene, the ultimate explanation of every political controversy, was the disposition of power. The acuteness of the colonists' sense of this problem is, for the twentieth-century reader, one of the most striking things to be found in this eighteenth-century literature: it serves to link the Revolutionary generation to our own in the most intimate way.

The colonists had no doubt about what power was and about its central, dynamic role in any political system. Power was not to be confused, James Otis pointed out, with unspecified physical capacity — with the “mere physical quality” described in physics. The essence of what they meant by power was perhaps best revealed inadvertently by John Adams as he groped for words in drafting his *Dissertation on the Canon and Feudal Law*. Twice choosing and then rejecting the word “power,” he finally selected as the specification of the thought he had in mind “dominion,”

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and in this association of words the whole generation concurred. "Power" to them meant the dominion of some men over others, the human control of human life: ultimately force, compulsion.¹ And it was, consequently, for them as it is for us "a richly connotative word": some of its fascination may well have lain for them, as it has been said to lie for us, in its "sado-masochistic flavor,"² for they dwelt on it endlessly, almost compulsively; it is referred to, discussed, dilated on at length and in similar terms by writers of all backgrounds and of all positions in the Anglo-American controversy.

Most commonly the discussion of power centered on its essential characteristic of aggressiveness: its endlessly propulsive tendency to expand itself beyond legitimate boundaries. In expressing this central thought, which explained more of politics, past and present, to them than any other single consideration, the writers of the time outdid themselves in verbal ingenuity. All sorts of metaphors, similes, and analogies were used to express this view of power. The image most commonly used was that of the act of trespassing. Power, it was said over and over again, has "an encroaching nature"; ". . . if at first it meets with no control [it] creeps by degrees and quick subdues the whole." Sometimes the image is of the human hand, "the hand of power," reaching out to clutch and to seize: power is "grasping" and "tenacious" in its nature; "what it seizes it will retain." Sometimes power "is like the ocean, not easily admitting limits to be fixed in it." Sometimes it is "like a cancer, it eats faster and faster every hour." Sometimes it is motion, desire, and appetite all at once, being "restless, aspiring, and insatiable." Sometimes it is like "jaws . . . always opened to devour." It is everywhere in public life, and

¹ [James Otis], *Brief Remarks on the Defence of the Halifax Libel* . . . (Boston, 1765), p. 24; Adams, *Diary and Autobiography*, I, 255. Cf. Charles Carroll: "power (understood as force)," *Maryland Historical Magazine*, 12 (1917), 187.

² K. R. Minogue, "Power in Politics," *Political Studies*, 7 (1959), 271.

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everywhere it is threatening, pushing, and grasping; and too often in the end it destroys its benign — necessarily benign — victim.³

What gave transcendent importance to the aggressiveness of power was the fact that its natural prey, its necessary victim, was liberty, or law, or right. The public world these writers saw was divided into distinct, contrasting, and innately antagonistic

³ The examples quoted here, selected from innumerable discussions of power in the literature before 1776, are from: *America, A Poem. By Alexander Martin . . . to Which Is Added, Liberty. A Poem. By Rusticus* . . . ([Philadelphia, 1769?]: JHL Pamphlet 31), p. [17]; [William Hicks], *Considerations upon the Rights of the Colonists to the Privileges of British Subjects* . . . (New York, 1766: JHL Pamphlet 18), p. 15; Richard J. Hooker, ed., "John Dickinson on Church and State," *American Literature*, 16 (1944-45), 90; John Adams, *Dissertation on the Canon and Feudal Law*, in *Works*, III, 457; [Moses Mather], *America's Appeal to the Impartial World* . . . (Hartford, 1775: JHL Pamphlet 59), p. 22; and John Adams ("Novanglus"), in *Works*, IV, 43. So also Jonathan Mayhew: "Power is of a grasping, encroaching nature . . . [it] aims at extending itself and operating according to mere will wherever it meets with no balance, check, control, or opposition of any kind." *The Snare Broken* . . . (Boston, 1766: JHL Pamphlet 20), p. 34; and "Power is like avarice, its desire increases by gratification," *Newport Mercury*, July 30, 1764.

The discussion of power, in precisely these terms, may be traced back through the political literature of mid-eighteenth-century America to seventeenth- and early eighteenth-century sources. See, for example, *Boston Gazette and Country Journal*, May 10, 1756, which contains a discourse on power and liberty; *New York Mercury*, October 15, 1753, where an essay on balance in government as "the firmest barrier against unlimited power . . . our whole constitution, so nicely poised between too much power and too much liberty," is fashioned from extracts from William Oldisworth's *A Dialogue Between Timothy and Philatheus* . . . (London, 1709), one of the many answers to Matthew Tindall's proscribed *Rights of the Christian Church Asserted* (1706); *New York Evening Post*, December 7, 1747, on disputes between power and liberty; John Wright's speech of 1741, quoting "a noted professor of law" who said that power "may justly be compared to a great river, which, while kept within due bounds, is both beautiful and useful, but when it overflows its banks . . . brings destruction and desolation where it comes" (Robert Proud, *History of Pennsylvania* . . . [Philadelphia, 1798], II, 224n); *Cato's Letters*, nos. 25, 33, 73, 115 ("Unlimited power is so wild and monstrous a thing that however natural it be to desire it, it is as natural to oppose it; nor ought it to be trusted with any mortal man, be his intentions ever so upright . . . It is the nature of power to be ever encroaching . . . It is dominion, it is power which [the Jacobite clergy] court" [6th ed., London, 1755, IV, 81-82, 214]); *The Craftsman*, nos. 180, 213; Benjamin Hoadly, *Works* (John Hoadly, ed., London, 1773), II, 25; Locke, *Second Treatise of Government*, I, 3; iii, 17.

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spheres: the sphere of power and the sphere of liberty or right. The one was brutal, ceaselessly active, and heedless; the other was delicate, passive, and sensitive. The one must be resisted, the other defended, and the two must never be confused. "Right and power," Richard Bland stated, "have very different meanings, and convey very different ideas"; "power abstracted from right cannot give a just title to dominion," nor is it possible legitimately, or even logically, to "build right upon power." When the two are intermingled, when "brutal power" becomes "an irresistible argument of boundless right" as it did, John Dickinson explained, under the Cromwellian dictatorship, innocence and justice can only sigh and quietly submit.⁴

Not that power was in itself—in some metaphysical sense—evil. It was natural in its origins, and necessary. It had legitimate foundations "in compact and mutual consent"—in those covenants among men by which, as a result of restrictions voluntarily accepted by all for the good of all, society emerges from a state of nature and creates government to serve as trustee and custodian

⁴ [Richard Bland], *An Inquiry into the Rights of the British Colonies* . . . (Williamsburg, 1766: JHL Pamphlet 17), pp. 5, 25; [John Joachim Zubly], *An Humble Enquiry* . . . ([Charleston], 1769: JHL Pamphlet 28), p. 26; [John Dickinson], *An Essay on the Constitutional Power of Great-Britain over the Colonies in America* . . . (Philadelphia, 1774), p. 108 (reprinted in *Pennsylvania Archives*, 2d ser., III, 610). See also, [William Hicks], *The Nature and Extent of Parliamentary Power Considered* . . . (Philadelphia, 1768: JHL Pamphlet 24), pp. 21, 27. Cf. *Cato's Letters*, no. 33: "Now, because liberty chastises and shortens power, therefore power would extinguish liberty; and consequently liberty has too much cause to be exceeding jealous, and always upon her defense. Power has many advantages over her . . . and whereas power can, and for the most part does, subsist where liberty is not, liberty cannot subsist without power, so that she has, as it were, the enemy always at her gates." So also, no. 73: "Alas! Power encroaches daily upon liberty, with a success too evident, and the balance between them is almost lost." The implicitly sexual character of the imagery is made quite explicit in passages of the libertarian literature, e.g., in Marchamont Nedham's *Excellencie of a Free State* (1656): "the interest of freedom is a virgin, that everyone seeks to deflower"; if it is not properly protected "(so great is the lust of mankind after dominion) there follows a rape upon the first opportunity" (in Richard Baron's 1767 ed., pp. 18-19).

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of the mass of surrendered individual powers. Power created legitimately by those voluntary compacts which the colonists knew from Lockean theory to be logical and from their own experience to be practical, power in its legitimate form inhered naturally in government and was the possession and interest of those who controlled government, just as liberty, always weak, always defensive, always, as John Adams put it, "skulking about in corners . . . hunted and persecuted in all countries by cruel power," inhered naturally in the people and was their peculiar possession and interest. Liberty was not, therefore, for the colonists, as it is for us, professedly the interest and concern of all, governors and governed alike, but only of the governed. The wielders of power did not speak for it, nor did they naturally serve it. Their interest was to use and develop power, no less natural and necessary than liberty but more dangerous. For "as great a blessing as government is," the Rev. Peter Whitney explained, "like other blessings, it may become a scourge, a curse, and severe punishment to a people." What made it so, what turned power into a malignant force, was not its own nature so much as the nature of man—his susceptibility to corruption and his lust for self-aggrandizement.⁵

⁵ Andrew Eliot, *A Sermon Preached before His Excellency Francis Bernard* . . . (Boston, 1765: JHL Pamphlet 15), p. 17; Adams, *Diary and Autobiography*, I, 282; II, 58; Peter Whitney, *The Transgressions of a Land* . . . (Boston, 1774), pp. 21-22. Whitney's thought—indeed his very phrasology—echoes through the opposition literature of early eighteenth-century England and in the many discussions of power and government published in the colonies. Thus, for example, Prideaux's doubt "*whether the benefit which the world receives from government be sufficient to make amends for the calamities which it suffers from the follies, mistakes, and maladministration of those that manage it*" was quoted in *Cato's Letters*, no. 31, May 27, 1721 ("Considerations on the Weakness and Inconsistencies of Human Nature," as republished, fifth ed., London, 1758, I, 241); the same quotation, properly attributed and identical in every detail, appears at the head of an essay on the "propensity of *men in power* to oppress the people" that was copied from an unnamed "northern paper" into the *South Carolina Gazette*, July 20-August 1, 1748. This borrowed essay, which is a classic example of the application to colonial politics of the language of English opposition ideology, appears between two issues of the *South Carolina Gazette*

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On this there was absolute agreement. Everyone, of course, knew that if "weak or ignorant men are entrusted with power" there will be "universal confusion," for "such exaltation will . . . make them giddy and vain and deprive them of the little understanding they had before." But it was not simply a question of what the weak and ignorant will do. The problem was more systematic than that; it concerned "mankind in general." And the point they hammered home time and again, and agreed on — freethinking Anglican literati no less than neo-Calvinist theologians — was the incapacity of the species, of mankind in general, to withstand the temptations of power. Such is "the depravity of mankind," Samuel Adams, speaking for the Boston Town Meeting, declared, "that ambition and lust of power above the law are . . . predominant passions in the breasts of most men." These are instincts that have "in all nations combined the worst passions of the human heart and the worst projects of the human mind in league against the liberties of mankind." Power always and everywhere had had a pernicious, corrupting effect upon men. It "converts a good man in private life to a tyrant in office." It acts upon men like drink: it "is known to be intoxicating in its nature" — "too intoxicating and liable to abuse." And nothing within man is sufficiently strong to guard against these effects of power — certainly not "the united considerations of reason and religion," for they have never "been sufficiently powerful to restrain these lusts of men."⁶

made up almost entirely of selections from *Cato's Letters*, the issue of July 25–29 republishing in its entirety *Cato's Letters*, no. 37 ("Character of a Good and of an Evil Magistrate, Quoted from Algernon Sidney, Esq."), the issue of August 1–8 republishing no. 38 ("The Right and Capacity of the People to Judge of Government"). The "northern paper" was in all probability *The Independent Advertiser* of Boston, which ran the same two numbers of *Cato's Letters*, also without attribution, on May 16 and February 29 of the same year.

⁶Eliot, *Sermon* (JHL 15), pp. 10–11; [Daniel Dulany], *Considerations on the Propriety of Imposing Taxes* (Annapolis, 1765: JHL Pamphlet 13), p. 41: "for mankind are generally so fond of power that they are oftener tempted to

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From these central premises on the nature of power and man's weakness in face of its temptations, there followed a series of important conclusions. Since power "in proportion to its extent is ever prone to wantonness," Josiah Quincy wrote, and since in the last analysis "the supreme power is ever possessed by those who have arms in their hands and are disciplined to the use of them," the absolute danger to liberty lay in the absolute supremacy of "a veteran army" — in making "the civil subordinate to the military," as Jefferson put it in 1774, "instead of subjecting the military to the civil powers." Their fear was not simply of armies but of *standing armies*, a phrase that had distinctive con-

exercise it beyond the limits of justice than induced to set bounds to it from the pure consideration of the rectitude of forbearance"; *The Votes and Proceedings of the Freeholders . . . of . . . Boston . . .* (Boston, [1772]: JHL Pamphlet 36), p. 20; [Jonathan Boucher], *A Letter from a Virginian . . .* ([New York], 1774: JHL Pamphlet 46), p. 7; Oliver Noble, *Some Strictures upon the . . . Book of Esther . . .* (Newburyport, 1775: JHL Pamphlet 58), p. 5; *The Genuine Principles of the Ancient Saxon, or English Constitution . . .* (Philadelphia, 1776: JHL Pamphlet 70), p. 5 (quoting [Obadiah Hulme's] *An Historical Essay on the English Constitution* [1771]); Josiah Quincy, Jr., *Observations on the . . . Boston Port-Bill; with Thoughts on . . . Standing Armies* (Boston, 1774), in Josiah Quincy, *Memoir of the Life of Josiah Quincy Jun. . . .* (Boston, 1825), pp. 372–373; Whitney, *Transgressions*, pp. 21–22; Zabdiel Adams, *The Grounds of Confidence and Success in War . . .* (Boston, 1775), p. 5; Adams, *Diary and Autobiography*, II, 59.

This basic concept of human nature, which would attain its greatest fame in the *Federalist*, appears full blown in the colonies well before the Revolutionary years, and may be traced back, intact, to the early eighteenth-century transmitters of English opposition thought. Thus, in words that may be found duplicated almost endlessly in the public prints of the mid-century, a writer in the *New York Mercury*, March 24, 1755, wrote: "A lust of domination is more or less natural to all parties; and hence the stupidity of entrusting any set of people with more power than necessity requires. Ambition and a thirst for sway are so deeply implanted in the human mind that one degree of elevation serves only as a step by which to ascend the next; nor can they ever mount the ladder so high as not to find the top still equally remote." The passage is indistinguishable from any number of discussions of the same topic in *Cato's Letters* (e.g., nos. 31, 39, 40, 43, 44, 134), and in the writings of the later English radicals (e.g., Catharine Macaulay, *Observations on a Pamphlet, Entitled, Thoughts on the Cause of the Present Discontents*, 3d ed., London, 1770, p. 9: "All systematical writers on the side of freedom plan their forms and rules of government on the just grounds of the known corruption and wickedness of the human character").

notations, derived, like so much of their political thought, from the seventeenth century and articulated for them by earlier English writers—in this case most memorably by Trenchard in his famous *An Argument, Shewing, that a Standing Army Is Inconsistent with a Free Government . . .* (1697). With him the colonists universally agreed that “unhappy nations have lost that precious jewel *liberty* . . . [because] their necessities or indiscretion have permitted a standing army to be kept amongst them.” There was, they knew, no “worse state of thralldom than a military power in any government, unchecked and uncontrolled by the civil power”; and they had a vivid sense of what such armies were: gangs of restless mercenaries, responsible only to the whims of the rulers who paid them, capable of destroying all right, law, and liberty that stood in their way.⁷

⁷ Quincy, *Observations*, in Quincy, *Memoir*, pp. 373, 428; [Thomas Jefferson], *A Summary View of the Rights of British America . . .* (Williamsburg, [1774]: JHL Pamphlet 43), p. 22; [John Trenchard and Walter Moyle], *An Argument*, p. 4 (reprinted in *The Pamphleteer . . .*, X [1817], 114); [Samuel Seabury], *An Alarm to the Legislature of the Province of New-York . . .* (New York, 1775), in Clarence H. Vance, ed., *Letters of a Westchester Farmer (Publications of the Westchester County Historical Society, VIII, White Plains, 1930)*, p. 159. For other examples of the almost obsessive concern in the colonies with standing armies, see *No Standing Army in the British Colonies . . .* (New York, 1775); Noble, *Some Strictures* (JHL 58), pp. 28–29; *Genuine Principles* (JHL 70), p. 23; Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery-Company . . .* (Boston, 1773), pp. 26–28 (quoting Trenchard); James Lovell, *An Oration . . .* (Boston, 1771), pp. 8–9 (also quoting Trenchard); and above all, Quincy, *Observations*, in Quincy, *Memoir*, pp. 400–445. Lois Schwoerer discusses the original context and literature of standing armies in England (see above, Chap. II, n. 18), and Caroline Robbins, *The Eighteenth-Century Commonwealthman* (Cambridge, 1959), deals with the subsequent English background at many points (see Index under “militia”). But the fullest discussion of the ideological meaning of standing armies is J. G. A. Pocock, “Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century,” *W.M.Q.*, 3d ser., 22 (1965), 560 ff. Pocock, who dates the origins of “that concept or bogey” in 1675, argues that by the end of the seventeenth century it had come to mean not praetorians or janissaries but “a permanent professional force maintained by the administration and supplied out of the public exchequer”; as such, standing armies were feared as instruments in the systematic corruption of Parliament by the administration and hence of

This fear of standing armies followed directly from the colonists' understanding of power and of human nature: on purely logical grounds it was a reasonable fear. But it went beyond mere logic. Only too evidently was it justified, as the colonists saw it, by history and by the facts of the contemporary world. Conclusive examples of what happened when standing armies were permitted to dominate communities were constantly before their minds' eyes. There was, first and foremost, the example of the Turks, whose rulers—cruel, sensuous “bashaws in their little divans”—were legendary, ideal types of despots who reigned unchecked by right or law or in any sense the consent of the people; their power rested on the swords of their vicious janissaries, the worst of standing armies. So too had the French kings snuffed out the liberties of their subjects “by force” and reduced to nothing the “puny privilege of the French parliaments.” The ranks of “despotic kingdoms” included also Poland, Spain, and Russia; India and Egypt were occasionally mentioned too.⁸

the overthrow of the balanced constitution. The colonists echoed this concern: see John Dickinson's association of standing armies and excise collection in his *Letters from a Farmer in Pennsylvania . . .* (Philadelphia, 1768: JHL Pamphlet 23), pp. 60–61; and Simeon Howard's definition of a standing army as “a number of men paid by the public to devote themselves wholly to the military profession,” who, though “really servants of the people and paid by them,” come to think of themselves as the King's men exclusively and become “the means, in the hands of a wicked and oppressive sovereign, of overturning the constitution of a country and establishing the most intolerable despotism” (*Sermon*, pp. 26, 27). But the phrase was also commonly used loosely to mean simply the personal troops of the prince in states already lacking balanced constitutions; e.g., John Hancock, *An Oration . . .* (Boston, 1774: JHL Pamphlet 41), pp. 13–14.

⁸ Turkey as the ultimate refinement of despotism fascinated eighteenth-century Americans and Englishmen alike, their fascination doubtless heightened by the salacious details furnished in such perennial best sellers as Sir Paul Rycout (or Ricaut), *History of the Present State of the Ottoman Empire* (first published 1668; 6th ed. 1686; reprinted continuously for a century afterward and lifted bodily into such comprehensive works as *A Compleat History of the Turks*, 4 vols., London, 1719), which jumbles together under the heading “Maxims of the Turkish Polity” chapters on the absolutism of the Turkish government, “The Affection and Friendship the Pages of the Seraglio Bear to Each Other” and

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More interesting than these venerable despotisms, bywords for the rule of force unrestrained by countervailing influences, were a number of despotic states that had within living memory been free and whose enslavement, being recent, had been directly observed, Venice was one: it had once, not so long ago, been a republic, but now it was governed "by one of the worst of despotisms." Sweden was another; the colonists themselves could remember when the Swedish people had enjoyed liberty to the full; but now, in the 1760's, they were known to "rejoice at being subject to the caprice and arbitrary power of a tyrant, and

"The Apartments of the Women." From at least the mid-seventeenth century, writings on the absolutism of the Turks had served in England as disguised tracts for the times, commentaries "upon the English polity from a safe vantage point" (Felix Raab, *The English Face of Machiavelli*, London, 1964, p. 164). The early eighteenth-century polemicists continued to probe the inner characteristics of absolutism, and by contrast the nature of liberty, by examining the society and government of the Turks. There are innumerable discussions and references to Turkish despotism in *Cato's Letters*; Letter 50, dilating on "that horrible and destroying government [of the Turks], a government fierce and inhuman, founded in blood, supported by barbarity," includes eight pages of quotations from Rycout. As a result, long before the Revolution the colonists were habituated to conceive of "the difference between free and enslaved countries" as "the difference between *England and Turkey*" (*Boston Gazette or Country Journal*, May 19, 1755); to see the ultimate in political oppression as "worse than Turkish cruelties" (M. G. Hall, et al., eds., *The Glorious Revolution in America*, Chapel Hill, 1964, p. 45); and to think of total power "as absolute as that of the Great Turk" (*Boston Evening Post*, July 4, 1737). This terminology and this mode of thought were carried over directly into the Revolutionary literature. See, for example, [William H. Drayton], *A Letter from Freeman of South-Carolina . . .* Charleston, 1774: JHL Pamphlet 45), p. 8; and [Richard Bland], *The Colonel Dismounted: Or the Rector Vindicated . . .* (Williamsburg, 1764: JHL Pamphlet 4), p. 26.

For an elaborate discussion of the "awful lesson" of Poland entirely in the spirit of the Revolutionary pamphleteers, see Mercy Otis Warren, *History of the . . . American Revolution . . .* (Boston, 1805), II, 182-184. On France and the other familiar tyrannies, see the characteristic background in *New York Evening Post*, December 7, 1747, and the examples in Quincy, *Observations*, in Quincy, *Memoir*, pp. 443, 450-451; Dickinson, *Farmer's Letters* (JHL 23), pp. 12, 46; [Stephen Johnson], *Some Important Observations . . .* (Newport, 1766: JHL Pamphlet 19), p. 11; [Alexander Hamilton], *The Farmer Refuted . . .* (New York, 1775), in *The Papers of Alexander Hamilton* (Harold C. Syrett, et al., eds., New York and London, 1961-), I, 122.

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kiss their chains." But the most vivid of these sad cases, because the most closely studied, was that of Denmark. The destruction of parliamentary liberties in Denmark had in fact taken place a century before, but that event, carefully examined in a treatise famous in opposition circles and in America, was experienced as contemporary by the colonists.

Molesworth's *An Account of Denmark* (1694) established the general point, implicit in all similar histories but explicit in this one, that the preservation of liberty rested on the ability of the people to maintain effective checks on the wielders of power, and hence in the last analysis rested on the vigilance and moral stamina of the people. Certain forms of government made particularly heavy demands on the virtue of the people. Everyone knew that democracy — direct rule by all the people — required such spartan, self-denying virtue on the part of all the people that it was likely to survive only where poverty made upright behavior necessary for the perpetuation of the race. Other forms, aristocracies, for example, made less extreme demands; but even in them virtue and sleepless vigilance on the part of at least the ruling class were necessary if privilege was to be kept responsible and the inroads of tyranny perpetually blocked off. It had been the lack of this vigilance that had brought liberty in Denmark to its knees, for there a corrupt nobility, more interested in using its privileges for self-indulgence than for service to the state, had dropped its guard and allowed in a standing army which quickly destroyed the constitution and the liberties protected by it.

The converse of all of this was equally true and more directly relevant. The few peoples that had managed to retain their liberties in the face of all efforts of would-be tyrants propelled by the lust for power had been doughty folk whose vigilance had never relaxed and whose virtue had remained uncontaminated. The Swiss, a rustic people locked in mountain sanctuaries, were ancient members of this heroic group; they had won their liberty

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long ago and had maintained it stubbornly ever after. The Dutch were more recent members, having overthrown the despotic rule of Spain only a century earlier; they too were industrious people of stubborn, Calvinist virtue, and they were led by an alert aristocracy. More recent in their emergence from darkness were the Corsicans, whose revolt against Genoese overlords backed by French power had begun only in 1729; they were still, at the time of the Stamp Act, struggling under the leadership of Pasquale Paoli to maintain their independence and liberty.⁹

Above all, however, there were the English themselves. The colonists' attitude to the whole world of politics and government was fundamentally shaped by the root assumption that they, as Britishers, shared in a unique inheritance of liberty. The English people, they believed, though often threatened by despots who had risen in their midst, had managed to maintain, to a greater degree and for a longer period of time than any other people, a tradition of the successful control of power and of those evil tendencies of human nature that would prevent its proper uses.

In view of the natural obstacles that stood in the way of such a success and in view of the dismal history of other nations, this,

⁹On the more recent despotisms, especially Denmark and Sweden, see *Votes and Proceedings of Boston* (JHL 36), p. 35; Dulany, *Considerations* (JHL 13), p. 46n; Samuel Williams, *A Discourse on the Love of Our Country* . . . (Salem, 1775: JHL Pamphlet 55), p. 21; H. Trevor Colbourn, *The Lamp of Experience* (Chapel Hill, 1965), pp. 74, 137. On the surviving free states, see, for example, John Joachim Zubly, *The Law of Liberty* . . . (Philadelphia, 1775), Appendix, pp. 33-41; [Carter Braxton], *An Address to . . . Virginia; on the Subject of Government* . . . (Philadelphia, 1776: JHL Pamphlet 66), p. 18; [James Chalmers], *Plain Truth . . . Containing Remarks on . . . Common Sense* . . . (Philadelphia, 1776: JHL Pamphlet 64), pp. 9 ff.; [Charles Inglis], *The True Interest of America . . . Strictures on a Pamphlet Intituled Common Sense* . . . (Philadelphia, 1776), pp. 46, 61. For a detailed discussion of Moleworth's influential *Account of Denmark*, see Robbins, *Commonwealthman*, pp. 98-109, 393-394. On the Corsicans, see e.g., Arthur Lee's equation of their effort against the French and Genoese to those of the Athenians against Xerxes, the starving Romans against their various besiegers, the Flemish against "a very potent monarch," and the Georgians against the Turks. "Monitor V," *Virginia Gazette* (R), March 24, 1768.

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as the colonists saw it, had been an extraordinary achievement. But it was not a miraculous one. It could be explained historically. The ordinary people of England, they believed, were descended from simple, sturdy Saxons who had known liberty in the very childhood of the race and who, through the centuries, had retained the desire to preserve it. But it had taken more than desire. Reinforcing, structuring, expressing the liberty-loving temper of the people, there was England's peculiar "constitution," described by John Adams, in words almost every American agreed with before 1763, as "the most perfect combination of human powers in society which finite wisdom has yet contrived and reduced to practice for the preservation of liberty and the production of happiness."¹⁰

The word "constitution" and the concept behind it was of central importance to the colonists' political thought; their entire understanding of the crisis in Anglo-American relations rested upon it. So strategically located was this idea in the minds of both English and Americans, and so great was the pressure placed upon it in the course of a decade of pounding debate that in the end it was forced apart, along the seam of a basic ambiguity, to form the two contrasting concepts of constitutionalism that have remained characteristic of England and America ever since.¹¹

At the start of the controversy, however, the most distinguishing feature of the colonists' view of the constitution was its apparent traditionalism. Like their contemporaries in England and like their predecessors for centuries before, the colonists at the beginning of the Revolutionary controversy understood by the word "constitution" not, as we would have it, a written

¹⁰Adams, *Works*, III, 477. For characteristic encomiums on the constitution and descriptions of its operating balance, see James Otis, *Rights of the British Colonies Asserted and Proved* (Boston, 1764: JHL Pamphlet 7), p. 47; Dulany, *Considerations* (JHL 13), p. 15; Johnson, *Some Important Observations* (JHL 19), pp. 27 ff.; Whitney, *Transgressions*, p. 10; Mather, *America's Appeal* (JHL 59), pp. 7-8, 34 ff.

¹¹See below, Chap. V, sec. 2.

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document or even an unwritten but deliberately contrived design of government and a specification of rights beyond the power of ordinary legislation to alter; they thought of it, rather, as the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them. So John Adams wrote that a political constitution is like “the constitution of the human body”; “certain contextures of the nerves, fibres, and muscles, or certain qualities of the blood and juices” some of which “may properly be called *stamina vitae*, or essentials and fundamentals of the constitution; parts without which life itself cannot be preserved a moment.” A constitution of government, analogously, Adams wrote, is “a frame, a scheme, a system, a combination of powers for a certain end, namely,—the good of the whole community.”¹²

The elements of this definition were traditional, but it was nevertheless distinctive in its emphasis on the animating prin-

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¹² Adams, *Works*, III, 478–479. The conception of “constitution” as the arrangement of existing laws and practices of government may be traced back through the literature of the early eighteenth and the seventeenth centuries. So, traditionally, David Lloyd referred in 1706 to “the best constitution we could find, to wit: the common and statute laws of England” (Roy N. Lokken, *David Lloyd*, Seattle, 1959, p. 168). Similarly, in 1748 *The Maryland Gazette* printed a series of essays elaborating the idea that parliaments “are the very constitution itself,” that “our constitution is at present but a series of alterations made by Parliament,” and ridiculing the notion that “*the Parliament cannot alter the constitution*” (issues of April 27 and May 4 and Supplement to issue of May 11). Bolingbroke’s views are particularly interesting since, while he insisted that the constitution was immutable, that even kings must subject themselves to it, and that obedience was justified by the degree to which magistrates conformed to the constitution, he nevertheless defined a constitution as “that assemblage of laws, institutions, and customs, derived 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”: “Dissertation on Parties,” Letter X, in *Works* . . . (London, 1754), II, 130. Cf. J. H. Burns, “Bolingbroke and the Concept of Constitutional Government,” *Political Studies*, 10 (1962), 264–276. For particularly close anticipations of Adams’ imagery and understanding of constitutions, see the discussion of the “natural or political body . . . composed of springs, wheels, and ligaments,” and of the “*stamina*, first principles, or original constitution” of government, in *Cato’s Letters*, nos. 69 and 84.

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ciples, the *stamina vitae*, those “fundamental laws and rules of the constitution, which ought never to be infringed.” Belief that a proper system of laws and institutions should be suffused with, should express, essences and fundamentals—moral rights, reason, justice—had never been absent from English notions of the constitution. But not since the Levellers had protested against Parliament’s supremacy in the mid-seventeenth century had these considerations seemed so important as they did to the Americans of the mid-eighteenth century. Nor could they ever have appeared more distinct in their content. For if the ostensible purpose of all government was the good of the people, the particular goal of the English constitution—“its end, its use, its designation, drift, and scope”—was known to all, and declared by all, to be the attainment of liberty. This was its peculiar “grandeur” and excellence; it was for this that it should be prized “next to our Bibles, above the privileges of this world.” It was for this that it should be blessed, supported and maintained, and transmitted “in full, to posterity.”¹³

¹³ *A Letter to the People of Pennsylvania* (Philadelphia, 1760: JHL Pamphlet 2), p. 3; Adams, *Works*, III, 479; Otis, *Rights of the British Colonies* (JHL 7), p. 47; Johnson, *Some Important Observations* (JHL 19), p. 28. For a characteristic pre-Revolutionary statement of the relation between fundamental law and the constitution, see *Boston Gazette and Country Journal*, May 10, 1756, where an anonymous essayist explained that Magna Carta “is only declaratory of the principal grounds, of the *fundamental* laws and liberties of England . . . so that it seems rather to be a collection of ancient privileges from the common law ratified by the suffrage of the people and claimed by them as their *reserved rights*. It is in short the constitution of *English* government—the basis of English law—the compact—the standing perpetual rule over which no man nor any body of men distinct from the whole may claim any just superiority.” There was an obvious answer, the writer made clear, to the question “whether the three branches [of Parliament] is the constitution, or whether they are not circumscribed by some rules established previous to their existence, which they may not depart from.” If Parliament were to pass a law that altered the constitution, the writer argued in phrases that anticipate both James Otis’ famous self-contradictions and the ultimate grounds of American defiance of Parliament, “would the people, if they did not like the alteration, think themselves obliged to abide by such a law? Notwithstanding the veneration which is justly due to an act of Parliament, *the known wisdom of British Parliament* will hardly admit of the supposition.” (Italics added.)

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But how had this been achieved? What was the secret of this success of the British constitution? It lay in its peculiar capacity to balance and check the basic forces within society. It was common knowledge, expressed in such familiar clichés, a Virginian complained, "that the merest sciolist, the veriest smatterer in politics must long since have had them all by rote,"¹⁴ that English society consisted of three social orders, or estates, each with its own rights and privileges, and each embodying within it the principles of a certain form of government: royalty, whose natural form of government was monarchy; the nobility, whose natural form was aristocracy; and the commons, whose form was democracy. In the best of worlds, it had been known since Aristotle, each of these forms independently was capable of creating the conditions for human happiness; in actuality all of them, if unchecked, tended to degenerate into oppressive types of government — tyranny, oligarchy, or mob rule — by enlarging their own rights at the expense of the others' and hence generating not liberty and happiness for all but misery for most. In England, however, these elements of society, each independently dangerous, entered into government in such a way as to eliminate the dangers inherent in each. They entered simultaneously, so to speak, in a balanced sharing of power. The functions, the powers, of government were so distributed among these components of society that no one of them dominated the others. So long as each component remained within its proper sphere and vigilantly checked all efforts of the others to transcend their proper boundaries there would be a stable equilibrium of poised forces each of which, in protecting its own rights against the encroachments of the others, contributed to the preservation of the rights of all.

Such was the theoretical explanation, universally accepted in the eighteenth century, of the famous "mixed" constitution of

¹⁴ [Robert Carter Nicholas], *Considerations on the Present State of Virginia Examined* ([Williamsburg], 1774), in the Earl G. Swem edition (New York, 1919), p. 40.

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England.¹⁵ It was an arrangement of power that appeared to the colonists as it did to most of Europe as "a system of consummate wisdom and policy." But if the theory was evident and unanimously agreed on, the mechanics of its operation were not. It was not clear how the three social orders were related to the functioning branches of government. The clarity of the modern assumption of a tripartite division of the functions of government into legislative, executive, and judicial powers did not exist for the colonists (the term "legislative," for example, was used to mean the whole of government as well as the lawmaking branch), and in any case the balance of the constitution was not expected to be the result of the symmetrical matching of social orders with powers of government: it was not assumed that each estate would singly dominate one of the branches or functions of government.¹⁶ What was generally agreed on was what Molesworth

¹⁵ On the origins and development of this theory of the English constitution, see Corinne C. Weston, *English Constitutional Theory and the House of Lords, 1556-1832* (London, 1965), where it is argued that, though the idea of mixed government was an ancient one, it acquired its classic English form in Charles I's *His Majesties Answer to the XIX. Propositions of Both Houses of Parliament* (London, 1642). Before the appearance of that pamphlet "the term three estates had been used officially and popularly to designate the lords spiritual, the lords temporal, and the commons" (p. 31). For a model statement of the concept as it was transmitted to the colonists in the early eighteenth century, see *The Spectator*, no. 287 (January 29, 1711/12), where the roots of the idea in classical antiquity are traced and where the main emphasis is placed on the liberty-preserving force of dividing government among persons "of different ranks and interests, for where they are of the same rank, it differs but little from a despotical government in a single person." Safety would be found in a government in which power was divided among "persons so happily distinguished that by providing for the particular interests of their several ranks they are providing for the whole body of the people." For a view of the theory of the mixed constitution as an expression of the fundamental change in intellectual orientation from medieval scholasticism to modern empiricism, see W. H. Greenleaf, *Order, Empiricism and Politics . . . 1500-1700* (London, 1964), chap. ix. See also Stanley Pargellis, "The Theory of Balanced Government," in Conyers Read, ed., *The Constitution Reconsidered* (New York, 1938), pp. 37-49, and below, Chap. VI, sec. 3.

¹⁶ Robert Shackleton argues ("Montesquieu, Bolingbroke, and the Separation of Powers," *French Studies*, III [1949], 25-38, and *Montesquieu* [Oxford, 1961], pp. 298-301) that Montesquieu interpreted the balance of the English constitution

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wrote in defining a "real Whig" in his Introduction to *Hotman's Franco-Gallia* (1711): "one who is exactly for keeping up to the strictness of the true old *Gothic constitution*, under the *three estates of King* (or *Queen*), *Lords*, and *Commons*, the *legislature* being seated in all three together, the executive entrusted with the first but accountable to the whole body of the people, in case

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in terms of the modern idea of the separation of functioning powers, and that he derived this idea from Bolingbroke's *Craftsman*. The argument seems unconvincing on both points from the evidence presented. The most that can be said, it would seem, is that in discussing the English constitution Montesquieu did attempt to show the matching of social powers with the functioning powers of government (which he did, indeed, clearly define as legislative, executive, and judicial) but that he did not succeed in doing so with any clarity. See *Spirit of the Laws* (Franz Neumann, ed., New York, 1949), bk. xi, sec. 6 (esp. p. 156; cf. p. lviii). His partial and confused mingling of the idea of the mixed state with the modern idea of the separation of powers (which the colonists did, on occasion, unambiguously extract from his writing: e.g., *Boston Gazette and Country Journal*, January 2, 1758) is described in Weston, *English Constitutional Theory*, pp. 124-125; in Betty Kemp, *King and Commons, 1660-1832* (London, 1959), pp. 82-85; and above all in W. B. Gwyn, *The Meaning of the Separation of Powers* (*Tulane Studies in Political Science*, IX, New Orleans, 1965), pp. 104, 109—a work of particular importance that came too late to be used in the writing of this book. Bolingbroke in his debate with Walpole's publicists over whether balance in government is properly attained by the independence or by the mutual dependence of powers, assumed, as did his opponents, that the object of discussion was England's mixed government, or constitution, of King, Lords, and Commons. See Isaac Kramnick, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole* (Cambridge, 1968), esp. chap. vi, and Gwyn, *Separation of Powers*, pp. 91-99. Bolingbroke's arguments, jumbling the concepts of balances and checks, the mixed constitution and the separation of powers, are echoed by Thomas Hutchinson in his notable message of July 14, 1772, to the Massachusetts House in which he sought to justify the proposed independent salary of the Massachusetts governor by analogy to the independence of King, Lords, and Commons in England. Thomas Hutchinson, *The History of . . . Massachusetts-Bay* (Lawrence S. Mayo, ed., Cambridge, 1936), III, Appendix W (esp. pp. 408-409). It is suggested below, Chap. VI, sec. 3, that in America the origins of the modern doctrine of the separation of functioning powers lay in the Revolutionary effort to recreate balance in governments within a society systematically lacking in divisions of rank or estate. For an account of the intense and revealing discussion of Montesquieu and the doctrine of the separation of power in Massachusetts on the eve of the Revolutionary controversy, see Ellen E. Brennan, *Plural Office-Holding in Massachusetts, 1760-1780* (Chapel Hill, 1945), chap. ii; on the English origins of the doctrine, see Gwyn, *Separation of Powers*, chaps. iii-v.

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of maladministration." What was agreed on, in other words, primarily and most significantly was that all three social orders did and should enter into and share, by representation or otherwise, the legislative branch. In the legislative functioning of government, Moses Mather explained in terms that commanded universal assent, power was

so judiciously placed as to connect the force and to preserve the rights of all; each estate, armed with a power of self-defense against the encroachments of the other two, by being enabled to put a negative upon any or all of their resolves, neither the King, Lords, or Commons could be deprived of their rights or properties but by their own consent in Parliament and no laws could be made or taxes imposed but such as were necessary and in the judgment of the three estates in Parliament, for the common good and the interest of the realm.¹⁷

It was also agreed that the executive function was largely if not completely the proper responsibility of the first order of society, the crown. The rights exercised there were understood to be the rights of power: prerogative rights, privileges properly enjoyed by the monarch and his servants. But there the agreement stopped. There were several explanations of how the balance of social forces worked to check the undue exercise of prerogative power. Some writers found a sufficient balance and check in the fact that executive action was confined to bounds laid down by

¹⁷ Francis Hotman, *Franco-Gallia* . . . (Molesworth trans., 2nd ed., London, 1721), p. vii (Molesworth's Introduction was republished separately in 1775 as *The Principles of a Real Whig*); Mather, *America's Appeal* (JHL 59), p. 8. Cf. Trenchard's formulation in his *History of Standing Armies*, copied with approval by Bolingbroke in his *Craftsman*, no. 198 (in collected edition, London, 1731, VI, 142): "All wise governments endeavor, as much as possible, to keep the *legislative* and *executive parts* asunder, that they may be a check upon one another. Our government trusts the King with no part of the *legislative* but a *negative voice*, which is absolutely necessary to preserve the *executive*. One part of the duty of the *House of Commons* is to punish offenders and redress the grievances occasioned by the *executive part* of the government; and how can that be done if they should happen to be the *same persons*, unless they would be public-spirited enough to *hang or drown themselves*?"

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laws in the making of which all three powers had shared. But others were able to perceive a subtler kind of check upon prerogative power. For John Adams an essential point was that the commons, or the democracy, of society shared too in the execution of laws through the institution of trial by jury. This ancient device was critical, as Adams saw it, in establishing the equipoise of the English constitution in that it introduced into the "executive branch of the constitution . . . a mixture of popular power" and as a consequence "the subject is guarded in the execution of the laws."¹⁸ Most writers, however, turned for explanation not so much to the popular recruitment of juries and hence to a social balance within the executive branch as to the pressure exerted against the executive from outside, by an independent judiciary. It was taken as a maxim by all, whether or not they used the point to explain how the executive branch entered into the separation of powers, that it was the function of the judges "to settle the contests between prerogative and liberty . . . to ascertain the bounds of sovereign power, and to determine the rights of the subject," and that in order for them to perform this duty properly they must be "perfectly free from the influence of either." The threat to this independence—liberty being passive and power active—came most commonly from prerogative because of the effect of "its natural weight and authority" working upon the almost universal "love of promotion and private advantage." Unless the judiciary could stand upon its own firm and independent foundations—unless, that is, judges held their positions by a permanent tenure in no way dependent upon the will and pleasure of the executive—it would be ridiculous "to look for strict impartiality and a pure administration of justice, to

¹⁸ Adams, *Works*, III, 481; cf. *Four Letters on Interesting Subjects* (Philadelphia, 1776: JHL Pamphlet 69), p. 21. On the background of the problem in European thought, see Gwyn, *Separation of Powers*, pp. 5-8, 101, 103, 106, 110-111.

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expect that power should be confined within its legal limits, and right and justice done to the subject."¹⁹

The difficulty of explaining how, precisely, the natural divisions of society expressed themselves in the English government so as to pit power against power for the mutual benefit of all was compounded when the unit involved was seen to be not the single community of Britain but an empire of communities each with its own separate social groupings and governmental institutions yet each part of a greater society and government as well. But until the Revolutionary crisis was well under way no one sought to settle this complicated constitutional problem.²⁰ The

¹⁹ *Letter to the People of Pennsylvania* (JHL 2), pp. 4, 5, 7.

²⁰ Thus Dickinson: ". . . the government here is not only *mixed* but *dependent*, which circumstance occasions a *peculiarity in its form* of a very delicate nature" (*Farmer's Letters* [JHL 23], p. 58). This peculiarity, and the constitutional difficulties it involved, had long been noticed. In 1711 the astute Governor Hunter of New York warned Bolingbroke, then Secretary of State, that if the New York Council successfully claimed the "rights and privileges of a House of Peers," since the Assembly already claimed the privileges of a House of Commons, the colony would become "a body politic coordinate with (claiming equal powers) and consequently independent of the Great Council of the realm," adding for authority Harrington's idiosyncratic formula, which he quoted exactly, but without attribution: "as national or independent empire is to be exercised by them that have the proper balance of dominion in the nation, so provincial or dependent empire is not to be exercised by them that have the balance of dominion in the province, because that would bring the government from provincial and dependent to national and independent." E. B. O'Callaghan and Berthold Fernow, eds., *Documents Relative to the Colonial History of the State of New-York . . .* (Albany, 1856-1887), V, 255-256; cf. *Oceana* (S. B. Liljegren, ed., Heidelberg, 1924), p. 18. While by the mid-eighteenth century there was general agreement that the colonial governments were miniatures of the English government whose discrepancies from the model "doubtless in time will be rectified" (William Douglass, *A Summary, Historical and Political . . .*, Boston, 1749-1751, I, 215), it was equally apparent that the colonial legislatures did not have "a corresponding power with that of the Parliament in Great Britain . . . If the three branches [of the colonial Assemblies] united have equal power [with that of Parliament], then each of them have separately the same: and so a house of representatives has power equal to the House of Commons, the council to the House of Lords, and a governor to the King, which is absurd . . . The truth is, we are all of us *British* subjects, from the

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colonists were content to celebrate the wonderful balance of forces they understood to exist in England, and to assume that in some effective way the same principles operated both in epitome within each colony and in the over-all world of the empire as well.

The result of this balanced counterpoise of social and governmental forces in the British constitution was the confinement of social and political powers to specified, limited spheres. So long as the crown, the nobility, and the democracy remained in their designated places in government and performed their designated political tasks, liberty would continue to be safe in England and its dominions. But if any of them reached beyond the set boundaries of their rightful jurisdictions; if, particularly, the agencies of power—the prerogative, administration—managed, by corrupt practices, to insinuate their will into the assembly of the commons and to manipulate it at pleasure, liberty would be endangered.

The very idea of liberty was bound up with the preservation

greatest to the least, subject to British laws and entitled to *British privileges* . . . that a government in America is not equal there to the Parliament of *Great Britain* is evident from this one consideration, that the former have not power to make laws repugnant or contrary to the laws of the latter." *Boston Gazette and Country Journal*, May 10, 1756. Yet it could also be assumed—and the assumption would ultimately flower into the most advanced Revolutionary views of the imperial constitution—that the colonists upon leaving England had "totally disclaim[ed] all *subordination* to a dependence upon the two inferior estates of their mother country" (Hicks, *Nature and Extent of Parliamentary Power* [JHL 24], p. 6), and that therefore from the start their Assemblies had been equivalent bodies to the Houses of Parliament, forming complete mixed polities in their separate affiliation with the King. As a consequence the question of how the colonies shared in "the democracy" of the English constitution became a matter of critical importance at the height of the crisis. See, e.g., Joseph Warren, *An Oration* . . . (Boston, 1772: JHL Pamphlet 35), pp. 9-10; Adams ("Novanglus"), *Works*, IV, pp. 100 ff., and Hutchinson's message of 1772 cited in note 16 above. Behind the lack of definition of the imperial constitution before 1763 and of the colonies' involvement in it lay the more basic question of the meaning of the British "empire" itself. The concept when applied to the American colonies had only a special and restricted meaning. See Richard Koebner, *Empire* (Cambridge, England, 1961), chap. iii, esp. pp.

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of this balance of forces. For political liberty, as opposed to the theoretical liberty that existed in a state of nature, was traditionally known to be "a natural power of doing or not doing whatever we have a mind" so long as that doing was "consistent with the rules of virtue and the established laws of the society to which we belong"; it was "a power of acting agreeable to the laws which are made and enacted by the consent of the **PEOPLE**, and in no ways inconsistent with the natural rights of a single person, or the good of the society." Liberty, that is, was the capacity to exercise "natural rights" within limits set not by the mere will or desire of men in power but by non-arbitrary law—law enacted by legislatures containing within them the proper balance of forces.²¹

But what were these all-important "natural rights"? They were defined in a significantly ambiguous way. They were understood to be at one and the same time the inalienable, indefeasible rights inherent in people as such, and the concrete specifications of English law. Rights, John Dickinson wrote,

are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice.

Such God-given, natural, inalienable rights, distilled from reason and justice through the social and governmental compacts, were expressed in the common law of England, in the statutory enact-

²¹ *New York Evening Post*, November 16, 1747; Levi Hart, *Liberty Described and Recommended* . . . (Hartford, 1775), p. 13 (cf. p. 9); [John Allen], *The Watchman's Alarm to Lord N . . . h* . . . (Salem, 1774), p. [5]. As Allen points out, his definition of liberty—"the true etymology of the word"—was taken from Daniel Fenning's *Royal English Dictionary* (London, 1761). He might equally well have attributed his definition to the elaborate discussion of liberty in *Cato's Letters*, nos. 62 and 63; to the casual reference in *The Spectator*, no. 287; or to various passages in Montesquieu, Rapin, or Bolingbroke. Cf. Neumann's Introduction to *The Spirit of the Laws*, pp. xlix-litii.

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ments of Parliament, and in the charters of privileges promulgated by the crown. The great corpus of common law decisions and the pronouncements of King and Commons were but expressions of "God and nature . . . The natural absolute personal rights of individuals are . . . the very basis of all municipal laws of any great value." Indeed, "Magna Carta itself is in substance but a constrained declaration, or proclamation and promulgation in the name of King, Lords, and Commons of the sense the latter had of their original, inherent, indefeasible, natural rights."²²

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But this relationship between human rights and English law — so simple sounding when expressed in casual phrases like Daniel Dulany's "unalienable rights of the subject" — was in fact complicated even before the events of the 1760's and seventies placed the whole issue under severe pressure. Even then the identification between the two was known to be necessarily incomplete, for the provision of English law did not and properly could not wholly exhaust the great treasury of human rights. No documentary specification ever could. Laws, grants, and charters merely stated the essentials (which everyone summarized, with minor variations in phrasing, as "personal security, personal liberty, and private property") insofar, and only insofar, as they had come under attack in the course of English history. They marked out the minimum not the maximum boundaries of right. To claim more, to assert that all rights might be written into a comprehensive bill or code was surely, James Otis declared, "the insolence of a haughty and imperious minister . . . the flutter of a coxcomb, the pedantry of a quack, and the nonsense of a pettifogger." The "strange gallimaufry" of "codes, pandects, nov-

²² [John Dickinson], *An Address to the Committee of Correspondence in Barbados* . . . (Philadelphia, 1766), in Paul L. Ford, ed., *The Writings of John Dickinson (Memoirs of the Historical Society of Pennsylvania*, XIV, Philadelphia, 1895), p. 262; [James Otis], *A Vindication of the British Colonies* . . . (Boston, 1765; JHL Pamphlet 11), p. 8; *Notes and Proceedings of Boston* (JHL 36), pp. 7-8.

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els, decretals of popes, and the inventions of the d—l" may be suitable for "the cold bleak regions [of] Brandenburg and Prussia or the scorching heats of Jamaica or Gambia" but not for Britain's more temperate climate.²³

Conceiving of liberty, then, as the exercise, within the boundaries of the law, of natural rights whose essences were minimally stated in English law and custom, the colonists saw in the balance of powers of the British constitution "a system of consummate wisdom" that provided an effective "check upon the power to oppress."²⁴ Yet they were far from optimistic about the future of liberty. They looked ahead with anxiety rather than with confidence, for they knew, from the whole of their received tradition, of the desperate plight of liberty everywhere: "new tyrannies have sprung up, like so many new plagues, within the memory of man, and . . . [have] engrossed almost the whole earth," rendering "the world a slaughterhouse." Rulers of the East were "almost universally absolute tyrants . . . The states of Africa are scenes of tyranny, barbarity, confusion, and every form of violence. And even in Europe, where human nature and society are arrived at the highest improvements, where can we find a well constituted government or a well governed people?" France "has an arbitrary authority"; Prussia, "an absolute government"; Sweden and Denmark "have sold or betrayed their liberties"; Rome "groans under a medley of civil and ecclesiastical bondage"; Germany "is a hundred-headed hydra"; and Poland a ruin of "extravagant licentiousness and anarchy . . . the nobility and gentry arbitrary despotic tyrants, and the populace a race of slaves." Only in Britain — and her colonies — had liberty emerged from its trials intact; only in Britain had the battle repeatedly been won. Yet even in Britain the margin of victory

²³ Dulany, *Considerations* (JHL 13), p. 30; *Notes and Proceedings of Boston* (JHL 36), p. 8; Otis, *Vindication* (JHL 11), p. 32.

²⁴ Mather, *America's Appeal* (JHL 59), p. 8; Lovell, *Oration*, p. 11.

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had been narrow, especially in the last, bitter struggle with would-be despots of the house of Stuart. And the dangers were known to persist.²⁵

The historical phasing of the defense of liberty in England was a matter of great importance to the colonists not merely because it illustrated the characteristic dangers liberty faced but also because it made clear their own special role in history. "Liberty," James Otis wrote in a sentence that reveals much of the structure of the colonists' historical thought, "was better understood and more fully enjoyed by our ancestors before the coming in of the first Norman tyrants than ever after, till it was found necessary for the salvation of the kingdom to combat the arbitrary and wicked proceedings of the Stuarts." The period before the Norman conquest was the greatest age of English history.

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... it is a fact as certain as history can make it that the present civil constitution of England derives its original from those Saxons who . . . established a form of government in [England] similar to that they had been accustomed to live under in their native country . . . This government, like that from whence they came, was founded upon principles of the most perfect liberty. The conquered lands were divided among the individuals in proportion to the rank they held in the nation, and every freeman, that is, every freeholder, was a member of their Witan Moot or Parliament . . . or, which was the same thing in the eye of the constitution, every freeholder had a right to vote at the election of members of Parliament, and therefore

²⁵ *Cato's Letters*, no. 73; *New York Gazette: or, The Weekly Post Boy*, November 1, 1756, quoting at length "a survey of the kingdoms of the earth" that appeared in the eleventh essay by "Virginia-Centinel," originally published in the *Virginia Gazette* in September or October 1756. (Essay 10, the only one of the original group that is extant, was published in the September 3, 1756, issue of the *Virginia Gazette*.) For an almost identical account of "the deplorable state of your fellow-creatures in other countries," see the *New York Mercury*, May 22, 1758, reprinting an essay from the *Pennsylvania Journal* which in turn quoted long extracts from "a late writer in an address to the farmers of England."

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might be said, with great propriety, to be present in that assembly either in his own person or by representation.

Political liberty, based upon a landholding system "the wisest and most perfect ever yet devised by the wit of man, as it stood before the eighth century," had flourished in this ancient, pre-feudal elysium. But then had come the conquest, and with it the imposition of feudal tyranny upon gothic liberty. "The spirit of the English nation, depressed and broken by the Norman conquest, for many years quietly gave way to the rage of despotism, and peaceably submitted to the most abject vassallage." Not only had the King himself been rapacious and cruel, eagerly snatching at the liberties of the ancient, Saxon constitution, but the barons, "domineering and turbulent . . . capricious and inconstant . . . sometimes abetted the King in his projects of tyranny, and at other times excited the people to insurrections and tumults. For these reasons the constitution was ever fluctuating from one extreme to another. Now despotism, now anarchy prevailed." Gradually, safeguards against such evils were built up—that great array of documents starting with Magna Carta that outlined the inner boundaries of English liberties—which remained effective until, in the seventeenth century, that "execrable race of the Stuarts" precipitated a "formidable, violent, and bloody" struggle between the people and the confederacy "of temporal and spiritual tyranny." In the end liberty, as all the world knew, had been re-established in England, for the Glorious Revolution had created "that happy establishment which Great Britain has since enjoyed." But it had been a close victory which would require the utmost vigilance to maintain.²⁶

²⁶ Otis, *Rights of the British Colonies* (JHL 7), p. 31; Bland, *Inquiry* (JHL 17), pp. 7-8; Jefferson to Edmund Pendleton, August 13, 1776, *Papers of Thomas Jefferson* (Julian P. Boyd, ed., Princeton, 1950-), I, 492; Hicks, *Considerations* (JHL 18) p. 2; [James Wilson], *Considerations on the . . . Authority of the British Parliament* (Philadelphia, 1774: JHL Pamphlet 44), p. 12; Adams, *Dissertation*, in *Works*, III, 451; Otis, *Rights of the British Colonies* (JHL 7),

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It had been at this critical juncture in the history of England and of liberty, when Englishmen had been forced to struggle with tyranny as they had not since the conquest, that America had been settled. The conjunction had not been accidental. "It

p. 70. The pamphlets contain a good deal of discussion of English history, for much of the intellectual coherence of the colonists' political arguments rested on their views of the past. The ancient, presumably Saxon, origins of the English constitution was of particular importance to them, though, as John Adams pointed out, the Saxon constitution was "involved in much obscurity . . . the monarchical and democratic factions in England, by their opposite endeavors to make the Saxon constitutions swear for their respective systems, have much increased the difficulty of determining . . . what that constitution, in many important particulars, was" (*Works*, III, 543). Most agreed with Charles Carroll that "the liberties which the English enjoyed under their Saxon kings were wrested from them by the Norman conqueror," but differed with him on the idea (which seems to have been Rapin's view also) that only at the close of the reign of Henry III could there be found "the first faint traces of the House of Commons" (Elihu S. Riley, ed., *Correspondence of "First Citizen"—Charles Carroll of Carrollton, . . . and "Antilon"—Daniel Dulany, Jr. . . .*, Baltimore, 1902, p. 212). Maurice Moore admitted that "whether the Commons of England made up a part of the Saxon Witan Moot hath been a subject of great dispute," but cited Spelman and Madox to the effect that the Commons in the ancient constitution, while not apparently meeting regularly, was summoned when taxation was to be discussed, a practice abolished at the conquest and only slowly thereafter recovered (*The Justice and Policy of Taxing the American Colonies* . . . [Wilmington, N. C., 1765: JHL Pamphlet 16], pp. 3-4). Richard Bland cited Petyt, Brady, Rapin, and particularly Tacitus to establish the ancient, Saxon antecedents of the actual representation of all freeholders in Parliament, but, concentrating on the lack of such a franchise in eighteenth-century England ("the putrid part of the constitution"), ignored the conquest altogether (*Inquiry* [JHL 17], pp. 7-10). William Hicks too passed silently over the "Saxon" era and wrote vaguely of the establishment of constitutional liberty in post-conquest struggles (*Considerations* [JHL 18], pp. 2-4; *Nature and Extent of Parliamentary Power* [JHL 24], p. 3). But the view most characteristic of the Revolutionary pamphleteers is that summarized in the text paragraph above, which postulated an ideal constitution based on an elected assembly in Saxon England, destroyed by the conquest, regained with modifications in the course of centuries of struggle that culminated in the Glorious Revolution, and that was once again challenged by the corruption of eighteenth-century politics. In accepting this view the colonists sought not to undermine Parliamentary authority as such but to establish its true character in its ancient origins in such a way as to emphasize the corruptions of the Parliament of George III. Cf. Colbourn, *Lamp of Experience*, esp. chap. ii, and the same author's articles on Dickinson and Jefferson, in *Pa. Mag.*, 83 (1959), 280-292. and *W.M.Q.*, 3d ser., 15 (1958), 56-70. For

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was this great struggle that peopled America . . . a love of universal liberty, and a hatred, a dread, a horror, of the infernal confederacy [of temporal and spiritual tyranny] projected, conducted, and accomplished the settlement of America." Just as their Saxon ancestors had left "their native wilds and woods in the north of Europe," the settlers of America had emigrated to create in a new land civil and ecclesiastical governments purer, freer than those they had left behind. The transplantation had been made from an undefiled branch of the nation, strong, healthy, brimming with the juices of liberty, and it had been placed in a soil perfect for its growth. In the colonies, "sought and settled as an asylum for liberty, civil and religious," virtue continued to be fortified by the simplicity of life and the lack of enervating luxury.²⁷

This was not merely a parochial view. Though the idea that America was a purer and freer England came largely from local, nonconformist readings of history, it was reinforced by powerful elements within Enlightenment thought. European illuminati continued to identify America, as John Locke had done, with

Rapin's account of the ancient origins of the English constitution, linking pre-conquest institutions to eighteenth-century politics, see his *Dissertation on the . . . Whigs and Tories* [1717] (Boston, 1773), pp. 6-16; for his elaborate and inconclusive discussion of the pre-conquest origins of Parliament, see his *Dissertation on the Government, Laws . . . of the Anglo-Saxons, Particularly, the Origin, Nature, and Privileges of Their Wittena-Gemot, or Parliament . . .*, published in volume II (London, 1728) of his *History of England*, pp. [135]-210. On the historiographical background of these views, see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, England, 1951), esp. chap. ii; Christopher Hill, "The Norman Yoke," *Puritanism and Revolution* (London, 1958), chap. iii; David C. Douglas, *English Scholars, 1660-1730* (London, 1951), esp. chap. vi; and Samuel Kliger, *The Goths in England* (Cambridge, 1952), chap. ii, esp. pp. 146 ff.

²⁷ Adams, *Dissertation*, in *Works*, III, 451; Jefferson, *Summary View* (JHL 43), p. 6; Amos Adams, *A Concise Historical View of the . . . Planting . . .* (Boston, 1769), p. 51. See also Judah Champion, *A Brief View of the Distresses . . . Our Ancestors Encountered in Settling New-England . . .* (Hartford, 1770), pp. 10 ff.; and, for an even more local application of the same point of view, James Dana, *A Century Discourse . . .* (New Haven, [1770]), pp. 18 ff.

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something approximating a benign state of nature and to think of the colonies as special preserves of virtue and liberty. They could not help but note the refreshing simplicity of life and the wholesome consequences of the spread of freehold tenure. Nor could they deny the argument of Trenchard that the colonies demonstrated the military effectiveness of militia armies whose members were themselves the beneficiaries of the constitution and hence not likely to wish to destroy it.²⁸ No less a figure than Voltaire stated that America was the refinement of all that was good in England, writing in his *Lettres philosophiques* that Penn and the Quakers had actually brought into existence "that golden age of which men talk so much and which probably has never existed anywhere except in Pennsylvania." At lower levels of sophistication too—in the propaganda turned out by promoters of emigration—the idea was broadcast that inhabitants of the colonies enjoyed a unique simplicity and rectitude in their social life and a special freedom in their politics.

Not all, of course, agreed. A contrary picture of the colonists as provincial rustics steadily degenerating in a barbarous environment distant from civilizing influences persisted.²⁹ But on the eve of the Revolutionary controversy Americans, if not all Europeans and if not the crown officials who legally ruled them, could see themselves as peculiarly descended, and chosen for a special destiny. English successes in the Seven Years' War made this seem particularly realistic, for it seemed reasonable, after the conquest of Canada, to envision, as Jonathan Mayhew did in 1759, "a mighty empire" in America ("I do not mean an independent one) in numbers little inferior perhaps to the greatest in Europe, and in felicity to none." There would be "a great and flourishing kingdom in these parts of America," with cities "rising

²⁸ *An Argument*, pp. 21–22 (in *The Pamphleteer*, X, 132–133).

²⁹ Durand Echeverria, *Mirage in the West* (Princeton, 1957), chap. i; Koebner, *Empire*, pp. 93–96.

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on every hill . . . happy fields and villages . . . [and] religion professed and practiced throughout this spacious kingdom in far greater purity and perfection than since the times of the apostles."³⁰

It was at least possible. What would in fact happen in England and America would be the result, the colonists knew, of the degree of vigilance and the strength of purpose the people could exert. For they believed with Trenchard, with Bolingbroke, Hume, and Machiavelli—with the basic presupposition of eighteenth-century history and political theory—that "what happened yesterday will come to pass again, and the same causes will produce like effects in all ages," the laws of nature, as James Otis explained, being "uniform and invariable."³¹ The preservation of liberty would continue to be what it had been in the past, a bitter struggle with adversity; and if at the moment the prospects for success in that struggle seemed excellent in the colonies, they appeared to be considerably less than that in the home country. By 1763, before any of the major problems of Anglo-

³⁰ *Two Discourses Delivered October 25, 1759* . . . (Boston, 1759), pp. 60, 61.

³¹ *An Argument*, p. 5 (in *The Pamphleteer*, X, 115); Otis, *Vindication* (JHL 11), p. [3]. This fundamental presumption was repeatedly expressed in the political writings of eighteenth-century America. See, e.g., Zenger's *New York Weekly Journal*, December 24, 1733 (" . . . as causes and effects are things correlative, and the same causes ever had and ever will have the same effects"); *O Liberty, Thou Goddess Heavenly Bright* . . . ([New York, 1732] Evans 3595), p. [1] ("men in the same circumstances will do the same things, call them by what names of distinction you please"); the Carrolls' remarks to the same effect quoted pp. 91–92 below; William Hooper to James Iredell, April 26, 1774, in W. L. Saunders, ed., *Colonial Records of North Carolina* (Raleigh, N. C., 1886–1890), V, 985 ("From the fate of Rome, Britain may trace the cause of its present degeneracy and its impending destruction. Similar causes will ever produce similar effects."); and [James Chalmers], *Additions to Plain Truth* . . . (Philadelphia, 1776), p. 128. For an explanation of this belief, see Daniel J. Boorstin, *The Mysterious Science of the Law* (Cambridge, 1941), chap. ii, esp. pp. 32–33; on the relation of this notion to the idea of progress, see Wallace K. Ferguson, *The Renaissance in Historical Thought* (Cambridge, 1948), chap. iv, esp. pp. 79–86, and Stow Persons, "The Cyclical Theory of History in Eighteenth-Century America," *American Quarterly*, 6 (1954), 147–163.

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American relations had appeared, the belief was widespread in America that while liberty had been better preserved in England than elsewhere in the Old World, the immediate circumstances in the home country were far from conducive to the continued maintenance of liberty — that it was not unreasonable to believe, in fact, that a new crisis of liberty might be approaching. Writings popular in the colonies insisted that the environment of eighteenth-century England was, to a dangerous degree, hostile to liberty: that Jacobite remnants flourished, that effeminizing luxury and slothful negligence continued to soften the moral fiber of the nation, and that politics festered in corruption. Specifically, the colonists were told again and again that the prime requisite of constitutional liberty, an independent Parliament free from the influence of the crown's prerogative, was being undermined by the successful efforts of the administration to manipulate Parliamentary elections to its advantage and to impose its will on members in Parliament.

How widespread the fear was in America that corruption was ripening in the home country, sapping the foundations of that most famous citadel of liberty, may be seen not only in the general popularity of periodicals like *The Craftsman* and *Cato's Letters*, which repeatedly excoriated the degeneracy of the age and the viciousness of ministerial corruption, but in the deliberateness with which some of the most vituperative of the English jeremiads were selected for republication in the colonies. There is no more sustained and intense attack on the corruption of Augustan England than James Burgh's *Britain's Remembrancer: or, The Danger Not Over . . .* (London, 1746), which had been touched off by the shock of the 'Forty-five. Its perfervid denunciation of "our degenerate times and corrupt nation" — a people wallowing in "luxury and irreligion . . . venality, perjury, faction, opposition to legal authority, idleness, gluttony, drunken-

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ness, lewdness, excessive gaming, robberies, clandestine marriages, breach of matrimonial vows, self-murders . . . a legion of furies sufficient to rend any state or empire that ever was in the world to pieces" — this blasting denunciation could scarcely have been improved upon by the most sulphurous of Puritan patriarchs. The pamphlet was reprinted by Franklin the year after its initial appearance; reprinted again the following year by another printer in Philadelphia; and reprinted still again in Boston in 1759. So too the lengthy lament, *An Estimate of the Manners and Principles of the Times*, written by the fashionable belletrist and Church of England preacher, Dr. John Brown, despairing of the prospects of liberty in England ("We are rolling to the brink of a precipice that must destroy us"), decrying the "vain, luxurious, and selfish EFFEMINACY" of the British people, and attributing the "weaken[ing of] the foundations of our constitution" to the deliberate corruption of the Commons by Robert Walpole, was reprinted in Boston in 1758, a year after its first publication.³²

Such charges were not allowed to dissipate. They were repeatedly reinforced by the testimony of direct experience. Letters from England expressed in personal terms what print impersonally conveyed — letters not only from such doctrinaire libertarians as Thomas Hollis but also from such undogmatic conservatives as the printer William Strahan, who wondered, he wrote David Hall in Philadelphia in 1763, whether England had "virtue

³² Burgh, *Britain's Remembrancer*, p. 6; *An Estimate* (Boston ed.), pp. 11, 19, 60. The phrases quoted from *An Estimate* are among the many that are underscored in Thomas Hollis' copy of the book, now in the Houghton Library, Harvard University (see pp. 15, 29, 115). At the word "weaken" in the passage concerning Walpole, Hollis inked in the words "read: ruined." Brown's *Estimate* was being quoted in Boston even before it was reprinted there: a writer in the *Boston Gazette and Country Journal*, January 2, 1758, identified the author of *The Spirit of the Laws* to his readers as a writer "whom Dr. Brown, in his late celebrated *Estimates*," approved of!

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enough to be saved from that deluge of corruption with which we have been so long overwhelmed."⁸³ The same question had long since occurred to Americans visiting England for business, pleasure, or education. Lewis Morris, in London in 1735-36 to recover the political losses he had sustained in New York at the hands of Governor Cosby, returned home with so intense a disgust at the scenes he had beheld that he took to poetry to relieve his feelings. His 700-line poem, "The Dream and Riddle" echoed the many despairing pamphlets, poems, and squibs published in London in the 1720's and early 1730's in ridiculing the justice of the English government ("Complaints if just are very shocking things; / And not encouraged in the courts of Kings"); the venality of the court ("... our noble Prince's ear / Is open to complaints, and he will hear; / The difficulty's how to get them there"); the mores of shopkeepers ("The gaudy shops of this tumultuous hive / By several arts of cheating only thrive"); and the corruption of Parliament ("Both senates and their chosers vote for pay / And both alike their liberty betray"). He ended with what would become a characteristic American response: "If bound unto that land of liberty / I just described, then know it is not nigh [i.e., in England], / But lies far distant from this place somewhere / Not in this, but some other hemisphere."⁸⁴

But Morris had been a casual visitor, and, as he discovered to his dismay, he was ignorant of the intricacies of backroom politics in England. Benjamin Franklin knew England and its

⁸³ William Strahan to David Hall, London, February 21, 1763, *Pa. Mag.*, 10 (1886), 89. So also the bookseller, pamphleteer, and printer John Almon, who was to be responsible for so much of the most effective pro-American publicity in England in the 1760's and 1770's and who was continuously in touch with American writers, observed in 1765 that "in no age except that which produced the destruction of the Roman liberty were venality and corruption so prevalent as at this time in Britain." Quoted in Ian Christie, *Wilkes, Wyvil and Reform* (London, 1962), p. 38.

⁸⁴ "The Dream and Riddle. A Poem." MS in papers relating to Lewis Morris, Robert Morris Papers, Rutgers University Library.

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politics better, and loved that country and its people. Yet he wrote to Peter Collinson in 1753: "I pray God long to preserve to Great Britain the English laws, manners, liberties, and religion notwithstanding the complaints so frequent in your public papers of the prevailing corruption and degeneracy of your people. I know you have a great deal of virtue still subsisting among you, and I hope the constitution is not so near a dissolution as some seem to apprehend. I do not think you are generally become such slaves to your vices as to draw down that *justice* Milton speaks of" in *Paradise Lost*. The tide, he comfortingly added, "is never so low but it may rise again." Yet it might not; and should the worst happen,

should this dreaded fatal change happen in my time, how should I, even in the midst of the affliction, rejoice if we [in America] have been able to preserve those invaluable treasures, and can invite the good among you to come and partake of them! O let not Britain seek to oppress us, but like an affectionate parent endeavor to secure freedom to her children; they may be able one day to assist her in defending her own.⁸⁵

So too John Dickinson, in England in the election year 1754 as a student of law, was enthralled by the sophistication and variety of life in London, and "filled with awe and reverence" by his contact with scenes of ancient greatness and by the opportunity to hear "some of the greatest men in England, perhaps in the world." But he was shocked, too, beyond all expectation, by

⁸⁵ Franklin to Collinson, Philadelphia, May 9, 1753, *The Papers of Benjamin Franklin* (Leonard W. Labaree, et al., eds., New Haven, 1959-), IV, 485-486. Among the many English writers Franklin read who confirmed his troubled views of England's prospects was his old friend James Ralph, whose *Of the Use and Abuse of Parliaments* . . . (2 vols., London, 1744) argued "that the constitution is everywhere undermined; at the first sound of the trumpet . . . it will sink at once into a heap of ruins . . . So great is the influence of the crown become, so servile the spirit of our grandees, and so depraved the hearts of the people, that hope itself begins to sicken." Colbourn, *Lamp of Experience*, p. 128.

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Hogarthian election scenes and by the callous disregard of freedom exhibited in Parliament. Over £1,000,000, he wrote his father, had been expended in efforts to manipulate the general election. The starting price for the purchase of votes in one northern borough, he reported, was 200 guineas.

It is astonishing to think what impudence and villainy are practiced on this occasion. If a man cannot be brought to vote as he is desired, he is made dead drunk and kept in that state, never heard of by his family or friends till all is over and he can do no harm. The oath of their not being bribed is as strict and solemn as language can form it, but is so little regarded that few people can refrain from laughing while they take it. I think the character of Rome will equally suit this nation: "Easy to be bought, if there was but a purchaser."

The fact that over seventy elections were disputed, he continued a few months later, is "one of the greatest proofs perhaps of the corruption of the age that can be mentioned."

Bribery is so common that it is thought there is not a borough in England where it is not practiced, and it is certain that many very flourishing ones are ruined, their manufactories decayed, and their trade gone by their dependence on what they get by their votes. We hear every day in Westminster Hall leave moved to file informations for bribery, but it is ridiculous and absurd to pretend to curb the effects of luxury and corruption in one instance or in one spot without a general reformation of manners, which everyone sees is absolutely necessary for the welfare of this kingdom. Yet Heaven knows how it can be effected. It is grown a vice here to be virtuous . . . People are grown too polite to have an old-fashioned religion, and are too weak to find out a new, from whence follows the most unbounded licentiousness and utter disregard of virtue, which is the unfailling cause of the destruction of all empires.

And in the House of Lords he heard speeches that could only be interpreted as acquiescence in the creation of a standing army. "But such is the complacency these great men have for the smiles

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of their prince that they will gratify every desire of ambition and power at the expense of truth, reason, and their country."³⁶

So too Charles Carroll of Carrollton wrote from London in 1760 after twelve years of study and travel abroad that "a change in our constitution is I think near at hand. Our dear-bought liberty stands upon the brink of destruction." His father, who had also been educated abroad, agreed: "Things seem to be tending hastily to anarchy in England;" he wrote his son in 1763, "corruption and freedom cannot long subsist together . . . for my part I think an absolute government preferable to one that is only apparently free; and this must be the case of your present constitution, if it be true that whoever presides in the treasury can command in Parliament." At home in Maryland two years later it seemed more evident than ever to the younger Carroll that the English constitution was "hastening to its final period of dissolution, and the symptoms of a general decay are but too visible." Sell your estate in England, he advised an English friend, and

purchase lands in this province where liberty will maintain her empire till a dissoluteness of morals, luxury, and venality shall have prepared the degenerate sons of some future age to prefer their own mean lucre, the bribes, and the smiles of corruption and arbitrary ministers to patriotism, to glory, and to the public weal. No doubt the same causes will produce the same effects, and a period is already set to the reign of American freedom; but that fatal time seems to be at a great distance. The present generation at least, and I hope many succeeding ones, in spite of a corrupt Parliament, will enjoy the blessings and the sweets of liberty.

Later, Carroll's father, further informed of the realities of European life not only by his well-traveled son but by "daily papers,

³⁶H. Trevor Colbourn, ed., "A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters, 1754-1756," *Pa. Mag.*, 86 (1962), 257, 268, 421, 445.

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periodical and occasional pamphlets" as well, enlarged upon the theme in letters to his English friends:

What must be the end of this shameless, long-continued want of honor, public spirit, and patriotism? Will not your profligacy, corruption, and versatility sink you into anarchy and destruction? All states laboring under the same vices have met with the fate which will be your lot. That fate is impending; it cannot be far off. The same causes will ever produce similar effects . . . are you not a people devoted to and on the brink of destruction? I began to be acquainted with the world in the year 1720, memorable by the ruin of not only the unthinking adventurers in the South Sea stock but of numberless widows, helpless minors, and innocent infants . . . Soon after Sir Robert Walpole was made premier he reduced corruption into a regular system which since his time to the present period has been improved and founded on so broad and solid a basis as to threaten the constitution with immediate ruin and already to have left to the people little more than the appearance of liberty.³⁷

In the context of such beliefs the question inevitably arose "whether we are obliged to yield," as Jonathan Mayhew put it in his famous *Discourse* of 1750, "an absolute submission to our prince, or whether disobedience and resistance may not be justifiable in some cases." The answer was clear. Submission is not required "to all who bear the *title* of rulers in common, but only to those who *actually* perform the duty of rulers, by exercising a reasonable and just authority for the good of human society." When government fails to serve its proper ends then "a regard to the public welfare ought to make us withhold from our rulers that obedience and subjection which it would, otherwise, be our

³⁷ Charles Carroll of Carrollton to Charles Carroll, Sr., London, January 29, 1760, *Maryland Historical Magazine*, 10 (1915), 251; Charles Carroll, Sr., to Charles Carroll of Carrollton, September 3, 1763, Thomas M. Field, ed., *Unpublished Letters of Charles Carroll of Carrollton . . .* (New York, 1902), p. 78; Charles Carroll of Carrollton to Mr. Bradshaw, November 21, 1765, *ibid.*, p. 97; Charles Carroll, Sr., to William Graves, December 23, 1768, *Maryland Historical Magazine*, 12 (1917), 185. See also, William L. Sachse, *The Colonial American in Britain* (Madison, 1956), pp. 204-207.

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duty to render to them." In such situations one is "bound to throw off [his] allegiance"; not to do so would be tacitly to conspire "in promoting slavery and misery."

For a nation thus abused to arise unanimously and to resist their prince, even to the dethroning him, is not criminal, but a reasonable way of vindicating their liberties and just rights; it is making use of the means, and the only means, which God has put into their power, for mutual and self-defense. And it would be highly criminal in them not to make use of this means. It would be stupid tameness and unaccountable folly for whole nations to suffer *one* unreasonable, ambitious, and cruel man to wanton and riot in their misery. And in such a case it would, of the two, be more rational to suppose that they that did NOT resist [rather] than that they who did, would *receive to themselves damnation*.

When tyranny is abroad, "submission," Andrew Eliot wrote quite simply in 1765, "is a crime."³⁸

³⁸ *A Discourse Concerning Unlimited Submission* (Boston, 1750: JHL Pamphlet 1), pp. 13, 20, 29, 30, 40; Eliot, *Sermon* (JHL 15), pp. 47-48.

Chapter V
TRANSFORMATION

But what do we mean by the American Revolution? Do we mean the American war? The Revolution was effected before the war commenced. The Revolution was in the minds and hearts of the people; a change in their religious sentiments, of their duties and obligations . . . *This radical change in the principles, opinions, sentiments, and affections of the people was the real American Revolution.*

— John Adams to Hezekiah Niles, 1818

IT WAS an elevating, transforming vision: a new, fresh, vigorous, and above all morally regenerate people rising from obscurity to defend the battlements of liberty and then in triumph standing forth, heartening and sustaining the cause of freedom everywhere. In the light of such a conception everything about the colonies and their controversy with the mother country took on a new appearance. Provincialism was gone: Americans stood side by side with the heroes of historic battles for freedom and with the few remaining champions of liberty in the present. What were once felt to be defects — isolation, institutional simplicity, primitiveness of manners, multiplicity of religions, weakness in the authority of the state — could now be seen as virtues, not only by Americans themselves but by enlightened spokesmen of reform, renewal, and hope wherever they might be — in London coffeehouses, in Parisian salons, in the courts of German princes. The mere existence of the colonists suddenly became philosophy teaching by example. Their manners, their morals, their way of life, their physical, social, and political condition were seen to vindicate

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ternal truths and to demonstrate, as ideas and words never could, the virtues of the heavenly city of the eighteenth-century philosophers.

But the colonists' ideas and words counted too, and not merely because they repeated as ideology the familiar utopian phrases of the Enlightenment and of English libertarianism. What they were saying by 1776 was familiar in a general way to reformers and illuminati everywhere in the Western world; yet it was different. Words and concepts had been reshaped in the colonists' minds in the course of a decade of pounding controversy — strangely reshaped, turned in unfamiliar directions, toward conclusions they could not themselves clearly perceive. They found a new world of political thought as they struggled to work out the implications of their beliefs in the years before independence. It was a world not easily possessed; often they withdrew in some confusion to more familiar ground. But they touched its boundaries, and, at certain points, probed its interior. Others, later — writing and revising the first state constitutions, drafting and ratifying the federal constitution, and debating in detail, exhaustively, the merits of these efforts — would resume the search for resolutions of the problems the colonists had broached before 1776.

This critical probing of traditional concepts — part of the colonists' effort to express reality as they knew it and to shape it to ideal ends — became the basis for all further discussions of enlightened reform, in Europe as well as in America. The radicalism the Americans conveyed to the world in 1776 was a transformed as well as a transforming force.

I. REPRESENTATION AND CONSENT

The question of representation was the first serious intellectual problem to come between England and the colonies, and while

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it was not the most important issue involved in the Anglo-American controversy (the whole matter of taxation and representation was "a mere incident," Professor McIlwain has observed, in a much more basic constitutional struggle¹), it received the earliest and most exhaustive examination and underwent a most revealing transformation. This shift in conception took place rapidly; it began and for all practical purposes concluded in the two years of the Stamp Act controversy. But the intellectual position worked out by the Americans in that brief span of time had deep historical roots; it crystallized, in effect, three generations of political experience. The ideas the colonists put forward, rather than creating a new condition of fact, expressed one that had long existed; they articulated and in so doing generalized, systematized, gave moral sanction to what had emerged haphazardly, incompletely and insensibly, from the chaotic factionalism of colonial politics.

What had taken place in the earlier years of colonial history was the partial re-creation, as a matter of fact and not of theory, of a kind of representation that had flourished in medieval England but that had faded and been superseded by another during the fifteenth and sixteenth centuries. In its original, medieval form elective representation to Parliament had been a device by which "local men, locally minded, whose business began and ended with the interests of the constituency," were enabled, as attorneys for their electors, to seek redress from the royal court of Parliament, in return for which they were expected to commute their constituents to grants of financial aid. Attendance at Parliament of representatives of the commons was for the most part an obligation unwillingly performed, and local communities bound their representatives to local interests in every way possible: by requiring local residency or the ownership of local

¹ Charles H. McIlwain, "The Historical Background of Federal Government," *Federalism as a Democratic Process* (New Brunswick, N.J., 1942), p. 35.

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property as a qualification for election, by closely controlling the payment of wages for official services performed, by instructing representatives minutely as to their powers and the limits of permissible concessions, and by making them strictly accountable for all actions taken in the name of the constituents. As a result, representatives of the commons in the medieval Parliaments did not speak for that estate in general or for any other body or group larger than the specific one that had elected them.²

Changing circumstances, however, had drastically altered this form and practice of representation. By the time the institutions of government were taking firm shape in the American colonies, Parliament in England had been transformed. The restrictions that had been placed upon representatives of the commons to make them attorneys of their constituencies fell away; members came to sit "not merely as parochial representatives, but as delegates of all the commons of the land." Symbolically incorporating the state, Parliament in effect had become the nation for purposes of government, and its members virtually if not actually, symbolically if not by sealed orders, spoke for all as well as for the group that had chosen them. They stood for the interest of the realm; for Parliament, in the words by which Edmund Burke immortalized this whole concept of representation, was not "a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; here, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole." "Instructions, therefore," Speaker Onslow said, "from particular constituents to their own Members are or can be only

Interim Report . . . on House of Commons Personnel . . . (London, 1932), cited in George L. Haskins, *The Growth of English Representative Government* (Philadelphia, 1948), p. 130; also pp. 111, 76-77.

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of information, advice, and recommendation . . . but not absolutely binding upon votes and actions and conscience in Parliament." The restrictions once placed upon representatives to make them attorneys of their constituencies fell away.³

But the colonists, reproducing English institutions in miniature, had been led by force of circumstance to move in the opposite direction. Starting with seventeenth-century assumptions, out of necessity they drifted backward, as it were, toward the medieval forms of attorneyship in representation. Their surroundings had recreated to a significant extent the conditions that had shaped the earlier experiences of the English people. The colonial towns and counties, like their medieval counterparts, were largely autonomous, and they stood to lose more than they were likely to gain from a loose acquiescence in the action of central government. More often than not they felt themselves to be the benefactors rather than the beneficiaries of central government, provincial or imperial; and when they sought favors from higher authorities they sought local and particular — in effect private — favors. Having little reason to identify their interests with those of the central government, they sought to keep the voices of local interests clear and distinct; and where it seemed necessary, they moved — though with little sense of innovating or taking actions of broad significance, and nowhere comprehensively or systematically — to bind representatives to local interests. The Massachusetts town meetings began the practice of voting instructions to their deputies to the General Court in the first years of settle-

³ S. B. Chimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge, England, 1936), p. 131. On the political functioning of this form of representation, see Samuel H. Beer, "The Representation of Interests in British Government: Historical Background," *American Political Science Review*, 51 (1957), 614-628. Burke's statement is from his speech to the electors of Bristol, 1774; for Speaker Onslow's almost identical understanding that "Every Member, as soon as he is chosen, becomes a representative of the whole body of the Commons, without any distinction of the place from whence he is sent to Parliament," see W. C. Costin and J. Steven Watson, eds., *The Law and Working of the Constitution: Documents, 1660-1914* (London, 1952), I, 392.

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ment, and they continued to do so whenever it seemed useful throughout the subsequent century and a half. Elsewhere, with variations, it was the same; and elsewhere, as in Massachusetts, it became customary to require representatives to be residents of, as well as property owners in, the localities that elected them, and to check upon their actions as delegates. With the result that disgruntled contemporaries felt justified in condemning Assemblies composed "of plain, illiterate husbandmen, whose views seldom extended farther than to the regulation of highways, the destruction of wolves, wildcats, and foxes, and the advancement of the other little interests of the particular counties which they were chosen to represent."⁴

⁴ Kenneth Colegrove, "New England Town Mandates," *Publications of the Colonial Society of Massachusetts*, XXI (Transactions, 1919), 411-436; William Smith, *History of the Late Province of New-York, from Its Discovery to . . . 1762*, I (Collections of the New-York Historical Society [vol. IV] for the Year 1829, New York, 1829), 309; see also, II, 14. Cf. William Douglass's excoriation of the Massachusetts law requiring a representative to be "a resident in the township for which he is elected." A gentleman, he argued, "of good natural interest, and resident in the province, a man of reading, observation, and daily conversant with affairs of policy and commerce, is certainly better qualified for a legislator than a retailer of rum and small beer called a tavern keeper in a poor obscure country town remote from all business." Residence in the province, together with the ownership of property in the constituency, should be quite enough to qualify a representative, he wrote. *A Summary, Historical and Political, of the . . . British Settlements in North-America* (Boston, 1749-1751), I, 506-507. For the argument in Pennsylvania in 1728 that the representative was at best a "creature of the people . . . Here is no transessentiating or transubstantiating of being from people to representative, no more than there is an absolute transferring of a title in a letter of attorney," see Roy N. Lokken, *David Lloyd* (Seattle, 1959), p. 232. See in general the material assembled in Hubert Phillips, *The Development of a Residential Qualification for Representatives in Colonial Legislatures* (Cincinnati, 1921); for an excellent account in detail, see Richard P. McCormick, *The History of Voting in New Jersey* (New Brunswick, 1953), chap. ii. The pamphlets published in Massachusetts in 1754 over the controversial excise bill of that year are particularly revealing of the tendency of thought on representation before the Revolution. See Evans listings 7176, 7186, 7227, 7296, 7303, 7304, 7312, 7319, 7332, 7418; the last of these, *An Appendix to the Late Total Eclipse of Liberty . . . Thoughts on . . . the Inherent Power of the People . . . Not Given Up to Their Representatives . . .* (Boston, 1756), by the harassed printer Daniel Fowle, was reprinted in 1775.

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All of this, together with the associated experience common to all of the colonies of selecting and controlling agents to speak for them in England,⁵ formed the background for the discussion of the first great issue of the Anglo-American controversy. For the principal English argument put forward in defense of Parliament's right to pass laws taxing the colonies was that the colonists, like the "nine tenths of the people of Britain" who do not choose representatives to Parliament, were in fact represented there. The power of actually voting for representatives, it was claimed, was an accidental and not a necessary attribute of representation, "for the right of election is annexed to certain species of property, to peculiar franchises, and to inhabitancy in certain places." In what really counted there was no difference between those who happened to live in England and those in America: "none are actually, all are virtually represented in Parliament," for, the argument concluded,

every Member of Parliament sits in the House not as representative of his own constituents but as one of that august assembly by which all the commons of *Great Britain* are represented. Their rights and their interests, however his own borough may be affected by general dispositions, ought to be the great objects of his attention and the only rules for his conduct, and to sacrifice these to a partial advantage in favor of the place where he was chosen would be a departure from his duty.⁶

⁵ The colonial agents in England were in fact, though never in theory, closely bound representatives in England of colonial constituencies. The Members of Parliament among them shared keenly at times the feeling of Charles Garth that he was "equally representative of this province of South Carolina and of Devizes in Parliament" (L. B. Namier, "Charles Garth, Agent for South Carolina" *English Historical Review*, 54 [1939], 645). But as the crisis developed it became obvious that conceiving of the agents as in some constitutional sense actual representatives of the colonies in England conceded major principles of the colonial arguments, and the notion was explicitly repudiated.

⁶ [Thomas Whately], *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed upon Them, Considered* (London, 1765), p. 109. For a discussion of Whately's pamphlet and others arguing the same point, together

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In England the practice of "virtual" representation provided reasonably well for the actual representation of the major interests of the society, and it raised no widespread objection. It was its opposite, the idea of representation as attorneyship, that was seen as "a new sort of political doctrine strenuously enforced by modern malcontents." But in the colonies the situation was reversed. There, where political experience had led to a different expectation of the process of representation and where the workings of virtual representation in the case at hand were seen to be damaging, the English argument was met at once with flat and universal rejection, ultimately with derision. It consists, Daniel Dulany wrote in a comprehensive refutation of the idea, "of facts not true and of conclusions inadmissible." What counts, he said in terms with which almost every writer in America agreed, was the extent to which representation worked to protect the interests of the people against the encroachments of government. From this point of view the analogy between the nonelectors in England and those in America was utterly specious, for the interests of Englishmen who did not vote for members of Parliament were intimately bound up with those who did and with those chosen to sit as representatives. The interests of all three, "the nonelectors, the electors, and the representatives, are individually the same, to say nothing of the connection among the neighbors, friends, and relations. The security of the nonelectors against oppression is that their oppression will fall also upon the electors and the representatives. The one can't be injured and the other indemnified." But no such "intimate and inseparable relation" existed between the electors of Great Britain and the inhabitants of the colonies. The two groups were by no means involved in the same consequences of taxation: "not a single actual elector

with Dulany's reply to them, see Introduction to [Daniel Dulany], *Considerations on the Propriety of Imposing Taxes* (Annapolis, 1765: JHL Pamphlet 13), in Bailyn, *Pamphlets*, I.

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in England might be immediately affected by a taxation in America imposed by a statute which would have a general operation and effect upon the properties of the inhabitants of the colonies."⁷

Once a lack of natural identity of interests between representatives and the populace was conceded, the idea of virtual representation lost any force it might have had; for by such a notion, James Otis wrote, you could "as well prove that the British House of Commons in fact represent all the people of the globe as those in America." The idea, in such situations, was "futile" and "absurd"—the work of a "political visionary." It was a notion, Arthur Lee wrote, with supporting quotations from Bolingbroke, Locke, Sidney, Camden, Pulteney, Petyt, Sir Joseph Jekyll, and assorted Parliamentary speakers, that "would, in the days of superstition, have been called witchcraft," for what it means is that while "our privileges are all *virtual*, our sufferings are *real* . . . We might have flattered ourselves that a *virtual obedience* would have exactly corresponded with a *virtual representation*, but it is the ineffable wisdom of Mr. Grenville to reconcile what, to our feeble comprehensions, appeared to be contradictions, and therefore a *real obedience* is required to this *virtual power*." Who, precisely, is the American freeman's virtual representative in England?

⁷ William Seal Carpenter, *The Development of American Political Thought* (Princeton, 1930), p. 47n; Dulany, *Considerations* (JHL 13), pp. 7, 10. Thus also, e.g., [Ebenezer Devotion], *The Examiner Examined* . . . (New London, 1766): "There is nothing, say the colonists, that can give a proper representation but the actual choice of a representative, or in failure of this, an obvious sameness of interest in him that represents and the party represented, or at least an interwoven, inseparable interest between the nonelector and him that elects" (p. 16). And see, among the many other refutations of virtual representation, Maurice Moore, *The Justice and Policy of Taxing the American Colonies* . . . (Wilmington, N. C., 1765: JHL Pamphlet 16); Richard Bland, *An Inquiry into the Rights of the British Colonies, Intended as an Answer to ["The Regulations Lately Made"]* . . . (Williamsburg, 1766: JHL Pamphlet 17); *Some Observations of Consequences in Three Parts* . . . ([Philadelphia], 1768), pp. 23 ff.

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Does he know us? Or we him? No. Have we any restriction over his conduct? No. Is he bound in duty and interest to preserve our liberty and property? No. Is he acquainted with our circumstances, situation, wants, &c.? No. What then are we to expect from him? Nothing but taxes without end.⁸

But it was not merely the American situation that called into question the idea of virtual representation. Logically one could lead the argument further and say that the whole conception, wherever or however it might be applied, was defective. If it was wrong in America it was wrong in England too, and should be rooted out no less thoroughly in the one place than in the other. "To what purpose," James Otis asked in a celebrated passage, "is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham, and Sheffield, who return no members? If those now so considerable places are not represented, they ought to be." For, as John Joachim Zubly, the Swiss-born pastor of Savannah, Georgia, wrote in an almost verbatim denial of what Burke five years later would describe as the proper function of representatives,

every representative in Parliament is not a representative for the whole nation, but only for the particular place for which he hath been chosen. If any are chosen for a plurality of places, they can make their election only for one of them . . . no member can represent any but those by whom he hath been elected; if not elected, he cannot represent them, and of course not consent to anything in their behalf . . . representation arises entirely from the free election of the people.

So widely believed, indeed,—such a simple matter of fact—was it that "virtual representation" anywhere, under any conditions, was "too ridiculous to be regarded," that the American

⁸ [James Otis], *Considerations on Behalf of the Colonists* . . . (London, 1765), p. 9; Benjamin Church, *An Oration Delivered March Fifth 1773* . . . (Boston, 1773), p. 15; [Arthur Lee], "Monitor III," *Virginia Gazette* (R), March 10, 1768.

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Tories gladly used it as a basis of protest against the assumed representativeness of the makeshift Provincial and Continental Congresses. For it was not much of an exaggeration of Otis' earlier arguments to claim in New York in 1775 that by the patriots' reasoning "every man, woman, boy, girl, child, infant, cow, horse, hog, dog, and cat who *now* live, or ever *did* live, or ever *shall* live in this province are fully, freely, and sufficiently represented in this present glorious and august Provincial Congress."⁹

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But the colonists' discussion of representation did not stop with the refutation of the claims made for virtual representation. The debate broadened into a general consideration of the nature and function of representation—in situations where interests of electors and elected, franchised and disfranchised, coincided as well as where they did not. The virtues of binding representatives by instructions were now explicitly explored. Some approached the question cautiously, arguing that, though the idea "that the constituent can bind his representative by instructions" may in recent years have become "an unfashionable doctrine," nevertheless, "in most cases" the "persuasive influence" if not the "obligatory force" of instructions should be insisted upon: "a representative who should act against the explicit recommendation of his constituents would most deservedly forfeit their regard and all pretension to their future confidence." But the dominant voices were direct and decisive. The right to instruct representatives, Arthur Lee declared in the fourth of his "Monitor" papers, has been denied only "since the system of corruption which is now arrived to so dangerous a height began first to predominate in

⁹ Otis, *Considerations*, p. 6; [John Joachim Zubly], *An Humble Enquiry into the Nature of the Dependency of the American Colonies . . .* ([Charleston], 1769: JHL Pamphlet 28), p. 17 (see also pp. 11, 16, 22); [John Dickinson], *An Essay on the Constitutional Power of Great-Britain over the Colonies in America . . .* (Philadelphia, 1774), in *Pennsylvania Archives*, 2d ser., III, 594; *The Triumph of the Whigs; or, T'Other Congress Convened* (New York, 1775: JHL Pamphlet 62), p. 8.

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our constitution. Then it was that arbitrary ministers and their prostituted dependents began to maintain this doctrine dangerous to our liberty, that the representatives were independent of the people. This was necessary to serve their own tyrannical and selfish purposes." Elected representatives, he stated, "are *trustees for their constituents* to transact for them the business of government . . . and for this *service* they, like all other agents, were paid by their constituents, till they found it more advantageous to sell their voices in Parliament, and then . . . wished to become independent of the people." Defended, he wrote, by all the great authorities from Demosthenes to Coke, its denial condemned by Sir William Wyndham as "the most monstrous, the most slavish doctrine that was ever heard," the right of freemen not merely to choose representatives but to bind them with instructions "must have begun with the constitution," and was "an ancient and unalienable right in the people." The fact that "Mr. Blackstone, in his commentary on the law of England, has asserted the contrary" carried no weight with him. It was enough to point out that Blackstone "founds his opinion on that fiction of a person's being, after he is elected, the representative of the whole kingdom, and not of a particular part. The sophistry of this argument is sufficiently manifest, and has been fully exploded. The British constitution is not to be new modelled by every court lawyer. [footnote:] *Mr. Blackstone is solicitor to the Queen.*" Constituents, it was agreed, had nothing less than "an inherent right to give instructions to their representatives." For representatives, James Wilson concluded, were properly to be considered the "creatures" of their constituents, and they were to be held strictly "accountable for the use of that power which is delegated unto them."¹⁰

¹⁰ Dulany, *Considerations* (JHL 13), p. [3]; *Virginia Gazette* (R), March 17, 1768; [Stephen Johnson], *Some Important Observations . . .* (Newport, 1766: JHL Pamphlet 19), p. 32; [James Wilson], *Considerations on the . . . Authority of the British Parliament* (Philadelphia, 1774: JHL Pamphlet 44), p. 9.

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But what did that mean? There were far-reaching implications, some of which, first drawn out during this decade of debate, would remain persistent problems until finally resolved in the realization of American democracy in the nineteenth and twentieth centuries. It was seen, even in the 1760's and 1770's, that if a representative were kept to strict accountability, he would in effect be acting "in every respect as the persons who appointed him . . . would do were they present themselves." With the result, it was concluded, that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them." If the population shifted in composition, so too should the character of the assembly, for "equal interest among the people should have equal interest in it." There might well be, in fact, "some permanent ratio by which the representatives should . . . increase or decrease with the number of inhabitants."¹¹

And what if such were the case? The result would be, if not a wholly original contribution to advanced thought, at least a reversion to a radical concept that had long since disappeared from the mainstream of English political theory. For such arguments led to a recovery and elaboration of conceptions of government by the active and continuous consent of the governed that had flourished briefly a century earlier, during the Commonwealth period, and had then faded during the Restoration, persisting subsequently only as arguments of the most extreme

¹¹ Moore, *Justice and Policy* (JHL 16), p. 7; [John Adams], *Thoughts on Government* . . . (Philadelphia, 1776: JHL Pamphlet 65), pp. 9, 10; *Four Letters on Interesting Subjects* (Philadelphia, 1776: JHL Pamphlets 69), pp. 21-22. See also the importance attached by Jefferson to the crown's denial of an increase of representation in the colonial assemblies to reflect the growth and spread of the population. [Jefferson], *A Summary View of the Rights of British America* . . . (Williamsburg, [1774]: JHL Pamphlet 43), pp. 17, 18. So too Adams felt that a truly representative imperial Parliament would reflect in its size and complexity the variety of peoples represented in it: Adams ("Novanglus"), in *Works*, IV, 101-102.

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radicals and of the most vociferous and intransigent leaders of the Parliamentary opposition.¹² The view of representation developing in America implied if it did not state that direct consent of the people in government was not restricted, as Locke would have had it, to those climactic moments when government was overthrown by the people in a last final effort to defend their rights, nor even to those repeated, benign moments when a government was peaceably dissolved and another chosen in its place.¹³ Where government was such an accurate mirror of the people, sensitively reflecting their desires and feelings, consent was a continuous, everyday process. In effect the people were present through their representatives, and were themselves, step by step and point by point, acting in the conduct of public affairs. No longer merely an ultimate check on government, they *were* in some sense the government. Government had no separate existence apart from them; it was *by* the people as well as *for* the people; it gained its authority from their continuous consent. The very nature and meaning of law was involved. The traditional sense, proclaimed by Blackstone no less than by Hobbes,

¹² On the continuity of radical theories of representation, see Alfred De Grazia, *Public and Republic* (New York, 1951), pp. 21 ff., 45 ff.; Caroline Robbins, *The Eighteenth-Century Commonwealthman* (Cambridge, 1959), pp. 30, 193, 268, 338-339, 364-366, 370-374; Ian R. Christie, *Wilkes, Wyvill and Reform* (London, 1962), *passim*, esp. pp. 36, 43, 48-49, 63, 146-147, 179-184; Gipson, *British Empire*, XI, 194-195, 220-221.

¹³ E.g., Locke, *Second Treatise of Government*, xiii, 149. Cf. Otis' discussion of the Glorious Revolution in his *Rights of the British Colonies Asserted and Proved* (Boston, 1764: JHL Pamphlet 7), 15 ff., quoting Locke on the dissolution of government (p. 23). For a forceful invocation of the Lockean notion of active consent at the moment of rebellion, see the argument for the constitutionality of the Continental Congress on the grounds of analogy to "the assembly of the barons at RUNNINGMEDE, when MAGNA CHARTA was signed, the Convention Parliament that recalled Charles II, and the Convention of Lords and Commons that placed King William on the throne," in James Wilson and John Dickinson's "Address to the Inhabitants of the Colonies" (1776), *Journals of the Continental Congress, 1774-1789* (W. C. Ford, et al., eds., Washington, D. C., 1904-1937), IV, 137.

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that law was a command "prescribed by source superior and which the inferior is bound to obey" — such a sense of law as the declaration of a person or body existing independently above the subjects of law and imposing its will upon them, was brought into question by the developing notion of representation. Already in these years there were adumbrations of the sweeping repudiation James Wilson and others would make of Blackstone's definition of law, and of the view they would put in its place: the view that the binding power of law flowed from the continuous assent of the subjects of law; the view "that the only reason why a free and independent man was bound by human laws was this — that he bound himself."¹⁴

These were deep-lying implications of making representation — systematically, in principle as well as in fact — "a substitute for legislation by direct action of the people." They were radical possibilities, glimpsed but not wholly grasped, thrown up in the creative clash of ideas that preceded the Revolution, and drawn into the discussion of the first state constitutions even before Independence was declared. They were perhaps, in these early years, understood most clearly by the more perceptive of the Tories, who stood outside and viewed with apprehension the tendency of events and the drift of theory. "The position," the Anglican minister Samuel Seabury wrote in 1774, "that we are bound by no laws to which we have not consented either by ourselves or our representatives is a novel position unsupported by any authoritative record of the British constitution, ancient or modern.

¹⁴ Wilson on Blackstone, in Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (New York, 1932), pp. 83-84; cf. [Moses Mather], *America's Appeal to the Impartial World . . .* (Hartford, 1775; JHL Pamphlet 59), p. 39. See, in general, on the points involved, Carpenter, *Development of American Political Thought*, pp. 91 ff.; J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955), pp. 175-176, 120; Charles H. McIlwain, *Constitutionalism and the Changing World* (New York, 1939), pp. 64-65.

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It is republican in its very nature, and tends to the utter subversion of the English monarchy."¹⁵

2. CONSTITUTIONS AND RIGHTS

Certain of the Tories understood also with special clarity the meaning of changes that were taking place in other areas of thought. They grasped, and exclaimed against in protest, the transformation of the notion of what a constitution was and of the nature of the rights that constitutions existed to protect. "What is the constitution," Charles Inglis demanded in his anguished reply to *Common Sense* — what is "that word so often used — so little understood — so much perverted? It is, as I conceive — *that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community.*" It was still for him, as it had been traditionally, what John Adams had described a decade earlier as "a frame, a scheme, a system, a combination of powers": the existing arrangement of governmental institutions, laws, and customs together with the animating principles, the *stamina vitae*, that gave them purpose and direction. But so far toward a different conception of constitutionalism had American thought shifted after 1765 that by 1776 Inglis' quite traditional definition could only be uttered as the *cri de coeur* of one bypassed by history.¹⁶

¹⁵ Carpenter, *Development of American Political Thought*, pp. 43, 91; [Samuel Seabury], *A View of the Controversy . . .* (New York, 1774), in Clarence H. Vance, ed., *Letters of a Westchester Farmer (1774-1775)* (Publications of the Westchester County Historical Society, VIII, White Plains, 1930), p. 111.

¹⁶ [Charles Inglis], *The True Interest of America . . . Structures on a Pamphlet Intituled Common Sense . . .* (Philadelphia, 1776), p. 18. Cf. above, Chap. III, note 12. On the seventeenth-century background in England of the later American developments, see Corinne C. Weston, *English Constitutional Theory and the House of Lords, 1556-1832* (London, 1965), pp. 99-100; Gough, *Fundamental Law*, pp. 51, 59, 67.

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The first suggestions of change came early in the period, the full conclusion only at the very end. At the start what would emerge as the central feature of American constitutionalism was only an emphasis and a peculiarity of tone within an otherwise familiar discourse. While some writers, like Richard Bland, continued to refer to "a legal constitution, that is, a legislature," and others spoke of "the English constitution . . . a nice piece of machinery which has undergone many changes and alterations," most of the writers saw the necessity of emphasizing principles above institutions, and began to grasp the consequences of doing so.¹⁷ The confusions and difficulties inherent in this process are dramatically illustrated in the troubled career of James Otis.¹⁸

The heart of the problem Otis faced in the early 1760's was the extent to which, indeed the sense in which, the "constitution" could be conceived of as a limitation on the power of lawmaking bodies. In the writs of assistance case in 1761 he had struck a bold and confident note—so bold, indeed, that John Adams later wrote, rather romantically, that "then and there the child Independence was born." On that famous occasion Otis had said not only that an act of Parliament "against the constitution is void" but that it was the duty of the courts to "pass such acts into disuse," for the "reason of the common law [could] control an act of Parliament." But what was the "constitution" which an act of Parliament could not infringe? Was it a set of fixed principles and rules distinguishable from, antecedent to, more fundamental than, and controlling the operating institutions of government?

¹⁷ [Richard Bland], *The Colonel Dismounted: Or the Rector Vindicated* . . . (Williamsburg, 1764: JHL Pamphlet 4), p. 22; [William Hicks], *Considerations upon the Rights of the Colonists to the Privileges of British Subjects* . . . (New York, 1766: JHL Pamphlet 18), p. 1.

¹⁸ Otis' constitutional thought is discussed in detail in the Introductions to his *Rights of the British Colonies* (JHL 7) and his *Vindication of the British Colonies* . . . (Boston, 1765: JHL Pamphlet 11) in Bailyn, *Pamphlets*, I. The reader is referred to these essays for full elaboration and documentation of the interpretation that follows.

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And was there consequently a "constitutional" limitation on Parliament's actions? Otis' answers were ambiguous, and proved to be politically disastrous. The main authority for his statement in the writs case that an act of Parliament against the constitution was void was Coke, reinforced by later judges expounding the great chief justice's dictum in *Bonham's Case*. But in that pronouncement Coke had not meant, as Professor Thorne has made clear, "that there were superior principles of right and justice which Acts of Parliament might not contravene." Thinking in terms of private law, not constitutional construction, Coke had meant only that the courts would interpret statutes "in such a way as not to conflict with those same accepted principles of reason and justice which . . . were presumed to underlie all law"; and by saying that the courts might "void" a legislative provision that violated the constitution he had meant only that the courts were to construe statutes so as to bring them into conformity with recognized legal principles.¹⁹

¹⁹ Adams, *Works*, X, 248; Josiah Quincy, Jr., *Reports of Cases . . . in the Superior Court of Judicature . . . Between 1761 and 1772* . . . (Samuel M. Quincy, ed., Boston, 1865), p. 474; Samuel E. Thorne, "Dr. Bonham's Case," *Law Quarterly Review*, 54 (1938), 545, 549, 551, and the same author's edition of *A Discourse upon the . . . Statutes* . . . (San Marino, 1942), pp. 85-92. Equally suggestive of the complicated anachronism of Otis' thought is his silent, perhaps unconscious, paraphrasing of Grotius, discussed below, p. 205, n. 46. The complete recovery of what Coke and the other early English jurists had meant by "voidance," and hence their easy ability to reconcile absolute Parliamentary supremacy and constitutionalism, seems to have become possible only when the American redefinition of the concept of "constitution" had reached its fulfillment in the early nineteenth century. Thus Chancellor Kent, after quoting Blackstone on the absolute supremacy of Parliament, wrote in his famous *Commentaries*: "When it is said in the [English law] books that a statute contrary to natural equity and reason, or repugnant or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding efficacy of the statute. The will of the legis-

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Otis, drawing the language of seventeenth-century law into the constitutional struggle of the eighteenth century, found himself veering toward positions he was neither intellectually nor politically prepared to accept. "If the reasons that can be given against an act are such," he wrote in his *Rights of the British Colonies* in 1764, "as plainly demonstrate that it is against *natural* equity, the executive courts will adjudge such act void." And again, in an Appendix to the same pamphlet, originally written as a memorial to the Massachusetts agent in London, commenting on the statement that "judges will strain hard rather than interpret an act void, *ab initio*," he wrote: "*This is granted, but still [Parliament's] authority is not boundless if subject to the control of judges in any case.*" Was this not to limit the power of Parliament by the provisions of a fixed constitution distinct from and superior to the legislature, a constitution interpreted and applied by the courts? Others, in time, would say it was. Indeed, a contemporary authority whom Otis quoted at length in the Appendix to his pamphlet could hardly have said this more clearly. Does the power of legislators extend to fundamental law, and if so may they "change the constitution of the state?" Otis asked in the words of the Swiss theorist Emmerich de Vattel. No, was the answer: "they ought to consider the fundamental laws as sacred if the nation has not in very express terms given them the power to change them. For the constitution of the state ought to be fixed; and since that was first established by the nation, which afterwards trusted certain persons with the legislative power, the fundamental laws are excepted from their commission."

But though Otis quoted this passage from Vattel he did not draw its implications. He ignored them, in fact, in working out

lature is the supreme law of the land, and demands perfect obedience." James Kent, *Commentaries on American Law* (New York, 1826), I, 419-420; cf. pp. 420-421, 425 on the American concept of "voidance."

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his own view of the constitution and of the limits of Parliament's powers. If an act of Parliament violated natural laws, "which are *immutably* true," he wrote, it would thereby violate "eternal truth, equity, and justice," and would be "consequently void."

. . . and so it would be adjudged by the Parliament itself when convinced of their mistake. Upon this great principle Parliaments repeal such acts as soon as they find they have been mistaken . . . When such mistake is evident and palpable . . . the judges of the executive courts have declared the act "of a whole Parliament void." See here the grandeur of the British constitution! See the wisdom of our ancestors! . . . If the supreme legislative errs, it is informed by the supreme executive in the King's court of law . . . This is government! This is a constitution! to preserve which . . . has cost oceans of blood and treasure in every age; and the blood and the treasure have upon the whole been well spent.

Parliament was thus itself part of the constitution, not a creature of it, and its power was "uncontrollable but by themselves, and we must obey. They only can repeal their own acts . . . let the Parliament lay what burdens they please on us, we must, it is our duty to submit and patiently bear them, till they will be pleased to relieve us." Yet Parliament's enactments against the constitution — against, that is, the whole system of laws, principles, and institutions based on reason and justice of which it was a part — were void, Otis argued; the courts will adjudge them so, and Parliament itself, by the necessity of the system, will repeal them.²⁰

It was a strange argument, comprehensible only as an effort to apply seventeenth-century assumptions to eighteenth-century problems. For Otis continued to assume, with Coke, that Parliament was effectively a supreme judicial as well as a supreme legislative body and hence by definition involved in judicial

²⁰ Otis, *Rights of the British Colonies* (JHL 7), pp. 41, 73ⁿ, 47, 39-40.

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processes. He continued to believe, too, that moral rights and obligations were not "differentiated as they would be today from legal rights and obligations," and that they naturally radiated from, rather than restricted, enacted law.²¹ And he expected fundamental, or higher, law to "control" positive acts of government not in the sense of furnishing judges with grounds for declaring them nonexistent because they conflicted with the "constitution" but only in the sense of providing judges with principles of interpretation by which to modify gross inequities and to interpret "unreasonableness" and self-contradiction in ways that would allow traditional qualities of justice to prevail.

But these assumptions were no longer applicable, in the same way, in the eighteenth century. Parliament was in reality no longer a court but an all powerful sovereign body, and the problem at hand concerned the structure and authority of government, not private law. Otis' theory of the constitution that included a self-correcting Parliament sensitive to the principles of justice and responsive to the admonitions of the courts was, insofar as it was realistic at all, an anachronism, and it came under attack by both the administration, which charged him with attempting to restrict the power of Parliament, and by the colonial radicals, who accused him of preaching passive obedience and nonresistance.

Otis had been faithful, in this way, to the seventeenth-century sources of constitutional thought which he, like so many Americans, revered. Others — poorer scholars, perhaps, but better judges of the circumstances that surrounded them — were less faithful, and in the end more creative. The dominant view of the constitution in 1764 was still the traditional one, unencumbered by Otis' complexities. While Otis was quoting Coke together with Vattel without grasping the implications of their conjunction, others were referring to constitutions as "a sort of fundamental laws"; as the common law; as Parliament; and as

²¹ Gough, *Fundamental Law*, pp. 45, 35-36.

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the whole complex of existing laws and public institutions.²² The transition to more advanced ground was forced forward by the continuing need, after 1764, to distinguish fundamentals from institutions and from the actions of government so that they might serve as limits and controls. Once its utility was perceived and demonstrated, this process of disengaging principles from institutions and from the positive actions of government and then of conceiving of them as fixed sets of rules and boundaries, went on swiftly.

In 1768 Samuel Adams, accustomed to drawing more extreme conclusions than most of his contemporaries, wrote in a series of letters in behalf of the Massachusetts House of Representatives that "the constitution is fixed; it is from thence that the supreme legislative as well as the supreme executive derives its authority," and he incorporated the same language into the famous Massachusetts Circular Letter of that year. At the same time a Philadelphian, William Hicks, wrote that if one were to concede that statutes were "a part of [the] constitution" simply because they were once promulgated by government, one would have no basis for restraining the actions of any government. There is nothing sacrosanct, he wrote, in the "variant, inconsistent form of government which we have received at different periods of time"; they were accidental in origins, and their defects should be corrected by comparison with ideal models. In 1769 the emerging logic was carried further by Zubly, who flatly distinguished legislatures from the constitution, and declared that the existing Parliament "derives its authority and power from the constitution, and not the constitution from Parliament." The constitution, he wrote, "is permanent and ever the same," and Parliament "can no more make laws which are against the constitution or the unalterable

²² Andrew Eliot, *A Sermon Preached before His Excellency Francis Bernard* . . . (Boston, 1765: JHL Pamphlet 15), p. 19; [Martin Howard, Jr.], *A Letter from a Gentleman at Halifax* (Newport, 1765: JHL Pamphlet 10), p. 10; Bland, *Colonel Dismounted* (JHL 4), pp. 27, 29.

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privileges of British subjects than it can alter the constitution itself . . . The power of Parliament, and of every branch of it, has its bounds assigned by the constitution."²³

In 1770 the constitution was said to be "a line which marks out the enclosure"; in 1773 it was "the standing measure of the proceedings of government" of which rulers are "by no means to attempt an alteration . . . without public consent"; in 1774 it was a "model of government"; in 1775 it was "certain great first principles" on whose "certainty and permanency . . . the rights of both the ruler and the subjects depend; nor may they be altered or changed by ruler or people, but [only] by the whole collective body . . . nor may they be touched by the legislator." Finally, in 1776 there came conclusive pronouncements. Two pamphlets of that year, brilliant sparks thrown off by the clash of Revolutionary politics in Pennsylvania, lit up the final steps of the path that led directly to the first constitutions of the American states. "A constitution and a form of government," the author of *Four Letters on Important Subjects* wrote, "are frequently confounded together and spoken of as synonymous things, whereas they are not only different but are established for different purposes." All nations have governments, "but few, or perhaps none, have truly a constitution." The primary function of a constitution was to mark out the boundaries of governmental powers—hence in England, where there was no constitution, there were no limits (save for the effect of trial by jury) to what the legislature might do. In order to confine the ordinary actions of government, the constitution must be grounded in some fundamental source of authority, some "higher authority than the giving out temporary

²³ Samuel Adams, quoted in Randolph G. Adams, *Political Ideas of the American Revolution* (3d ed., New York, 1958), p. 138; the texts of the letters are in *Adams' Writings* (H. A. Cushing, ed., New York, 1904-1908), I, 152 ff. (see esp. p. 156); the Circular Letter is at pp. 184-188. [William Hicks], *The Nature and Extent of Parliamentary Power Considered . . .* (Philadelphia, 1768: JHL Pamphlet 24), p. 31; Zubly, *Humble Enquiry* (JHL 28), p. 5.

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laws." This special authority could be gained if the constitution were created by "an act of *all*," and it would acquire permanence if it were embodied "in some written charter." Defects, of course, might be discovered and would have to be repaired: there would have to be some procedure by which to alter the constitution without disturbing its controlling power as fundamental law. For this, the means "are easy":

some article in the constitution may provide that at the expiration of every seven or any other number of years a *provincial jury* shall be elected to inquire if any inroads have been made in the constitution, and to have power to remove them; but not to make alterations, unless a clear majority of all the inhabitants shall so direct.

Thus created and thus secured, the constitution could effectively designate what "part of their liberty" the people are to sacrifice to the necessity of having government, by furnishing answers to "the two following questions: first, what shall the form of government be? And secondly, what shall be its power?" In addition, "it is the part of a constitution to fix the manner in which the officers of government shall be chosen, and determine the principal outlines of their power, their time of duration, manner of commissioning them, etc." Finally, "all the great rights which man never mean, nor ever ought, to lose should be *guaranteed*, not *granted*, by the constitution, for at the forming a constitution, we ought to have in mind that whatever is left to be secured by law only may be altered by another law."²⁴

The same ideas, in some ways even more clearly worked out, appear in the second Pennsylvania pamphlet of 1776, *The Genuine Principles of the Ancient Saxon or English Constitution*, which was largely composed of excerpts from Obadiah Hulme's *An*

²⁴ Samuel Cooke, *A Sermon Preached at Cambridge . . .* (Boston, 1770), p. 11; Charles Turner, *A Sermon Preached before His Excellency Thomas Hutchinson* (Boston, 1773), pp. 16, 17, 18-19; Peter Whitney, *The Transgressions of a Land . . .* (Boston, 1774), p. 8; Mather, *America's Appeal* (JHL 59), pp. 22-23; *Four Letters on Important Subjects* (JHL 69), pp. 18, 15-16, 19, 22.

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Historical Essay on the English Constitution, published in London in 1771, a book both determinative and representative of the historical understanding that lay behind the emerging American constitutionalism. Here too was stated the idea of a constitution as a "set of fundamental rules by which even the supreme power of the state shall be governed" and which the legislature is absolutely forbidden to alter. But in this pamphlet there are more explicit explanations of how such documents come into being and of their permanence and importance. They are to be formed "by a convention of the delegates of the people appointed for that express purpose," the pamphlet states, and they are never to be "added to, diminished from, nor altered in any respect by any power besides the power which first framed [them]." They are to remain permanent, and so to have the most profound effect on the lives of people. "Men entrusted with the formation of civil constitutions should remember they are *painting for eternity*: that the smallest defect or redundancy in the system they frame may prove the destruction of millions."²⁵

Accompanying this shift in the understanding of constitutionalism, and part of it, was another change, which also began as a relocation of emphasis and ended as a contribution to the transforming radicalism of the Revolution. The *rights* that constitutions existed to protect were understood in the early years of the period, as we have seen, to be at once the inalienable, indefeasible

²⁵ *Genuine Principles* (JHL 70), pp. 4, 35, 34; on Hulme and the influence of his *Essay*, see Robbins, *Eighteenth-Century Commonwealthman*, pp. 363-365. Among the many other statements of the idea of a fixed constitution published by 1776, see especially those of the Tories; e.g., Seabury, *A View*, in Vance, *Letters of a Westchester Farmer*, p. 123; and [Thomas Bradbury Chandler], *What Think Ye of the Congress Now?* . . . (New York, 1775), p. 44. But for a dramatic illustration of the speed with which Revolutionary ideas were maturing, compare Chandler's and Seabury's understanding with that expressed by the Concord Town Meeting in 1776, in S. E. Morison, ed., *Sources and Documents of the American Revolution* . . . (Oxford, 1923), p. 177.

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rights inherent in all people by virtue of their humanity, and the concrete provisions of English law as expressed in statutes, charters, and court decisions; it was assumed that the "constitution" in its normal workings would specify and protect the inalienable rights of man. But what if it did not? What if this sense proved false, and it came to be believed that the force of government threatened rather than protected these rights? And what if, in addition, the protective machinery of rights — the constitution — came to be abstracted from the organs of government and to be seen not as an arrangement of institutions and enactments but as a blueprint for institutions, the ideal against which the actual was to be measured?

These questions were first posed early in the controversy, in the course of one of the most vituperative exchanges of constitutional views of the entire period. It is true, Judge Martin Howard, Jr., of Rhode Island wrote in response to Stephen Hopkins' *Rights of Colonies Examined* (1765), that the common law carries within it and guarantees with special force the "indefeasible" personal rights of men; for Britons it is the common law that makes these natural rights operative. But Parliament's power is no less a part of that same common law. "Can we claim the common law as an inheritance, and at the same time be at liberty to adopt one part of it and reject the other?" If Parliament is rejected, so too must political and even personal rights. If rights are accepted as inextricable parts of laws and institutions, the laws and institutions must be accepted in all their normal workings.²⁶

James Otis accepted the challenge. But in his stinging reply — a bitter, sarcastic, half-wild polemic — he again displayed a commitment to tradition that kept him from following through the logic of his own argument; again, he succeeded in dramatizing but not in resolving the issue. The judge's "truly *Filmerian*" performance, he wrote, has "inaccuracies in abundance, declamation

²⁶ Howard, *Halifax Letter* (JHL 10), p. 11.

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and false logic without end . . . and the most indelicate fustian." His central error is that he "everywhere confounds the terms rights, liberties, and privileges, which, in legal as well as vulgar acceptance, denote very different ideas." The source of this confusion, Otis said, was a misreading of Blackstone; from his *Commentaries*, Howard had mistakenly derived the idea that the rights of natural persons are the same as those of artificial persons: that is, "bodies politic and corporate." Corporate rights are indeed "matters of the mere favor and grace of the donor or founder"; but that is not to say that the rights of natural people are too. Britons are entitled to their "natural absolute personal rights" by virtue of "the laws of God and nature, as well as by the common law and the constitution of their country so admirably built on the principles of the former." Only such a one as Judge Howard, with his "Filmerian sneer," who "cannot see any difference between power and right, between a blind, slavish submission and a loyal, generous, and rational obedience"—only such a person could fail to understand that the origin of "the inherent, indefeasible rights of the subject" lay in "the law of nature and its author. This law is the grand basis of the common law and of all other municipal laws that are worth a rush. True it is that every act of Parliament which names the colonies . . . binds them. But this is not so, strictly and properly speaking, by the common law as by the law of nature and by the constitution of a parliament or sovereign and supreme legislative in a state."²⁷

Otis had shifted the emphasis of discussion to the priority of abstract rights, but he had not attempted to follow through the implications of his own thought: he continued to assume that the actual law would express, and naturally protect, the universal rights of man. But if he did not draw the conclusions implicit in his own logic, others did: there is in the proliferating discussion of constitutionalism a steadily increasing emphasis on the uni-

²⁷ Otis, *Vindication* (JHL 11), pp. 4, 3-4, 8, 9, 13, 14.

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versal, inherent, indefeasible qualities of rights. John Dickinson, also a lawyer — indeed, a more professionally trained lawyer than Otis — attacked in a more knowing and thorough way the idea that rights are matters of "favor and grace." True, in 1764 he had vehemently defended the charter of Pennsylvania against the attacks of Joseph Galloway and others, but not because he believed that "the liberties of the subject were mere favors granted by charters from the crown." The liberties of Pennsylvanians, he had proclaimed in a ringing oration in the Pennsylvania Assembly, are "founded on the acknowledged rights of human nature." The value of a charter like that of Pennsylvania was that it stated the true character of such liberties beyond any misunderstanding, and freed them from the entanglements of those ancient, archaic customs "that our ancestors either had not moderation or leisure enough to untwist." Two years later (1766) he elaborated the point significantly. Charters, he wrote in his *Address to the Committee of Correspondence in Barbados*, like all aspects of the law, are "declarations but not gifts of liberties." Kings and Parliaments cannot give "the rights essential to happiness."

We claim them from a higher source — from the King of kings, and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short, they are founded on the immutable maxims of reason and justice.

Written laws — even the great declarations like Magna Carta — do not create liberties; they "must be considered as only declaration of our rights, and in affirmance of them."²⁸

²⁸ [John Dickinson], *An Address to the Committee of Correspondence in Barbados* . . . (Philadelphia, 1766), in Paul L. Ford, ed., *Writings of John Dickinson* (*Memoirs of the Historical Society of Pennsylvania*, XIV, Philadelphia, 1895), pp. 261, 262; John Dickinson, *A Speech Delivered . . . 1754*, in *ibid.*, p. 34; [Silas Downer], *A Discourse Delivered in Providence . . . at the Dedication of the Tree of Liberty* (Providence, 1768: JHL Pamphlet 25), p. 6.

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Ultimately, the conclusion to be drawn became obvious: the entire legitimacy of positive law and legal rights must be understood to rest on the degree to which they conformed to the abstract universals of natural rights. Not all were willing, even in 1775, to go as far as Alexander Hamilton, who wrote in bold, arresting words that "the sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power." But if some found this statement too enthusiastic, few by 1774 — few even of the Tories — disagreed with the calmer formulation of the same idea, by Philip Livingston. Had he understood his antagonist, the Rev. Thomas Bradbury Chandler, correctly? Had Chandler really meant to say "that any right . . . if it be not confirmed by some statute law is not a legal right"? If so, Livingston declared, "in the name of America, I deny it." Legal rights are "those rights which we are entitled to by the eternal laws of right reason"; they exist independent of positive law, and stand as the measure of its legitimacy.²⁹

Neither Hamilton nor Livingston, nor any of the other writers who touched on the subject, meant to repudiate the heritage of English common and statutory law. Their claim was only that the source of rights be recognized, in Jefferson's words, as "the laws of nature, and not as the gift of their chief magistrate," and that as a consequence the ideal must be understood to exist before the real and to remain superior to it, controlling it and limiting it. But what was the ideal? What precisely were the ideal rights of man? They were, everyone knew, in some sense Life, Liberty, and Property. But in what sense? Must they not be specified?

²⁹ [Alexander Hamilton], *The Farmer Refuted* . . . (New York, 1775), in *Papers of Alexander Hamilton* (Harold C. Syrett, et al., eds., New York and London, 1961-), I, 122; [Philip Livingston], *The Other Side of the Question* . . . (New York, 1774: JHL Pamphlet 51), p. 9.

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Must not the ideal now be reduced from a radiant presence and a conglomerate legal tradition to specific enumerated provisions? Must not the essential rights of man be specified and codified if they were to serve effectively as limits on the actions of courts and legislatures? In 1765 James Otis had fulminated at the mere suggestion that a document might profitably be drawn up stating the "rights of the colonies with precision and certainty." Insolence, he had called it, pedantry and nonsense; Britons had no need for "codes, pandects, novels, decretals of popes." "The common law is our birthright, and the rights and privileges confirmed and secured to us by the British constitution and by act of Parliament are our best inheritance." But thought had shifted rapidly in the decade that followed, Arthur Lee exhorting his countrymen in 1768 to draw up a petition of rights "*and never desist from the solicitation till it be confirmed into a bill of rights*," and Andrew Eliot a year later despairing of all solutions save that of "an American bill of rights." No voice was raised in objection when in 1776 the idea was proclaimed, and acted upon, that "all the great rights . . . should be *guaranteed*" by the terms of a written constitution.³⁰

These closely related changes — in the view of what a constitution was and of the proper emphasis in the understanding of rights — were momentous; they would shape the entire future development of American constitutional thought and practice. Yet they did not seem to be momentous at the time. They were

³⁰ Jefferson, *Summary View* (JHL 43), p. 22; Otis, *Vindication* (JHL 11), p. 32; *Four Letters on Interesting Subjects* (JHL 69), p. 22; [Arthur Lee], "Monitor III," *Virginia Gazette* (R), March 10, 1768 (see also nos. IV and V where Lee works out further his arguments for "a confirmation of our rights . . . to merit the title of the *Magna Carta Americana*"); Eliot to Hollis, July 10, 1769, in *MHS Colls.*, 4th ser., IV, 442. Later there would be doubts about the value of enumerating rights just as there would be about other of the ideas developing before 1776. See particularly Madison's penetrating analysis in his letter to Jefferson of October 17, 1788, *Papers of Thomas Jefferson* (Julian P. Boyd, ed., Princeton, 1950-), XIV, 18-19, especially arguments 2 and 4.

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not generally experienced as intrusive or threatening alterations. They were hardly seen as changes at all: they drifted into consciousness so gradually and easily and were accepted with so little controversy that writers would soon feel called upon to remind Americans that the fundamental principles of their political and constitutional thought were "of recent date, and for [them] the world is indebted to America; for if [the distinction between constitutional law and that of the ordinary legislature] did not originate in this country, it was here that it was first reduced to practice, exemplified, and its utility and practicability first established."³¹ For in this area too, as in so many other developments in political and social thought, the way had been paved by the peculiar circumstances of colonial life. Whatever Otis may have thought of the issue when he came to consider it in theoretical terms, the fact was that written constitutions—documents not different essentially from the "codes, pandects, novels" he denounced—had existed, had been acted upon, had been assumed to be proper and necessary, for a century or more. Some, like the charter of the Massachusetts Bay Colony, had originated as commercial charters, concessions of powers by the crown to enterprisers willing to undertake the risks of exploration and settlement. These, in the colonial setting, had quickly changed in character, and "by some metamorphosis or feat of legerdemain had . . . become the frame of government for a state." The Massachusetts Bay charter in particular "approximated a popular constitution," Professor McIlwain has written, "more closely than any other instrument of government in actual use up to that time in America or elsewhere in modern times." It is hardly surprising, he concludes, that the Fundamental Orders of Connecticut of 1639, "the first American constitution accepted by the people,"

³¹ Anon., "A Concise View of the Principles of the Constitution and Government of the United States . . .," in Jedidiah Morse, comp., *Annals of the American Revolution* . . . (Hartford, 1824), p. 385.

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should have been written by men who emigrated from Massachusetts.³²

Later crown charters, like those of Connecticut and Rhode Island, were designed in the first place to be basic instruments of government; and if the seventeenth-century proprietary grants—those of New York, Maryland, and the Carolinas—were anachronistic in their feudal terminology, they too created "governing powers" and provided for public institutions that were expected to be "incapable of alteration or amendment except by concession from the grantor." Most important of all, because most deliberately "constitutional" in character, were the foundations laid down by William Penn for the establishment of government in New Jersey and Pennsylvania. This remarkable man—courtier and sectarian; saint, schemer, and scholar—whose imaginative grasp of the possibilities of constitution-making led him eventually to propose not only a "Plan of Union for the Colonies" but also a scheme for "The Establishment of a European Diet, Parliament, or Estates," devoted himself enthusiastically to constructing a proper framework of government for the Quaker colonies. In consultation with the leading political theorists of his time, he drew up and published a series of concessions, frames of government, and charters, which were, in effect, blueprints for "civil administration, elections, court procedure, the exercise of justice, fines, penalties, and . . . the duties and obligations of officeholders." These schemes, again and again revised in an effort to adjust soaring idealism to the demands of ordinary human real-

³² Charles M. Andrews, *The Colonial Period of American History* (New Haven, 1934-1938), I, 440; McIlwain, *Constitutionalism and the Changing World*, p. 241 (cf. Andrews, *Colonial Period*, II, 102 ff.). See, in general, Benjamin F. Wright, Jr., "The Early History of Written Constitutions in America," *Essays . . . in Honor of Charles Howard McIlwain* (Cambridge, 1936), pp. 344-371. For the claim that "to Plymouth belongs the credit for having established what may fairly be described as the first American constitution" (the code of laws of 1636), see George L. Haskins, "The Legacy of Plymouth," *Social Education*, 26 (1962), 9.

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ities, could hardly have been more clearly fundamental, more manifestly constituent, in nature.⁸³

By the Revolutionary period, the surviving charters, which in origins had been the instruments of the aggressive creation, or legitimation, of power, had become defensive bulwarks against the misuse of power. In Connecticut, Rhode Island, and Massachusetts they were cherished still, as they had been for a century and more, as special confirmations of "the ancient common law of England, and of the common rights of Englishmen." In Pennsylvania, in the years immediately preceding the Stamp Act, the attack launched against the Penn family's tax privileges, which had been written into the original charter, was fended off by impassioned pleas, like that of John Dickinson, to preserve intact, Proprietary tax privileges and all, the "laws and liberties framed and delivered down to us by our careful ancestors . . . Any body of men acting under a charter must surely tread on slippery ground when they take a step that may be deemed a surrender of that charter." Nor were the benefits of these famous compacts "between the sovereign and the first patentees" valued only in the particular provinces in which they had survived. Everywhere in the colonies the existing charters were prized as "evidential of the rights and immunities belonging to all the King's subjects in America."⁸⁴

For some people, in fact, the charters had acquired, in the course

⁸³ Andrews, *Colonial Period*, II, 137 (cf. 49), 283n; III, 269, 287n-288n, 286. On the Duke's Laws of New York, see A. E. McKinley, "The Transition from Dutch to English Rule in New York," *American Historical Review*, 6 (1900-01), 704 ff.

⁸⁴ [Thomas Fitch, et al.], *Reasons Why the British Colonies Should Not Be Charged with Internal Taxes* (New Haven, 1764: JHL Pamphlet 6), p. 9; Dickinson, *Speech Delivered . . . 1764*, in Ford, *Writings*, p. 30; Cooke, *Sermon Preached at Cambridge*, p. 33. Dickinson's assumption in 1764 that Pennsylvania's Charter of Privileges of 1701 was in effect unalterable fundamental law is particularly important. See David L. Jacobson, "John Dickinson's Fight against Royal Government, 1764," *W.M.Q.*, 3d ser., 19 (1962), 72-74. For a particularly valuable analysis of the extent to which colonial charters had taken on the characteristics of modern written constitutions before the Revolution, and

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of the years, an additional, transcendent sanction. Those who viewed the world in the light of covenant theology could see the colonial charters as valid not merely in the eyes of the law but in the eyes of God as well: "our charter . . . was a solemn *covenant* between [the King] and our *fathers*" — a "sacred" covenant by which the crown had contracted with a morally regenerate people to maintain their "rights, liberties, and privileges . . . inviolably firm and free from the least innovations, in the same manner that King David stood engaged by the covenant of the people." For "the covenant people of God" in particular, these charters, on the eve of the Revolution, were known to contain "the first great principles, or stamina, of their governments . . . prescribing the forms of their several governments, determining and bounding the power of the crown over them within proper limits, and ascertaining and securing their rights, jurisdictions, and liberties."⁸⁵

It took no wrench of mind, no daring leap, to accept, by then, the concept of a fixed, written constitution limiting the ordinary actions of government. Famous examples of the fact had long been present: the explicit idea, following, brought this experience into consciousness, gave it new meaning and propulsive power.

The same, though perhaps less obviously so, was true of the change in emphasis in the meaning of rights. The abstraction of rights from their embodiments in ancient, customary law, and their purposeful compilation and publication were not entirely

at the Revolution in effect *became*, by subtle alterations, actual state constitutions, see Charles R. Erdman, Jr., *The New Jersey Constitution of 1776* (Princeton, 1929).

⁸⁵ Samuel Webster, *The Misery and Duty of an Oppressed and Enslav'd People . . .* (Boston, 1774), pp. 10 ff. (the quotation is at 22); Mather, *America's Appeal* (JHL 59), p. 24. See also Johnson, *Some Important Observations* (JHL 19), pp. 42 ff.; and, for a full presentation of this theme and of the political significance of the renewal of "jeremiad" preaching on the eve of the Revolution, Perry Miller, "From the Covenant to the Revival," *The Shaping of American Religion* (James W. Smith and A. Leland Jamison, eds., *Religion in American Life*, I, Princeton, 1961).

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new things for the colonists. Experience in such matters was buried deep in the colonial past; the process, and its results, had been familiar a century before it became systematically important in constitutional theory.

Denied the guidance of experts in the law, lacking sure ideas of what precisely the law provided and what rights were theirs, yet passionately devoted to the belief that English laws and English rights *were* theirs if they would but claim them, the first settlers in British America had found it necessary to compile the law they knew, enumerate its provisions, and specify some, at least, of the rights it guaranteed. The process could hardly have begun earlier than in fact it did. The Pilgrims, responding not to theory but to the practical needs of everyday life, drew up a code of law as early as 1636: "it contains," a leading authority on the early history of American law has written, "a rudimentary bill of rights," which, when elaborated and enlarged in the later years of the seventeenth century, became "a recognizably modern bill of rights." The Puritans did the same, also within two decades of settlement. Their *Laws and Liberties* of 1648 was in design an abridgement of the laws they had themselves enacted; but, "the culmination of an extraordinarily creative period" of legal and constitutional thought, it went beyond restating and digesting the laws in force, to define "the just rights and privileges of every freeman." It quickly became famous, and influential, in all the colonies. It proved to be

the fountainhead of Massachusetts law during most of the seventeenth century, and even thereafter, and its provisions were widely copied by other colonies, or used by them as models in framing their own laws. Through such intercolonial borrowing, its influence spread into other parts of New England, beyond to New York and even to Delaware and Pennsylvania.³⁶

³⁶Haskins, "Legacy of Plymouth," pp. 9-10, 22; Andrews, *Colonial Period*, I, 458; George L. Haskins, *Law and Authority in Early Massachusetts* (New York, 1960), pp. 136 ff., 120.

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But the other colonies were not entirely dependent on New England models. Acting independently, in response to needs similar to those that had motivated the Massachusetts codifiers, they too drew up, on various occasions, their own formulations of rights. The ill-fated "Charter of Liberties and Privileges" passed by the first General Assembly of New York in 1683, contained not only "the outlines of a constitution for the province" but a "bill of rights" as well. Even more elaborate, and explicit, were the provisions of the "Rights and Privileges of the Majesty's Subjects" enacted eight years later, in 1691, by the same body. This remarkable statute, objected to in England because of its "large and doubtful expressions" and disallowed there, listed the rights of the individuals in the form of a series of categorical prohibitions on government: the individual was to be free from unlawful arrest and imprisonment, arbitrary taxation, martial law and the support of standing armies in time of peace, feudal dues, and restrictions on freehold tenure; in addition, he was guaranteed due process of law, especially trial by jury, and, if Protestant, full liberty to "enjoy his or their opinion, persuasions, [and] judgments in matters of conscience and religion throughout all this province."³⁷

But, again, it was William Penn who saw farthest and accomplished the most. His "Laws, Concessions, and Agreements" for the province of West New Jersey, which he drafted probably in collaboration with Edward Byllynge and published in 1677, provided not only for the distribution of land and the organization of government but also, and in great detail, for "the common laws or fundamental rights and privileges" of the inhabitants. The central purpose of this remarkably enlightened document was, in fact, to state, so that they might be known and be pre-

³⁷Andrews, *Colonial Period*, III, 117, 119; *The Colonial Laws of New York . . .* (Charles Z. Lincoln, et al., eds., Albany, 1894-1896), I, 244-248; *Documents Relative to the Colonial History of the State of New-York . . .* (E. B. O'Callaghan and Berthold Fernow, eds., Albany, 1856-1887), IV, 263-264.

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served intact in the New World, "such liberties as were guaranteed by law for the good government of a people, in accord with, as near as conveniently might be, 'the primitive, ancient, and fundamental laws of the people of England.'" Most explicit of all were Penn's statements of rights and privileges in the provisions he made for his own province of Pennsylvania. In his original Concessions and in his Frames of Government, but even more in the so-called "Laws Agreed upon in England" and in the Charter of Liberties and the Charter of Privileges, he laid out, point by point, the rights, duties, and proper regulations of "every phase of human life, civil and social."⁸⁸

By no means all of these documents were bills of rights as we know them. Most of them were not thought of as defining rights antecedent to government and law, rights to which government and law must accommodate themselves. The most common assumption behind them was, rather, that these were rights that the law—English law if not colonial—already provided for and that were now being compiled simply to make them better known and more readily available for reference in a wilderness environment. Presumed to be neither "basic" in some special way nor logically comprehensive, they were mainly devoted to eliminating arbitrary procedures in the enactment and execution of laws. But some of them are nevertheless astonishingly modern, containing some of the precise prohibitions on governmental powers and some of the exact guarantees of individual action that would later come to be thought of as necessary parts of fully evolved bills of rights. The eighteenth century would add nothing to the declaration, in the "Concessions . . . or Fundamental

⁸⁸ *The Grants, Concessions, and Original Constitutions of the Province of New Jersey* . . . (Aaron Leaming and Jacob Spicer, eds., [Somerville, N.J., 1881]), pp. 382-409; John E. Pomfret, *The Province of West New Jersey, 1609-1702* (Princeton, 1956), pp. 92 ff.; Andrews, *Colonial Period*, III, 273-274 (cf. 167), 286; *The Federal and State Constitutions, Colonial Charters* . . . (F. N. Thorpe, comp., Washington, D. C., 1909), V, 3044 ff.

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Rights" of West New Jersey, that "no men nor number of men upon earth hath power or authority to rule over men's conscience in religious matters"; nor would much improvement be made in the clause providing that no one "shall be deprived or condemned of life, limb, liberty, estate, [or] property . . . without a due trial and judgment passed by twelve good and lawful men of his neighborhood." And it is doubtful if James Madison, writing a full century later, would better the statements in New York's *Act Declaring What Are the Rights and Privileges* guaranteeing "due course of law," trial by jury, and freedom from the obligation to quarter troops in peacetime.⁸⁹

All of these codes and declarations—whatever the deliberate assumptions of their authors, and however archaic or modern-sounding their provisions—were, at the very least, efforts to abstract from the deep entanglements of English law and custom certain essentials—obligations, rights, and prohibitions—by which liberty, as it was understood, might be preserved. As English law in America became better known in the eighteenth century through the work of an increasingly professional bar, and as governmental and judicial processes became stabilized in the colonies, the original need that had given rise to these documents faded. Except where they were embedded in, or protected by, crown charters, they tended to drop from prominence—but not from awareness. In some places surviving intact from the settlement period to the Revolution, well remembered in others where they had been eliminated from the statutes, and everywhere understood to be reasonable and beneficent, these documents formed a continuous tradition in colonial American life, and drifted naturally into the thought of the Revolutionary generation. So in 1774 Alexander Hamilton asserted, as a conclusive argument, that New York's "very remarkable" Act of 1691 "confutes all that has been said concerning the novelty of our present

⁸⁹ *Grants of New Jersey*, pp. 394, 395; *Colonial Laws of New York*, I, 247.

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claims, and proves that the injurious reflections on the [Continental] Congress for having risen in their demands are malicious and repugnant to truth."⁴⁰

3. SOVEREIGNTY

Representation and consent, constitution and rights—these were basic problems, consideration of which led to shifts in thought that helped shape the character of American radicalism. But of all the intellectual problems the colonists faced, one was absolutely crucial: in the last analysis it was over this issue that the Revolution was fought. On the pivotal question of sovereignty, which is the question of the nature and location of the ultimate power in the state, American thinkers attempted to depart sharply from one of the most firmly fixed points in eighteenth-century political thought; and though they failed to gain acceptance for their strange and awkward views, they succeeded nevertheless in opening this fundamental issue to critical discussion, preparing the way for a new departure in the organization of power.

The idea of sovereignty current in the English-speaking world of the 1760's was scarcely more than a century old. It had first emerged during the English Civil War, in the early 1640's, and had been established as a canon of Whig political thought in the Revolution of 1688. It was composed essentially of two elements. The first was the notion that there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself. Derived in part from the political theory of classical antiquity, in part from Roman law, and in part from medieval thought, this idea came to England most directly in the sixteenth-century writings, especially those of Jean Bodin, that sought to justify and fortify monarchical supremacy.

⁴⁰ Hamilton, *Farmer Refuted*, in Syrett, *Papers*, I, 163.

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But in these early writings the concept of sovereignty still retained important limitations derived from its legal, religious, and pre-national origins. By sovereign Bodin had meant supreme, but not arbitrary: not without restrictions or controls, that is; the action of the sovereign state, he assumed, must still "embody the law of nature and of God." Bodin's theory, Professor McIlwain writes, for all its efforts to establish a power beyond appeal, "is a theory of law not of might, the theory of the *Rechtsstaat*; and it is this theory which . . . for two generations after Bodin dominated even English thought." But then, in the mid-seventeenth-century crisis in England, a change came. In the desperate necessity to isolate a reliable source of order, the permeation of might with right ended; a generation of cold-eyed analysts stripped the idea of sovereignty of its moral and legalistic qualities and laid bare the doctrine of naked force. Hobbes and Filmer are the names most obviously associated with this change in English thought; but it was not their work alone. The familiar restrictions had been attacked and undermined, if not eliminated, by earlier defenders of the royal prerogative—Roger Mainwaring and Robert Sibthorpe (whom the colonists would frequently denounce as pre-eminent absolutists), Francis Bacon, and James I himself. Yet it was, nevertheless, Hobbes who, in a series of writings in the mid-seventeenth century, first went beyond the immediate claims of monarchy to argue systematically that the only essential quality of sovereignty as such—whatever its possessor might be—was the capacity to compel obedience; and it was with his name, and with Filmer's, that the colonists came to associate the conception of the *Machtstaat* in its most blatant form.⁴¹

⁴¹ McIlwain, *Constitutionalism and the Changing World*, pp. 26-29, 52-55, 72 ff.; Gough, *Fundamental Law*, pp. 117 ff.; Margaret A. Judson, *The Crisis of the Constitution . . . 1603-1645* (New Brunswick, N.J., 1949), chaps. iv, v; George L. Mosse, *The Struggle for Sovereignty in England* (East Lansing, Mich., 1950), chap. iv.

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Final, unqualified, indivisible power was, however, only one part of the notion of sovereignty as it was understood by Englishmen on the eve of the American Revolution. The other concerns its location. Who, or what body, was to hold such powers? For the absolutists of James I's time, as later for Filmer, the answer was, of course, the crown. But others who also believed with Hobbes that "the preservation of life itself depended essentially upon power and not upon law" feared that an absolutely unfettered King would become an absolute despot — precisely the sort of ruler that Charles I had sought to become. In the extraordinary outburst of political theorizing that took place in 1642 when the final break with the crown was made, a new conclusion was drawn from the argument that there must necessarily be "an arbitrary power in every state somewhere." If this power fell to "one man or to a few there may be danger in it, but the Parliament is neither one nor few," and as a result "no inconvenience" would follow from placing arbitrary power in Parliament's hands. Parliament is "so equally and geometrically proportionable" in its composition, "and all the [e]states do so orderly contribute their due parts therein" that its absolute, arbitrary power "is not dangerous nor need to be restrained."⁴²

The words are those of Henry Parker, taken from the pamphlet of 1642 in which he "worked out for the first time in English history a theory of Parliamentary sovereignty." He, and others with him, developed the idea further under the pressure of attacks that came, on the one hand from extreme Royalists, now defenders of fundamental law as a necessary qualification on sovereignty, and on the other from extreme libertarians, determined to protect the individual against government in any form. Parker's view survived and flourished, and the result, by the Restoration, was a conception of Parliament that would have been inconceivable

⁴² Margaret A. Judson, "Henry Parker and the Theory of Parliamentary Sovereignty," *Essays [to] McIlwain*, pp. 152, 144, 150, 151.

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a generation earlier: a body absolute and arbitrary in its sovereignty; the creator and interpreter, not the subject, of law; the superior and master of all other rights and powers within the state. It was this conception of Parliamentary sovereignty that triumphed in the Glorious Revolution; and it was this conception, justified in the end by the theory of an ultimate supremacy of the people — a supremacy, that is, normally dormant and exercised only at moments of rebellion against tyrannical government — that was carried on into the eighteenth century and into the debates that preceded the American Revolution.⁴³

It had been a gradual development, and it had ended in a significant inversion. The earliest tradition, Professor McIlwain writes in one of his most striking essays, had been that of Hooker and Coke, Eliot and Hale, who

would have repudiated all arbitrary government whatsoever, whether by king or parliament; Filmer had declared that any government in England must be both arbitrary and royal; for Hobbes it must be arbitrary but not necessarily royal; for many Whigs a century later it must be arbitrary and cannot be royal. Thus after 1689, and the revolution settlement which marked the final triumph of the Whigs, the arbitrary power of Hobbes and Filmer was for the first time "engrafted into the English constitution" . . . and vested in the national assembly . . . For the Whigs the only real sovereign must be the Parliament, that is all.

By the mid-eighteenth century this Whig conception of a sovereign Parliament had hardened into orthodoxy. In the year of the Stamp Act, it was given its classic formulation by Blackstone, who wrote in his *Commentaries* that "there is and must be in all [forms of government] a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside," and that in England this "sovereignty of the British constitution" was lodged in Parliament, the

⁴³ Judson, "Henry Parker," pp. 153, 163, 164; Gough, *Fundamental Law*, pp. 176 ff.

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aggregate body of King, Lords, and Commons, whose actions "no power on earth can undo."⁴⁴

The formula seemed incontrovertible — "its truth is intuitive," Thomas Pownall declared, "and need not be demonstrated" — and it quickly became the foundation of the English claim against America. For there were few who would deny that "a power to tax is a necessary part of every supreme legislative authority." Therefore if Parliament "have not that power over America they have none, and then America is at once a kingdom of itself." The logic of the Declaratory Act, consequently, was impeccable: Parliament "had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and vitality to bind the colonies and people of America . . . in all cases whatsoever."⁴⁵

How to qualify, undermine, or reinterpret this tenet of English political theory was the central intellectual problem that confronted the leaders of the American cause; and there is no more fascinating spectacle in the history of American political thought than the efforts that were made — starting in the struggle with England over the extent of Parliament's power and continuing into the debates on the ratification of the Federal Constitution — to come to terms with this problem. It is a classic instance of the creative adjustment of ideas to reality. For if in England the concept of sovereignty was not only logical but realistic, it was far from that in the colonies. From the beginning of settlement, circumstances in America had run directly counter to the exercise

⁴⁴McIlwain, *Constitutionalism and the Changing World*, pp. 63-64; on the complexities of Blackstone's position, see Ernest Barker, *Essays on Government* (Oxford, 1945), pp. 137-138; for Blackstone's application of these ideas to the question of Parliament's control of the colonies, see Lawrence H. Gipson, "The Great Debate . . . on the Stamp Act, 1766, as Reported by Nathaniel Ryder," *Pa. Mag.*, 86 (1962), 17.

⁴⁵T. C. Hansard, *The Parliamentary History of England . . .* (London, 1806-1820), XVI, 612; [Jared Ingersoll], *Mr. Ingersoll's Letters Relating to the Stamp-Act* (New Haven, 1766; JHL Pamphlet 22), p. 13.

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of unlimited and undivided sovereignty. Despite the efforts that had been made by the English government in the late seventeenth century to reduce the areas of local jurisdiction in the colonies, local provincial autonomy continued to characterize American life. Never had Parliament or the crown, or both together, operated in actuality as theory indicated sovereign powers should. They had exercised authority, of course. The crown had retained the final power of legalizing or annulling actions of the colonial legislatures and of the colonial courts; it had made appointments to high office; it had laid down rules and policies for its colonial officials to follow; it had held in its own hand major decisions, civil and military, affecting relations with other nations; and it had continued to claim control of, if not actually to control, vast areas of wild land in the west as well as certain settled territories in the east. Similarly, Parliament had created the colonial postal system, regulated naturalization, and laid down rules for certain economic activities in the colonies, of which the laws of trade and navigation were the most important. But these were far from total powers; together they did not constitute governance in depth, nor did they exclude the exercise of real power by lesser bodies or organs of government. They touched only the outer fringes of colonial life; they dealt with matters obviously beyond the competence of any lesser authority; they concerned the final review of actions initiated and sustained by colonial authorities. All other powers were enjoyed, in fact if not in constitutional theory, by local, colonial organs of government. This area of residual authority, constituting the "internal police" of the community, included most of the substance of everyday life.

It had in fact been local American agencies that effectively created and maintained law and order, for there had been no imperial constabulary, and such elements of England's military power as had appeared in America from time to time had acted for purposes that only incidentally involved the daily lives of the

colonists. It had in fact been local, common law courts that administered justice in the colonies; the courts associated with the home government had been condemned as "prerogative," their jurisdiction repeatedly challenged and closely restricted. And it had in fact been local bodies—towns and counties in the first instance, ultimately the provincial Assemblies—that laid down the rules for daily life; rules concerning the production and distribution of wealth, personal conduct, the worship of God—most of the ways in which people deal with the world, animate and inanimate, about them. And these same bodies had been the ones accustomed to tax. Moneys had of course been collected by the home authorities; but they had been fees, dues, and rents—charges, for the most part, incidental to the regulation of overseas trade—not taxes. The power of taxing, from the earliest years of settlement, had been exercised by the representative Assemblies of the various colonies, and exercised without competition—indeed with encouragement—from England.

The condition of British America by the end of the Seven Years' War was therefore anomalous: extreme decentralization of authority within an empire presumably ruled by a single, absolute, undivided sovereign. And anomalous it had been known to be at the time. For decades before 1763 the situation had been remarked on, and reforms proposed by officers of the crown in the colonies as well as by administrators and theorists in England. But since, in the age of Walpole and Newcastle, no sustained effort had been made to alter the situation, the colonists found themselves in 1763 faced not merely with new policies but with a challenge to their settled way of life—a way of life that had been familiar in some places for a century or more. The arguments the colonists put forward against Parliament's claims to the right to exercise sovereign power in America were efforts to express in logical form, to state in the language of constitutional theory, the truth of the world they knew. They were at first,

necessarily, fumbling and unsure efforts, for there were no arguments—there was no vocabulary—to resort to: the ideas, the terminology, had to be invented.

How was this to be done? What arguments, what words, could be used to elevate to the status of constitutional principle the division of authority that had for so long existed and which the colonists associated with the freedom they had enjoyed? Here again Otis' pronouncements were among the first and most famous (they are inextricably involved with his statements on rights and the constitution), and they are also among his most confused. In this instance as in others, the curiously anachronistic quality of his thought led him into difficulties he could not resolve and toward conclusions he could not accept. He assumed the validity of the current concept of sovereignty—"a supreme legislative and a supreme executive power must be placed *some-where* in every commonwealth. Where there is no other positive provision or compact to the contrary, those powers remain in the *whole body of the people*." And he agreed also that in England this power resided in Parliament. "The power of Parliament is uncontrollable but by themselves, and we must obey. They only can repeal their own acts. There would be an end of all government if one or a number of subjects or subordinate provinces should take upon them so far to judge of the justice of an act of Parliament as to refuse obedience to it." But to say that a sovereign Parliament is absolute, he added, is not to say that it is arbitrary. "The Parliament cannot make 2 and 2, 5," he wrote in a silent paraphrase of Grotius that encapsulates the whole pre-Hobbesian view of sovereignty; "omnipotency cannot do it." The pillars of Parliament "are fixed in judgment, righteousness, and truth."⁴⁶

⁴⁶Otis, *Rights of the British Colonies* (JHL 7), pp. 12, 39, 47, 48. The passage in Grotius (*De Jure Belli Et Pacis*, I, i, 10, ¶5) containing the arithmetical example Otis used concerns natural law as a logically necessary restriction on omnipotent power, and it is broadly suggestive of the context of

This position, which reverted to a conception of sovereignty that had been realistic at a time when Parliament's legislative authority had not in fact been supreme, could not in the 1760's be maintained as an effective political argument. It could easily be shown to be self-contradictory. Seeking to maintain it—asserting, that is, the absolute power of what was, by definition, a benign authority—Otis found himself weaving back and forth, fending off attacks from both political extremes. Judged by what he had said about constitutional limitations on legislative power in the writs of assistance case in 1761, his assertion in 1765 that—such is the nature of sovereignty—"it is our duty to submit," appeared to leading patriots to constitute an astonishing reversal, and they could only conclude that he had been "corrupted and bought off" by the ministry. Otis reacted more keenly, however, to the opposite charge, leveled at him both in England and America, that his view of the self-defining restrictions of Parliament's power amounted to claiming for the colonies "an independent, uncontrollable, provincial legislative." Never, he replied, had he intended to make such a claim. Everyone knows, he wrote in his *Vindication*, repeating one of the most commonplace phrases of eighteenth-century political theory, that "*imperium in imperio* [is] the greatest of all political solecisms,"⁴⁷ and that

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Otis' thought and of the reasons for his ultimate dilemma: "Natural law, Grotius wrote, 'is so immutable that it cannot be changed by God himself. For though the power of God be immense, there are some things to which it does not extend: because if we speak of those things being done, the words are mere words, and have no meaning, being self-contradictory. Thus God himself cannot make twice two not be four; and in like manner, he cannot make that which is intrinsically bad, not be bad.'" See, in general on Otis' constitutional arguments the Introductions to his *Rights of the British Colonies* and to his *Vindication of the British Colonies* (JHL 11), in Bailyn, *Pamphlets*, 1.

"Thus, e.g., Bolingbroke had used the phrase in condemning Walpole's "Robberocracy": such a ministerial government "may properly be called . . . *imperium in imperio*, which hath been always treated as a solecism in politics by the best writers upon government . . ." *The Craftsman*, no. 172 (October 18, 1728), republished, vol. V (London, 1731), p. 153. So also in *The Votes and Proceedings of the Freeholders . . . of . . . Boston . . .* (Boston, [1772]: JHL Pamphlet 36), p. 4.

there is, consequently, no limit to Parliament's power of legislation or taxation. England "justly asserts the right and authority to bind her colonies where she really thinks the good of the whole requires it; and of this she remains the supreme judge, from whose final determination there is no appeal"—though, of course, he added, from this it does not follow "that 'tis always expedient and in all circumstances equitable for the supreme and sovereign legislative" to use its power.

By 1776 Otis' argument, grossly distended by the pressures placed upon it, was blatantly self-contradictory. By then he was beseeching his readers to believe that he had never intended so much as to hint at limitations on the "unlimited authority of Parliament over the colonies," apologizing to them if he had inadvertently given a different impression, and proclaiming himself in basic agreement with the Grenville ministry. But simultaneously he lashed out at that "contaminated knot of thieves, beggars and transports" in Newport responsible for such "evil work" as Judge Howard's *Halifax Letter*, which stated essentially the same position he was defending.⁴⁸

It was a bewildering performance, and it is little wonder that he was denounced as a "double-faced Jacobite-Whig."⁴⁹ His political judgment, on this occasion as on others, was obviously

phlet 36), p. 4, Catholics are condemned as introducing "that solecism in politics, *imperium in imperio*, leading directly to the worst anarchy and confusion, civil discord, war and bloodshed"; "*imperium in imperio*," Daniel Leonard wrote, is "the height of political absurdity." *The Origin of the American Contest with Great-Britain . . .* (New York, 1775: JHL Pamphlet 56), p. 56. For the explicit repudiation of the formula, see Iredell's remarks, quoted below, pp. 224-225.

⁴⁷ *Rights of the British Colonies*, p. 40; Adams, *Works*, X, 296-297; Otis, *Vindication* (JHL 11), pp. 4, 14, 5; [Otis], *Brief Remarks on the Defence of the Halifax Libel . . .* (Boston, 1765), pp. 22, 5. On the political embarrassment of Otis' ambiguity, see Governor Bernard's statement of 1770, quoted in Gipson, *British Empire*, XII, 39.

⁴⁸ Ellen E. Brennan, "James Otis: Recreant and Patriot," *New England Quarterly*, 12 (1939), 722.

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erratic. But his troubles mainly stemmed, here as in his arguments on other constitutional issues, from his peculiar application of early seventeenth-century ideas and assumptions to eighteenth-century problems. Failing to recognize that the idea of sovereignty had long since acquired as an essential characteristic arbitrariness as well as absolutism, he saw no danger in allowing Parliament to exercise sovereign authority, and to exercise it not only over the nation proper but over distant colonies as well. Parliament might make occasional mistakes, he admitted, but in the end — such was the wonder of the British constitution — it would necessarily act justly and wisely. If the Stamp Act was in fact wrong, Parliament would repeal it.

The repeal, when it came, was too late to vindicate Otis' position. By then, leading colonial writers were attacking the problem of sovereignty in a different way — a more realistic and pragmatic way. Tacitly acknowledging that by accepted definition sovereignty was both absolute and arbitrary, but convinced nevertheless that there were things that Parliament could not rightly do, they set out, silent on the metaphysics of the problem, to locate pragmatically a line of separation between powers of Parliament that were valid when exercised in America and those that were not. It was only later and gradually, when challenged by informed and articulate opponents, that they faced up to the implications of what they had been doing, and acknowledged that they were in effect calling "sovereignty itself into question" and attempting to reconceive the basic principles of state authority.⁵⁰

The path the colonists took away from the accepted eighteenth-

"If, intemperately, unwisely, fatally," Edmund Burke predicted in his *Speech on American Taxation*, "you sophisticate and poison the very source of government by urging subtle deductions . . . from the unlimited and illimitable nature of supreme sovereignty, you will teach them by these means to call that sovereignty itself in question. When you drive him hard, the boar will surely turn upon the hunters. If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face. Nobody will be argued into slavery."

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century notions of sovereignty appears now, in retrospect, to have been so clear that it is surprising that it was not seen sooner than it was by the colonists themselves. For, as Otis made abundantly evident, any effort to restrict Parliament's power assumed that sovereignty was in some sense divisible; and to search deliberately for the actual seams along which the fabric of power might be divided was to grope toward a political order in which "powers of government are separated and distinguished and in which these powers are distributed among governments, each government having its quota of authority and each its distinct sphere of activity."⁵¹ But the awareness of this fact was slow in developing: the discussion began at the level of specific distinctions in the powers of Parliament, and it progressed to more general grounds only after it was shown that these distinctions could not be maintained.

The first distinction advanced in the effort to express in constitutional language the limitations on Parliament's power familiar to the colonists, was extemporized casually by the simple expedient of applying to this constitutional problem one of the most common pairs of antonyms in the English language. No distinction could be more obvious or more fundamental than that between things "internal" and things "external." Not only did it appear to separate out conveniently the powers that had been exercised for so long by the colonists' own Assemblies and those that had been exercised by Parliament, but it did so echoing the

⁵¹ Andrew C. McLaughlin, "The Background of American Federalism," *American Political Science Review*, 12 (1918), 215. The interpretation in the pages that follow owes much to this essay which argues "that the essential qualities of American federal organization were largely the product of the practices of the old British empire as it existed before 1764" and that "the discussions of the generation from the French and Indian war to the adoption of the federal Constitution, and more particularly, the discussions in the ten or twelve years before independence" were devoted to the problems of this kind of organization. See also McLaughlin, *Foundations of American Constitutionalism*, chap. vi; McIlwain, "Historical Background of Federal Government."

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words of some of the most respected authorities on questions of government.⁵² An ordinary distinction already drawn into theoretical discussions, used in all sorts of ways in everyday speech, it quickly drifted into the discussion of Anglo-American relations. It was used loosely throughout the pre-Revolutionary years, applied generally to spheres of government, and it was specified by some to the problem of taxation.

Thus in 1764 Richard Bland, searching for a principle by which to assign exclusive powers to colonial governments and yet retain the colonies' dependency on England, found the distinction between things internal and things external to be essential to his purpose. If Virginians are freemen, he argued, they must have a representative assembly capable of enacting "laws for the INTERNAL government of the colony"—"internal" being defined so as to exclude "all power derogatory to their dependence upon the mother kingdom . . . In every instance, therefore, of

⁵² Thus Burlamaqui in his *Principles of Natural and Politic Law* (1747; first complete English trans., 1752) argued that "there are two sorts of obligations, one internal and the other external. By internal obligation I understand that which is produced only by our own reason, considered as the primitive rule of conduct, and in consequence of the good or evil the action in itself contains. By external obligation we mean that which arises from the will of a being on whom we allow ourselves dependent and who commands or prohibits some particular things under a commination of punishment" (I, vi, 13; see also I, x, 8-10). Similarly, Vattel, arguing that nations, like men, are naturally "free and independent of each other" except where a bonded obligation has been incurred, pointed out that such an obligation "and the right correspondent to it . . . is distinguished into *external* and *internal*. The obligation is *internal*, as it binds the conscience, and as it comprehends the rules of our duty; it is *external*, as it is considered relatively to other men, and as it produces some right between them." He then discussed the freedom of action permissible to nations in the light of internal and external obligations. *Law of Nations* (London, 1759; the edition used by both Otis and Bland), I, Introduction, secs. 16-17, 20, 27 (pp. 5-7). For an example of the direct use of Burlamaqui's distinction between internal and external obligations in the discussion of Parliament's powers in America, see Samuel Cooper to Thomas Pownall, March 25, 1773, in *American Historical Review*, 8 (1902-03), 328. For the importance of the distinction in Harrington's thought, see Charles Blitzer, *An Immortal Commonwealth* (New Haven, 1960), pp. 111 ff.

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OUR EXTERNAL government we are and must be subject to the authority of the British Parliament, but in no others; for if the Parliament should impose laws upon us merely relative to our INTERNAL government, it deprives us, as far as those laws extend, of the most valuable part of our birthright as Englishmen . . ." And if Parliament is limited in its legislative power over the colonies to external matters, "then any tax respecting our INTERNAL polity which may hereafter be imposed on us by act of Parliament is arbitrary, as depriving us of our rights, and may be opposed."

When the Stamp Act controversy exploded, the distinction naturally became part of the discussion of the rights involved. Stephen Hopkins, writing for the colony of Rhode Island, began by defining stamp duties as internal taxes and hence properly within the jurisdiction of the separate colonial legislatures, which had responsibility for the "internal government" of the colonies. The colonial jurisdiction of Parliament, he wrote, was quite different. Its proper power was over

things of a more general nature, quite out of the reach of these particular legislatures . . . One of this kind is the commerce of the whole British empire, taken collectively, and that of each kingdom and colony in it as it makes a part of that whole. Indeed, everything that concerns the proper interest and fit government of the whole commonwealth, of keeping the peace, and subordination of all the parts towards the whole and one among another, must be considered in this light.

For all such "matters of general nature" there must be some "supreme and overruling authority" to make laws and "compel their execution," and such a supreme power, everyone knows, Hopkins wrote, lies in "that grand and august legislative body," Parliament. He did not at this point develop the idea that if "internal" taxes were denied Parliament, "external" taxes might not be; he was not attempting to distinguish among types of

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taxes but to deal with the broader issue of spheres of authority within which taxation fell.⁵³

Others, however, would make this distinction — casually, almost inadvertently, and not with the sense that it was exclusive, comprehensive, or rigorously logical. Thus Connecticut's protest, published under the title *Reasons Why the British Colonies in America Should Not Be Charged with Internal Taxes*, in effect defined all taxation as "internal" taxation, and though it denied Parliament all right to tax the colonies, conceded to it the right to raise revenue through duties on trade, since such commercial fees, as distinct from taxes, fell properly within the sphere of "external" government. Others agreed, especially when it was understood, as Dulany explained, that the essential difference between internal taxes and trade duties was that the former were levied "for the single purpose of revenue" and the latter only "for the regulation of trade."⁵⁴

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But discriminating among the intentions of lawmakers was both difficult and dangerous; trade duties — whether called "external taxes" or not — could be as onerous as excise taxes. "They may find duties on trade enough," Thomas Hutchinson warned, "to drain us so thoroughly that it will not be possible to pay internal taxes as a revenue to them or even to support government within ourselves." It was obviously to the benefit of the administration to consolidate the advantage this presumed concession appeared to bestow, no matter how "nonsensical" informed people believed distinctions in revenue-raising powers to be. By 1765 English opponents of American claims were imputing to

⁵³ Bland, *Colonel Dismounted* (JHL 4), p. 22; [Stephen Hopkins], *The Rights of Colonies Examined* (Providence, 1765: JHL Pamphlet 9), pp. 10, 11. For Hopkins' later distinction between taxing the colonies in their "interior police" and in their "foreign importations," see Bailyn, *Pamphlets*, I, 504.

⁵⁴ On Connecticut's pamphlet and the issues involved, see Introduction to Pamphlet 6 in Bailyn, *Pamphlets*, I, and the documents cited there; Dulany, *Considerations* (JHL 13), p. 33.

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the distinction between "internal" and "external" taxation, said to be commonly drawn in the colonies (it was the opinion "of most people" in Boston, according to Hutchinson), an importance and a rigor that had never been intended for it and that made it vulnerable to attacks no one had expected it to have to withstand. That the usage took on this importance and became the subject of powerful attacks was to a considerable extent the result of the stress placed on it by Benjamin Franklin in the course of his famous three-hour testimony before the House of Commons in February 1766.⁵⁵

No one could have been better informed on the state of American thinking and on the armory of weapons the colonists had devised to attack Parliamentary taxation than Franklin. Having

⁵⁵ Hutchinson to Ebenezer Silliman, Boston, November 9, 1764, quoted in Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis* (Chapel Hill, 1953), p. 216; Thomas Whately to John Temple, May 2, 1767, in *MHS Colls.*, 6th ser., IX, 83. Cf. Edmund S. Morgan, "Colonial Ideas of Parliamentary Power, 1764-1766," *W.M.Q.*, 3d ser., 5 (1948), 311-341, where it is argued that the colonists never admitted Parliament's right to levy external taxes, the presumed concession being an attribution to the colonists by writers and debaters in England, and that the colonists' arguments against Parliamentary taxation appeared fully developed in the Stamp Act crisis. The present interpretation, which owes much to Morgan's, differs from it not so much on whether or not this concession was ever made by the colonists (I find that it was, though uncommonly and, in the ways indicated, indeliberately) but on the more basic question of the development of the colonists' constitutional ideas. In the perspective of the fundamental problem of sovereignty, whether the colonists did or did not admit Parliament's right to impose "external" taxes is less important than that they universally thought in terms of "internal" and "external" spheres of government, and that this distinction, of which the taxing issue was a specification, provided them with the means of discriminating among and qualifying the sovereign powers of Parliament. (On this point, see, in addition, the citations in note 65 below.) For an example of the colonists' admission of external taxation, see, besides those cited in Bailyn, *Pamphlets*, I, Charles Carroll's explanation of the propriety of Parliament's taxing the colonies by "disallowing drawbacks and imposing duties on our imports and exports," in his letter to Henry Graves, September 15, 1765, *Unpublished Letters of Charles Carroll of Carrollton* . . . (Thomas M. Field, ed., New York, 1902), p. 90. Cf., more generally, James Iredell's "Causes Leading up to the American Revolution," in Griffith J. McRee, *Life and Correspondence of James Iredell* (New York, 1857-58), I, 287 ff.

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left America well after the discussion of the Stamp Act had begun, and having kept in continuous communication with the colonists and with the other agents in London since his arrival there, he knew the official and unofficial literature of opposition thoroughly. In his blandly confident, adroit, and hardheaded testimony covering the whole range of issues in the controversy, the "internal"—"external" distinction became crucial. Since it allowed him to evade the question of whether or not his countrymen were in principle denying Parliament's right to tax them, he referred to it frequently and was forced to defend it. The colonists were not, he said, denying Parliament's right to collect moneys from them. They had long acknowledged Parliament's right "of laying duties to regulate commerce." What they were objecting to as "unconstitutional and unjust" was Parliament's effort "to lay internal taxes," for such a right "was never supposed to be in Parliament, as we are not represented there." His interrogators pressed him: Did he really believe that such a distinction was valid? Yes, Franklin assured them, he did; the difference between "external" and "internal" taxing was "very great."

An external tax is a duty laid on commodities imported; that duty is added to the first cost and other charges on the commodity, and, when it is offered to sale, makes a part of the price. If the people do not like it at that price, they refuse it; they are not obliged to pay it. But an internal tax is forced from the people without their consent, if not laid by their own representatives.

But may not the colonists "by the same interpretation object to Parliament's right of external taxation?" Franklin's reply was shrewdly evasive:

Many arguments have been lately used here to show them that there is no difference, and that if you have no right to tax them internally, you have none to tax them externally, or make any other law to bind

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them. At present they do not reason so; but in time they may possibly be convinced by these arguments.⁵⁶

Some, in the colonies, were in fact already approaching such conclusions. Dulany's pamphlet, published only a few months before Franklin spoke, had done more than sophisticate the meaning of "internal" taxation. It had broadened the discussion, and led it to a higher plane of generality. For, Dulany had argued, if there were, as he believed, powers that inferior bodies might exercise "without control or compulsion"—if there were areas where "the authority of the superior can't properly interpose"—does it not follow that the superior authority is actually limited in what it can do "by the powers vested in the inferior"?⁵⁷ In the light of such a possibility, and in the light of the approaching Townshend Duties—aimed as obviously as the Stamp Act at raising a revenue yet "external" by the colonists' own definition—the inadequacy of the much overstrained distinction between "internal" and "external" taxation for marking the limits of Parliament's power over the colonies became obvious. John Dickinson, in his *Farmer's Letters* (1767-68), flatly and formally repudiated it, and, examining the problem of Parliament's power with greater acuity than any writer had shown before, went on to a new stage in the exploration of the idea of sovereignty.

All taxation, Dickinson wrote in his famous pamphlet, being an "imposition to raise money," is essentially the same, and so there is no difference between "external" and "internal" taxation. Parliament has no right to levy taxes on Americans for any purpose whatsoever: that much was clear. What was not so clear,

⁵⁶ Albert H. Smyth, ed., *The Writings of Benjamin Franklin* (New York, 1905-1907), IV, 421, 424, 445, 446. On Franklin's constitutional ideas, see Verner W. Crane, ed., *Benjamin Franklin's Letters to the Press, 1758-1775* (Chapel Hill, 1950), pp. xxxvii-xlvi, 60-61, and documents cited there.

⁵⁷ Dulany, *Considerations* (JHL 13), p. 15.

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what needed discussion, and what he followed out in his thought boldly and imaginatively, was the proper role of a central government in a truly imperial constitution. The legislature of an empire, he said, was different from the legislature of a nation. Though the two might exist in the same body, they had different functions and powers as organs of government. Over the American colonies Parliament must have all the power, but only the power, necessary to maintain the essential connections of empire, and this meant the power to regulate commerce and other aspects of the economy "in such a manner as [England] thought most conducive to their mutual advantage and her own welfare." The duties imposed in the course of such regulation, he made clear, would be legitimate, for such "external impositions" do not grant property away but only prevent its acquisition. England's other imperial powers were quite specific, and inhered not in Parliament but in the crown: the power to repeal colonial legislation, to exercise "the *executive* authority of government," and to sit in appeal "from all judgments in the administration of justice."⁵⁸

In admitting that Parliament had such regulatory authority but yet no taxing powers whatever over America, Dickinson was approaching a conception of sovereignty different in essence from what had been accepted hitherto. For in assuming an empire to be basically different from a unitary nation, he was saying now explicitly that its sovereign body need not be supreme everywhere and in all matters in the territory it controlled, but only on some issues and in some ways, and that other, lesser bodies might exercise absolute and arbitrary powers—sovereign powers in effect—within spheres specifically allotted to them.

Once the discussion had reached this level, a maturing of views took place rapidly. For the reiterated assertions that were soon heard to the effect that even "the boldest advocates for the

⁵⁸ [John Dickinson], *Letters from a Farmer in Pennsylvania . . .* (Philadelphia, 1768: JHL Pamphlet 23), pp. 20, 24.

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power of Parliament cannot, at this day, without blushing, assert that it is sovereign and supreme *in every respect whatsoever*"—such assertions required a fuller rationalization and a more cogent explanation of principle than even Dickinson had given them if they were to be kept from degenerating into the more extreme claims, already being heard in 1768, that Parliament "cannot pass *any* laws to bind us." Such a notion, the Reverend John Joachim Zubly stated in 1769, must contain "some fallacy couched under an otherwise specious appearance." For it is not a matter of all or nothing. There are, he wrote in his fumbling yet original and penetrating *Enquiry*, significant gradations in the authority of Parliament derived from the variety of separate national entities it rules. The British "EMPIRE" is a more "extensive word" than the "kingdom" of Great Britain; it refers to "England, Scotland, Ireland, the Islands of Man, Jersey, Guernsey, Gibraltar, and Minorca, etc., in the Mediterranean; Senegal, etc., in Africa; Bombay, etc., in the East Indies; and the islands and colonies in North America, etc." The peoples of these extensive domains are not to be equally affected by Parliament's power. With regard to trade, yes: "the power of making it most beneficial to the head and every branch of the empire is vested in the British Parliament"; and with regard to rights, yes: Parliament must guarantee that "all the British subjects everywhere have a right to be ruled by the known principles of their common constitution." But otherwise, the various peoples of the empire are ruled unequally by Parliament; the "nature and degree of [their] dependence" upon Parliament "is not exactly alike," and Parliamentary laws affect them only in cases where they are specifically named, and to the extent of the specification.⁵⁹

⁵⁹ Hickes, *Nature and Extent of Parliamentary Power* (JHL 24), p. xiii (see also, p. 23: "while the power of the British Parliament is acknowledged *sovereign and supreme in every respect whatsoever*, the liberty of America is no more than a flattering dream, and her privileges delusive shadows"); Downer, *Discourse* (JHL 25), p. 7; Zubly, *Humble Enquiry* (JHL 28), pp. 2-4, 6, 9.

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By then the departure from the traditional understanding of sovereignty had gone far enough to make a sharp recall to orthodoxy advisable on the part of spokesmen for England. The most notable statement of this sort was written in 1769 by William Knox, a Grenvillite, who the following year would be appointed undersecretary of state for the colonies. Knox, setting a pattern for subsequent opponents of American claims, began by ridiculing what he understood to have been the shifting American positions on what Parliament could and could not do in regard to the colonies. First, he said, the colonists had attempted to distinguish "internal" taxation from "external"; then, when Parliament "seemed to adopt the distinction" and introduced just such "external" taxing, they changed their minds and decided to distinguish taxation for the purpose of regulating trade from taxation for the purpose of creating a revenue — a distinction, Knox wrote, "of all absurdities the most ridiculous that ever was contended for." Finally, they had rejected taxation altogether and admitted only commercial regulation. There was no logic or law behind such gyrations. What Americans were really objecting to had nothing to do with constitutional principles. Their objection was not to Parliament's constitutional right to levy certain kinds of taxes as opposed to certain others, but to its effort to collect any. Their theoretical position was worthless:

For if the authority of the legislative be not in one instance equally supreme over the colonies as it is over the people of England, then are not the colonies of the same community with the people of England. All distinctions destroy this union; and if it can be shown in any particular to be dissolved, it must be so in all instances whatever. There is no alternative: either the colonies are a part of the community of Great Britain or they are in a state of nature with respect to her, and in no case can be subject to the jurisdiction of that legislative power which represents her community, which is the British Parliament.⁶⁰

⁶⁰ [William Knox], *The Controversy Between Great Britain and Her Colonies Reviewed* . . . (London, 1769), as reprinted in *Old South Leaflets*, no. 21

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It was a rebuttal not so much of the pragmatic efforts that had been made in America to limit the power of Parliament as of attempts like that of Zubly to devise a theoretical justification for dividing sovereign power in any way at all. This abstract problem was at the heart of the controversy between England and the colonies, and once directly confronted, it could not be evaded. As a consequence the major constitutional issue in debate shifted permanently after 1769 from the specific questions of taxes and the administration of government to the correct definition of a concept of political science. While defenders of England's policies followed Knox in insisting on the indivisibility of Parliament's sovereignty, American leaders, gingerly choosing among the alternatives open to them, felt their way toward new conclusions.

The structure of this critical problem of theory is perhaps best revealed in the remarkable series of exchanges between Lieutenant Governor Thomas Hutchinson of Massachusetts and the two Houses of Assembly of that colony in 1773. Smarting under the publication late in 1772 of the belligerent *Votes and Proceedings* of the Boston Town Meeting, Hutchinson on January 6, 1773, launched a formal debate with the legislature on the central question involved.⁶¹ His opening speech was characteristically

[E. E. Morison, ed.], pp. 8-9, 10-11 (pp. 34-35, 44, 50 in the original edition). [John Mein], *Sagittarius's Letters and Political Speculations* . . . (Boston, 1775), p. 12; [Jonathan Boucher], *A Letter from a Virginian* . . . ([New York], 1774; JHL Pamphlet 46), pp. 20, 23; Leonard ("Massachusettsensis"), *Origin of the American Contest* (JHL 56), pp. 62-63.

⁶¹ The entire debate was published by order of the House in a 126-page pamphlet entitled *The Speeches of His Excellency Governor Hutchinson to the General Assembly . . . 1773. With the Answers of His Majesty's Council and the House of Representatives Respectively* . . . (Boston, 1773; JHL Pamphlet 47). The same documents, with the exception of the governor's concluding speech of March 6, are reprinted in [Alden Bradford, ed.], *Speeches of the Governors of Massachusetts, from 1765 to 1775* . . . (Boston, 1818), pp. 336-366. The passages quoted in the paragraphs that follow are from pp. 5, 7, 11, 18, 19, 20, 31, 35, 56-57, 60, 61, 81, 115, of the pamphlet, corresponding to pp. 337, 338, 340, 342, 344, 345, 351, 353, 364, 368, 369, 379 in Bradford's *Speeches*.

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temperate and lucid. Assuming that "from the nature of government there must be one supreme authority" and that for Britons everywhere it was lodged in Parliament, "of which the King is a constituent part," he explained that the Boston *Votes* were subversive in that some of them deny "the supreme authority of Parliament" and others "speak of this supreme authority . . . in such terms as have a direct tendency to alienate the affections of the people from their sovereign." Methodically, he took up the arguments of the Town Meeting, arguments based in turn on reason, on the charter, on the rights of Englishmen, and on natural rights. He concluded that there was "no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies: it is impossible there should be two independent legislatures in one and the same state for . . . two legislative bodies will make two governments as distinct as the kingdoms of England and Scotland before the Union." He ended in the same spirit of reason in which he had begun, requesting the two Houses, since "independence I may not allow myself to think that you can possibly have in contemplation," to communicate their sentiments to him "with the same freedom and unreservedness as I have communicated mine to you" so that he might be convinced of his error "if I am wrong in my principles of government or in the inference which I have drawn from them."

The two Houses lost no time in replying. The Council, confessing certain doubts about some of the Boston Resolves but vehemently defending the town's right to issue such declarations, pointed out that if in insisting that Parliament's indivisible authority was "supreme" Hutchinson had meant to imply that it was "unlimited," he should realize that he was in effect offering the colonies only the choice between slavery (except for the liberties that might be granted them by "the mere grace and favor of their governors") and "a declaration of total independ-

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ence." The councilors denied that the choice was properly so narrow. There is no such thing, they wrote, as total, absolute authority: "supreme or unlimited authority can with fitness belong only to the sovereign of the universe"; the supreme authority in all human governments, including that of Parliament, is by its very nature limited. The real question is how to state those limitations and thus to define other alternatives than those Hutchinson had offered. To fix "with precision" the limits of Parliament's authority, "to determine the exact lines of right and wrong," was, they admitted, a most difficult task which ordinarily they would not attempt; but the governor's speech having "made it absolutely necessary" for them to do so, they proceeded to review the essential parts of the constitution that demonstrated the illegality of Parliament's taxing the people of Massachusetts.

The House leaders too confessed that "it is difficult to draw a line of distinction between the universal authority of Parliament over the colonies and no authority at all," but they declared that if they were forced to make a choice between all or nothing they would certainly choose the latter, for "there is more reason to dread the consequences of absolute uncontrolled supreme power, whether of a nation or a monarch, than those of total independence." But why this choice? What if, as Hutchinson said, two independent legislatures *did* make two separate governments? If they were "united in one head and common sovereign" and did not interfere with each other, could they not "live happily in that connection and mutually support and protect each other"?

Hutchinson retorted sharply to the Council, informing them that their efforts to separate out permissible from forbidden powers in a sovereign body "rather tend to evince the impracticability of drawing such a line." Logically, what they were saying was that two supreme authorities could act simultaneously over the same people; but this, he insisted, was simply impossible. The claims of the House he could not so easily dismiss, for

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he understood the importance of the legal arguments that could be mobilized to defend the idea that two absolute legislatures might coexist within an empire if they came into contact only in the person of the King. It took this accomplished lawyer, scholar, and politician twenty-two pages of closely wrought and learned prose to state his reasons for believing that the chartered authority of the Massachusetts government derived and depended not from the King but from "the *crown* of England" and was "consequently subject to the supreme authority of England," that is, to Parliament.

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The debate went on in exchanges of messages for two months, until it exhausted the knowledge, ingenuity, and patience of all involved. The final statement was Hutchinson's, and it was prophetic. You believe, he said in his recapitulation, that "a *subordinate* power in government . . . , whilst it keeps within its limits, is not subject to the control of the *supreme* power." This is illogical, for how can there be "a *subordinate* power without a power *superior* to it? Must it not, so far as it is without control, be itself supreme?"

It is essential to the being of government that a power should always exist which no other power within such government can have right to withstand and control. Therefore, when the word *power* relates to the supreme authority of government it must be understood *absolute* and *unlimited*.

The future looked dark, he said, for "no sensible writer upon government has before denied" the principles he was restating, and if the members of the Massachusetts General Court

are still of opinion that two jurisdictions, each of them having a share in the supreme power, are compatible in the same state, it can be to no purpose to reason or argue . . . It's enough to observe that this disagreement in our principles will have its influence upon all the deductions which are made from them.

And so it did. The powerful influence of "this disagreement in our principles" was felt generally in the two years that fol-

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lowed. Leading Americans like John Dickinson continued to insist—though now with increasing desperation—that "the sovereignty over the colonies must be limited," that "a line there must be," in principle as well as in fact, setting off Parliament's powers from those of the colonial legislatures, and that this line gave to the English government control of the commerce and foreign affairs of the colonies and to the colonial Assemblies "exclusive right of internal legislation," including taxing. But the response was as adamant, as rigidly secured to the traditional conception of sovereignty as Hutchinson's had been. By the middle of October 1774, when Dickinson's view was adopted as the official American position by the first Continental Congress, its ineffectiveness was widely conceded. Spokesmen for England repeated, with what appears to have been an almost obsessive and ritualistic regularity, that if the colonial legislatures were not in principle "subordinate to the supreme sovereign authority of the nation . . . there is *imperium in imperio*: two sovereign authorities in the same state; which is a contradiction." Arguments to the contrary, Joseph Galloway wrote, were nothing but "unintelligible jargon and horrid nonsense"; an independent unit of government within the territory of the principal state, he explained, "is a *monster*, a thing *out of nature*"; what the Revolutionaries had taken into their "*learned heads*, philosophers-like," to do was to "conceive that the supreme legislative authority, which is indivisible in its nature, was, like matter, divisible *ad infinitum*; and under this profound mistake, you began with splitting and dividing it, until by one slice after another, you have hacked and pared it away to less than an atom."⁶²

There was little point, in the face of such inflexibility, in con-

⁶²Dickinson, *Essay on the Constitutional Power of Great-Britain*, in *Pennsylvania Archives*, 2d ser., III, 603, 569–589. Cf. article 4 of the Declaration and Resolves of the first Continental Congress. Seabury, *A View*, in Vance, *Letters of a Westchester Farmer*, p. 119; [Joseph Galloway], *A Reply to an Address to . . . a Candid Examination . . .* (New York, 1775), pp. 17, 26, 20.

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 continuing to press for a formal classification and division of Parliament's powers. Defenders of American claims were forced to move on to the politically more extreme position that the Massachusetts House had maintained. Acknowledging the impossibility of convincing the authorities in England that Parliament's sovereignty might be divisible, they pursued, with careful logic and a wealth of legal learning, the idea of an imperial federation of sovereign states sharing and establishing unity in a single monarch. If, Moses Mather argued, two supreme powers within a single state are really "the height of political absurdity" then let Parliament's power be totally excluded from the colonies. But the exclusion of Parliament's authority would not necessarily mean the total elimination of all links to England. For, he explained, a "state" was, after all, only "a country or body of people that are connected and united under one and the same constitution of civil government," and there was therefore no contradiction in conceiving of two such entities sharing the same king. George III derived his authority as "King of the American colonies" from a source different from that which empowers his rule as King of Great Britain. And since, "when several rights or capacities meet and are vested in one and the same person they remain entire and as distinct as though they were vested in different persons," the King's role as the first of the three estates in Parliament in no way means that the authority of that body extends to America.⁶³

Others arrived by other routes at this total rejection of Parliamentary authority in favor of what would become the modern notion of Commonwealth relations. James Iredell condemned the "beautiful theory" of sovereignty as "narrow and pedantic," "calculated to sacrifice to a *point of speculation* the happiness of millions," and developed the argument from the inapplicability of the idea of sovereignty — "the great solecism of an *imperium*

⁶³ Mather, *America's Appeal* (JHL 59), pp. 44, 47, 34, 46.

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in imperio" — "to the case of several *distinct* and *independent legislatures* each engaged within a *separate* scale and employed about *different* objects. The *imperium in imperio* argument is, therefore, not at all applicable to our case, though it has been so vainly and confidently relied on." The most powerful presentations were based on legal precedents, especially *Calvin's Case* (1608), which, it was claimed, proved on the authority of Coke and Bacon that subjects of the King are by no means necessarily subjects of Parliament. One of the most notable pamphlets that developed the details of this claim, James Wilson's *Considerations on the Nature and the Extent of the Legislative Authority of the British Parliament* (1774), opened with a revealing confession. The maturing of his thought, Wilson wrote in his Preface, had been an unwilling progression. He had begun, only a few years earlier, with the

expectation of being able to trace some constitutional line between those cases in which we ought, and those in which we ought not, to acknowledge the power of Parliament over us. In the prosecution of [my] enquiries, [I] became fully convinced that such a line does not exist, and that there can be no medium between *acknowledging* and *denying* that power in all cases.

Under the pressure of insistent declarations that sovereignty was indivisible he had followed out the "principles of reason, of liberty, and of law," to their natural conclusion, which was that "the only dependency which [the colonies] ought to acknowledge is a dependency on the crown."⁶⁴

But the position that Wilson and others had given up — that Parliament's sovereignty did extend to America but was consti-

⁶⁴ James Iredell, *Address to the Inhabitants of Great Britain* (n.p., 1774), in McRee, *Iredell*, I, 206, 207, 217, 219; Wilson, *Considerations* (JHL 44), pp. [iii], 31. On Calvin's Case and the legal-historical argument, see Bailyn, *Pamphlets*, I, 709-710 (note 25) and documents cited there. See also Hutchinson's arguments, *Speeches*, pp. 62-83; and, in general, Adams, *Political Ideas*, chaps. iii, v.

tionally limited by the powers reserved to the colonial legislatures—had not been forgotten. The movement of thought had been so rapid, however, that this argument, radical for the mid-1760's, had by 1775 become a conservative bastion; it was defended not only in point of theory by authentic leaders of the American cause who, like John Dickinson, hesitated to proceed to the more extreme position, but also by outspoken Tories who, continuing to ridicule the theory of divided sovereignty, accepted it in practice as they sought to establish some measure of rapport with the new forces of American life. To "disavow the authority of Parliament" and still claim allegiance to the King, the New York Tory leader Samuel Seabury wrote in 1774, "is another piece of Whiggish nonsense"; and he cited Pitt's speeches in Parliament and Dickinson's *Farmer's Letters* to defend the argument, now comfortably old-fashioned, that the line to be drawn—in fact if not in theory—between "the supremacy of Great Britain and the dependency of the colonies" should leave "all internal taxation . . . in our own legislatures, and the right of regulating trade . . . [and] enacting all general laws for the good of the colonies" in Parliament. So also, with minor variations, wrote the English traveler John Lind; so too wrote Daniel Leonard in Massachusetts; so too Joseph Galloway in Pennsylvania; so too Thomas Bradbury Chandler in New York; and so too, in the end—though still ambiguously and much too late—did the government of George III.⁶⁵

⁶⁵ Seabury, *A View*, in Vance, *Letters of a Westchester Farmer*, pp. 112, 125; [John Lind?], *An Englishman's Answer, to the Address, from the Delegates . . .* (New York, 1775), pp. 14–16; Leonard ("Massachusettsensis"), in *Novanglus and Massachusettsensis . . .* (Boston, 1819), pp. 202–203 (also *Massachusetts Gazette*, February 20–27, 1775) Galloway's Plan of Union, 1774, in Morison, *Sources and Documents*, pp. 116–118; [Chandler], *What Think Ye of the Congress Now?* p. 44. The distinction between fact and theory in accepting a division of sovereignty between internal and external jurisdictions was drawn with particular clarity by Thomas Pownall, replying to Dickinson's *Essay*, in the 1774 edition of his *Administration of the British Colonies*, II, 89–111. Pownall, a former governor of Massachusetts and in general sympathetic to the colonies

Through all these years of crisis, when American thought had moved steadily from Otis' archaisms and confusions to Wilson's advanced speculations on imperial federalism, the British ministry, fortified by fresh, militant assertions such as Dr. Johnson's that "in sovereignty there are no gradations," had remained adamant in its refusal even to consider infringing the Declaratory Act. Its final, pre-Independence proposals for reconciliation did not compromise the point. Only in 1778—after Independence had invoked the ultimate sovereignty of the people; after most of the states had organized their own governments, and the Articles of Confederation of the new nation had been drawn up and submitted to the states for ratification; and only under the pressure of the catastrophe at Saratoga and of France's entrance into the war—only then, in the instructions to the ill-fated Carlisle Commission, did the North administration relent sufficiently to endorse, though still not in theory, the position that Dickinson had advanced so long ago in the *Farmer's Letters*. Such a grudging concession was by then grotesquely irrelevant to the realities of the situation. The idea that Americans would at that late date be willing, as the instructions to the Carlisle Commission put it, "to return to their condition of 1763" and to

Introduction to Dulany's *Considerations*, in Bailyn, *Pamphlets*, I), conceded "in the ordinary exercise" of government, Parliament would respect the Dickinson described, but "that in the intendment and remembrance of law, the power of Parliament, as a supreme censorial or remedial power, must be supposed to have a right to go to all cases whatsoever." Similarly, though Parliament had "given up forever" the levying of internal taxes on the colonies, it would never allow herself to suffer the "open test of humiliation" involved in formally renouncing that right (pp. 95–96). Pownall's discussion in this volume "Postscript" on Dickinson's *Essay* (and also in his book proper, chapter 10, vol. II, 32 ff.) follows Dickinson's in focusing sharply on the distinction between internal and external spheres of jurisdiction. Independence did not put an end to the discussion of this mode of distinguishing spheres of jurisdiction; it was carried over into the debate on federalism in the early national period, as in R. H. Lee's "Federal Farmer" letters of 1787, as reprinted in Forrest McDonald, ed., *Empire and Nation* (Englewood Cliffs, N. J., 1962), pp. 110–120.

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do so in such a way that "the sovereignty of the mother country should not be infringed" was unthinkable.⁶⁶ The course of intellectual, as well as of political and military, events had brought into question the entire concept of a unitary, concentrated, and absolute governmental sovereignty. It had been challenged, implicitly or explicitly, by all those who had sought constitutional grounds for limiting Parliament's power in America. In its place had come the sense, premised on the assumption that the ultimate sovereignty—ultimate yet still real and effective—rested with the people, that it was not only conceivable but in certain circumstances salutary to divide and distribute the attributes of governmental sovereignty among different levels of institutions. The notion had proved unacceptable as a solution of the problem of Anglo-American relations, but it was acted upon immediately and instinctively in forming the new union of sovereign states. The problems, intellectual and political, inherent in such an arrangement would persist; some were scarcely glimpsed when the nation was formed. The belief that "*imperium in imperio*" was a solecism and the assumption that the "sovereignty of the people" and the sovereignty of an organ of government were of the same order of things would remain to haunt the efforts of those who would struggle to build a stable system of federal government. But the initial challenges to the traditional eighteenth-century notion of sovereignty had been made. Later analysts starting where the colonists had left off before Independence and habituated to think in terms of "qualified sovereignty," "less-sovereignties," "the divisibility of sovereignty," would continue the effort to make federalism a logical as well as a practical system of government.⁶⁷

⁶⁶ Royal Instructions to the Peace Commission of 1778, in Morison, *Sources and Documents*, pp. 192, 200.

⁶⁷ On the history of the debate on sovereignty in the later eighteenth century and early nineteenth century, see, e.g., Adams, *Political Ideas*, chaps. vii, viii, and *Records of the Federal Convention of 1787* (Max Farrand, ed., New Haven, 1911), pp. 10-11.

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They would not entirely succeed; the task would be a continuing one, never fully completed. Generations later there would still be those, states rightists and nationalists, who would repudiate this legacy of the Revolution and reinvoke in different contexts the theories of Hobbes and Blackstone, of Hutcheson and Locke. But the federalist tradition, born in the colonists' efforts to state in constitutional language the qualification of Parliament's authority they had known—to comprehend, systematize, and generalize the unplanned circumstance of colonial life—nevertheless survived, and remains, to justify the distribution of absolute power among governments no one of which can claim to be total, and so to keep the central government from amassing a degree of energy, in order to sustain itself, dangerous to the liberties of the people."⁶⁸

⁶⁸ (1-1937), I, 27, 323, 328, 331-332, 467; II, 347, 584; *The Federalist*, nos. 15, 20, 31, 32, 39, 40, 44, 45, 62, 81; Jackson T. Main, *The Antifederalists* (Chapel Hill, 1961), pp. 120-125; Charles E. Merriam, *A History of American Political Theories* (New York, 1936), pp. 254 ff.; and above all, Madison's private calculations, written to Jefferson in 1787, on "the due partition of power between general and local governments," in Boyd, *Jefferson Papers*, XII, 273-279, and his public statement of 1792, in *Writings* (G. Hunt, ed., New York, 1900-1910), pp. 91-93.

⁶⁹ Anon., "Concise View," in Morse, *Annals*, p. 394.