

## Chapter Two: The Colonial Era

### I. Introduction

American constitutionalism had a history even before fifty-five men assembled in Philadelphia in 1787 to draft a new federal constitution. It had a history even before there was a United States. The origins of American constitutionalism lie in the colonial experience and are intertwined with the inherited traditions of British constitutionalism, Enlightenment thought, and classical and religious influences.

The British colonies in North America were created separately and with distinct governing structures. The thirteen colonies that would become the United States were established in three different ways. The royal colonies, the most common, were ruled directly by the British crown through appointed governors. Proprietary colonies were the products of royal grants to private owners (the proprietors, such as William Penn in Pennsylvania) who established a local government of their choosing. Corporate colonies were based on written royal charters to a group of self-governing settlers.

Despite these differences, the colonies shared some basic features. All were within the constitution of the British Empire. The colonists were British subjects, with the attendant rights and privileges. Each colony had developed elected assemblies to make local policy (usually joined in the legislative process by a royal governor and an upper house selected by the governor), and all were subject to oversight and control by the British government in London. In particular, the king's Privy Council routinely reviewed and struck down colonial laws. The trans-Atlantic constitutional debate up until 1776 was a shared one about the meaning of the unwritten British constitution that both the English and the American colonists lived under. The Americans eventually came to think that constitution both had been broken and was inadequate to their needs. They, at least, would have to adopt a new one.

While each of the colonies was individually tied to Britain, there were no formal connections among them. Proposals to organize the colonies as a collective were a recurrent subject of debate but none got off the ground until the eve of the American Revolution. The most notable was the plan that emerged from a 1754 conference in Albany, New York. Largely the brainchild of Benjamin Franklin, the proposal would have created a continental government to conduct war and trade and with the power to raise its own taxes and army. Despite the threat of war with the French and their native allies on the North American continent, jealousies among the colonies and nervousness in Britain doomed the planned union. The failure led Franklin to complain that "everybody cries, a Union is absolutely necessary; but when they come to the Manner and Form of the Union, their weak Noddles are perfectly distracted." The next year he proposed that the British impose a union on the colonies or else they could "never expect to see an American War carried on as it ought to be," but London declined.<sup>1</sup> It would be another two decades before the colonists found a common enemy that would pull them together.

Insert Table 2-1 about here

The first constitutional debates in America were debates about the British constitution and its meaning for the colonies. The Declaration of Independence may be the constitutional beginning of the United States, but it was the last move in an earlier constitutional dialogue between the partisans of colonies in North America and the partisans of the English authorities in London. The colonists and the imperial officials offered competing interpretations of the British constitution as they tried to justify their actions to one another and to interested observers both in North America and in the British Isles. As that dialogue progressed, the two sides found themselves drifting further apart rather than finding common

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<sup>1</sup> Benjamin Franklin, *The Writings of Benjamin Franklin*, ed. Albert H. Smyth, vol. 3 (New York: Macmillan, 1905), 242, 267.

ground. Their policy disagreements over taxes and trade soon exposed irreconcilable constitutional disagreements.

The central debate was over the constitutional limits on the authority of Parliament in the colonies. On that issue, constitutional interpretation eventually gave way to constitutional revolution. The Americans stopped trying to live within the British constitution. Instead, in 1776, they chose to draw upon the British constitutional tradition to explain why they could no longer accept being bound by its terms. The Declaration of Independence gave the final American position: Parliament could have no authority in the thirteen colonies. The constitutional debate after that point would be exclusively American.

Insert Box 2-1 about here

The long political struggle with Britain before 1776 also led to a general deepening of American constitutional thought and practice. It was largely within this political struggle that the Americans developed their ideas about democracy and representation, federalism (the division of power between a central authority and regional or local governments), separation of powers (the responsibilities of the executive, legislative, and judicial branches), rights and liberties, and the nature of constitutionalism itself. By the 1770s, established political leaders like Benjamin Franklin and John Dickinson of Pennsylvania, Samuel Adams and James Otis of Massachusetts, and Patrick Henry and Edmund Pendleton of Virginia were joined by young lawyers like John Adams and Thomas Jefferson to press the case for the rights of the American colonies, first within the British constitution and if necessary outside of it. The ideas, arguments, and experience that they and others developed in the decades leading up to Revolution and American independence continued to shape American constitutionalism as the Revolution was being fought and after it had been won.

The debates over the interpretation of the British constitution are distinctive in yet another way – the British constitution is “unwritten.” The American constitutional tradition is a “written” one. Each American government has a single foundational document that empowers the government and fairly comprehensively defines its structure and limits. Constitutional debate revolves around the interpretation of that foundational document, though that process pulls in additional materials and creates additional materials for interpretation. How that document should be interpreted and the extent to which Americans also have an unwritten constitutional tradition remain subjects of controversy. By contrast, the British constitutional tradition does not rest on a single foundational document. There are multiple documents of constitutional significance within the British tradition such as the Magna Carta of 1215 and the Bill of Rights of 1689, but no single document stands as a source of government authority or the primary touchstone for evaluating the limits of government power. Prior governmental practice and precedent played a central role in constitutional argument within that eighteenth century British tradition. In a constitutional system built on precedent, it became particularly important for the colonists to make known their objections to British policies or taxes that seemed to change the rules of the constitutional game. Even if the taxes imposed were small, the principle established by an unchallenged law would be woven into the constitutional system for the future.

The American constitutional experience after independence built on the colonial and Revolutionary experience. As Justice John Marshall Harlan observed, the United States has been defined by “the traditions from which it developed as well as the traditions from which it broke.”<sup>1</sup> The Americans learned from their earlier experiences, altering some institutions and legal inheritances and keeping others. Colonial-era debates shed light on how the founding generation understood their own constitutional choices. More basically, the process of constitutional politics in the colonial era set the tone for the future. Constitutional debates spilled across legislatures, courts, newspapers, and meeting halls. Political actors made use of the best tools and arguments that they had available to them to advance their particular interests and ideals.

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<sup>1</sup> Poe v. Ullman, 367 U.S. 497, 542 (1961).

The following materials organize these pre-Revolutionary debates around four main points of contention: powers of the national government, separation of powers, judicial power, and other issues. Unlike later chapters, the “national” government in this case is the British government, but the issues of the proper limits on central government power, the boundaries between the central government and the provincial governments, and the problems of representation and diversity that first arise in the colonial context are analogous to those that will arise within the United States after independence. For the sake of brevity, we do not include materials on federalism and the relationship among the states, or colonies, in this chapter.

## II. POWERS OF THE NATIONAL GOVERNMENT

The primary constitutional debate of the colonial period – the one that drove all others and that eventually led to the Declaration of Independence – was over the extent of Parliament’s policymaking authority over the colonies. In this, there were two closely intertwined issues.

The first issue was the precursor to the federalism debate that has echoed down through all of American history: How much power does and should the central government have within the constitutional system? In the imperial context prior to 1776, this meant how much control the British government should have over public policy in the North American colonies. Was British authority absolute? Could the Parliament or the monarch dictate any policy in the colonies, or were there constitutional limits on their authority in North America? Were there areas of public policy or particular governmental powers that were under the exclusive control of local colony governments? Was it possible to draw a constitutional line between the scope of British authority and the scope of colonial authority, or would any attempted line give way in one direction or the other – either to absolute British domination or to absolute colonial independence? Could there be a kind of sustainable federalism within the constitution of the British Empire?

The second issue arose from the first. This was essentially a debate about the nature and meaning of representative government. Were the colonies adequately represented in Parliament, and did that make a difference for how much policymaking authority over colonial affairs Parliament should be understood to have? Most famously, this is what the cry of “no taxation without representation” was about. If the colonists were not represented in Parliament, then the principles of the British constitution dictated that Parliament did not have the right to tax the colonists. Since the colonists did not elect any members of Parliament, the challenge for the defenders of parliamentary authority was to show that the British legislature adequately represented their interests anyway. Taxation was the flashpoint for the debate, but once the colonists began to question whether their interests were only represented in their local assemblies or whether they were also represented in Parliament then it did not take long to begin asking whether Parliament should have any say in North American affairs at all.

The debate began when Parliament passed the Sugar Act of 1764, but reached crisis proportions after the passage of the Stamp Tax in 1765. The global British war with the French, including operations in North America, had left the government with a massive debt. The colonies in the western hemisphere had always been a source of imperial wealth, but now London wanted the colonists to pay taxes to defray the expenses of empire as well. The taxes collected in the colonies, however, had generally been assessed and spent locally. The trade between the colonies and Europe had always been closely regulated by Britain; Parliament’s control over commerce across the empire was a well understood feature of the British constitution. The Sugar and Molasses Act of 1733 set high duties on foreign sugar and rum and was designed to stop that trade altogether so that sugar would be purchased from British sources instead. Nonetheless, smuggling of French sugar was rampant in the colonies. The Sugar Act of 1764 cut the tariffs but cracked down on smuggling. If the Americans could not be forced to buy British sugar, London at least wanted to collect revenue on the French sugar trade. The result in practice was to make several basic goods both less available and more expensive than they had been. When passing the Stamp Act of 1765, Parliament made special reference to the previous year’s Sugar Act as providing a precedent for taking further measures for taxing the colonies to raise revenue for the crown. The Stamp Act imposed imperial taxes on a wide variety of printed paper, including newspapers, calendars, playing cards, and legal documents. The Stamp Act was financially burdensome, but it was more disturbing for being a clear and direct tax on the colonists unrelated to the regulation of their international trade. A line had been crossed, but did that make the tax unconstitutional?

Colonial thinking evolved over the course of the 1760s and 1770s from emphasizing that certain kinds of taxes imposed by the British Parliament were unconstitutional to arguing that Parliament had no authority in the colonies and the colonists were subject only to the king to finally concluding that the Americans could not be properly be subject to and owed no allegiance to either the Parliament or the English king. A debate over centralization gave way to a debate over independence.

Thomas Whately, *The Regulations Lately Made*, (1765)<sup>1</sup>

*Thomas Whately, who had previously served on the British Board of Trade that oversaw colonial affairs, was a Member of Parliament and secretary of treasury in 1765, and he was the principal author of the Stamp Act. This pamphlet was a sweeping vindication of the British colonial system, including the Sugar Act of the year before. It concluded with an argument in favor of the Stamp Act then being considered in Parliament. The pamphlet was a leading defense of the policy and constitutionality of parliamentary taxation of the colonies. Whately denied that the power to impose the stamp tax was different in kind than any other type of power that Parliament exercised over the colonies. It was also a prominent statement of the doctrine of virtual representation, the view that legislators represent the populace generally and not just their particular electorates. Virtual representation was Parliament's explanation of how it could represent, and therefore tax, the colonists, even though the colonists did not vote for any members of Parliament. As Whately points out, the theory of virtual representation was crucial to parliamentary democracy as it operated in England itself as well as the colonies.*

*As you read Whately's argument, think about what assumptions he relies upon in making his arguments for virtual representation. Does he, for example, rely upon an assumption of shared interests between representatives and those they represent to make virtual representation work?*

The Revenue that may be raised by the duties which have been already, or by these if they if they should be hereafter imposed, are all equally applied by Parliament, *towards defraying the necessary Expenses of defending, protecting, and securing, the British Colonies and Plantations in America*: Not that on the one hand an *American* Revenue might not have been applied to different purposes; or on the other, that *Great Britain* is to contribute nothing to these . . . . *Great Britain* has a right at all times, she is under a necessity, upon this occasion, to demand their assistance . . . .

The reasonableness, and even the necessity of requiring an *American* revenue being admitted, the right of the mother country to impose such a duty upon her colonies, if duly considered, cannot be questioned: they claim, it is true, the privilege, which is common to all *British* Subjects, of being taxed only with their own consent, given by their representatives; and may they ever enjoy the privilege in all its extent: May this sacred pledge of liberty be preserved inviolate, to the utmost verge of our Dominions, and to the latest page of our history! But let us not limit the legislative rights of the *British* people to subjects of taxation only: No new law whatever can bind us that is made without the concurrence of our representatives. The acts of trade and navigation, and all the other acts that relate either to ourselves or to the colonies, are founded upon no other authority; they are not obligatory if a Stamp Act is not, and every argument in support of an exemption from the superintendence of the *British* Parliament in the one case, is equally applicable to the others. The constitution knows no distinction; the colonies have never attempted to make one; but have acquiesced under several parliamentary taxes. [Sugar and The Molasses Act of 1733] lays heavy duties on all foreign rum, sugar, and molasses, imported into the *British* Plantations: the amount of the impositions has been complained of; the policy of the laws has been objected to; but the right of making such a law, has never been questioned. . . .

It is in vain to call these only regulations of trade; the trade of *British* Subjects may not be regulated by such means, without the concurrence of their representatives. Duties laid for these purposes, as well as for the purposes of revenue, are still levies of money upon the people. The constitution again knows no distinction between *Impost* duties and internal taxation; and if some speculative difference should be attempted to be made, it certainly is contradicted by fact; for an internal tax also was laid on the colonies by the establishment of a post office there; which, however it may be represented, will . . . appear to be essentially a tax, and that of the most authoritative kind; for it is enforced by provisions, more

<sup>1</sup> Excerpt taken from Thomas Whately, *The Regulations Lately Made concerning the Colonies, and the Taxes Imposed upon Them, Considered*, third edition (London: J. Wilkie, 1775), 101-110.

peculiarly prohibitory and compulsive, than others are usually attended with . . . . These provisions are indeed very proper, and even necessary; but certainly money levied by such methods, the effect of which is intended to be a monopoly of the carriage of letters to the officers of this revenue, and by means of which the people are forced to pay the rates imposed upon all their correspondence, is a public tax to which they must submit, and not merely a price required of them for a private accommodation. . . .

The instances that have been mentioned prove, that the right of the Parliament of *Great Britain* to impose taxes of every kind on the colonies, has been always admitted; but were there no precedents to support the claim, it would still be incontestable, being founded on the principles of our constitution; for the fact is, that the inhabitants of the colonies are represented in Parliament; they do not indeed choose the members of that assembly; neither are nine tenths of the people of *Britain* electors; for the right of election is annexed to certain species of property, to peculiar franchises, and to inhabitancy in some particular places; but these descriptions comprehend only a very small part of the land, the property, and the people of this island . . . . Women and persons under age be their property ever so large, and all of it freehold, have [no vote]. The merchants of *London*, a numerous and respectable body of men, whose opulence exceeds all that *America* could collect . . . . are all in the same Circumstances; none of them choose their representatives; and yet are they not represented in Parliament? Is their vast property subject to taxes without their consent? Are they all arbitrarily bound by laws to which they have not agreed? The colonies are in exactly the same Situation; All *British* Subjects are really in the same; none are actually, all are virtually represented in Parliament; for every Member of Parliament sits in the House not as a 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. . . .

The inhabitants of the colonies however have by some been supposed to be excepted, because they are represented in their respective assemblies. So are the citizens of *London* in their common council; and yet so far from excluding them from the national representation, it does not impeach their right to choose Members of Parliament: it is true, that the powers vested in the common council of *London*, are not equal to those which the assemblies in the Plantations [colonies] enjoy; but still they are legislative powers, to be exercised within their district, and over their citizens; yet not exclusively of the general superintendence of the great council of the nation. . . . and indeed what contradiction, what absurdity, does a double representation imply? What difficulty is there in allowing both, though both should even be vested with equal legislative powers, if the one is to be exercised for local, and the other for general purposes? And where is the necessity that the subordinate power must derogate from the superior authority? . . . .

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Daniel Dulany, *Considerations of the Propriety of Imposing Taxes in the British Colonies* (1765)<sup>1</sup>

*Daniel Dulany was trained in law in England before returning to his native Maryland, where he had served on the Governor's Council. Regarded as one of the best lawyers in the colonies, his pamphlet was one of the first and most cutting critiques of the Stamp Act and the doctrine of virtual representation by which it had been defended. He later refused to join the movement for American independence, however, which he regarded as too radical.*

*As you read Dulany's argument against virtual representation, consider whether we can dispense entirely with the notion even in modern democracies. What might be the difficulties with taking his argument to its logical conclusions? The colonists contended that the principle of "no taxation without*

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<sup>1</sup> Excerpt taken from Daniel Dulany, *Considerations of the Propriety of Imposing Taxes in the British Colonies for the Purposes of Raising Revenue*, Second Edition (London: J. Almon, 1766), 1-10, 17-18, 40-41, 46-47.

*consent” required that only local legislatures had the authority to impose taxes. If the colonists had been able to vote for any of the members of Parliament, would that have also satisfied the principle? What line does he try to draw between the powers of Parliament and the colonial assemblies?*

. . . [I]n framing the late Stamp Act, the commons [I] acted in the character of representative of the colonies. They assumed it as the principle of that measure and the propriety of it must therefore stand, or fall, as the principle is true, or false: For the preamble sets forth, that the commons of *Great-Britain* had resolved to *give and grant* the several rates and duties imposed by the act; but what Right had the Commons of *Great-Britain* to be thus munificent at the expense of the commons of *America*?—To give property not belonging to the giver, and without the consent of the owner, is such evident and flagrant injustice, in *ordinary cases*, that few are hardy enough to avow it; and therefore, when it really happens, the fact is disguised and varnished over by the plausible pretences the ingenuity of the giver can suggest.—But it is alleged that there is a *virtual*, or *implied representation* of the colonies springing out of the constitution of the *British* government: And it must be confessed on all hands, that, as the representation is not actual, it is virtual, or it doth not exist at all; for no third kind of representation can be imagined. The colonies claim only the privilege, which is common to all *British subjects*, of being taxed *only* with their own consent given by their representatives, and all the advocates for the *Stamp Act* admit this claim. Whether, therefore, upon the whole matter, the imposition of the *Stamp Duties* is a *proper* exercise of constitutional authority, or not, depends upon the single question, Whether the commons of *Great-Britain* are *virtually* the representatives of the commons of *America*, or not.

. . . .  
I shall undertake to disprove the supposed similarity of situation, whence the same kind of representation is deduced, of the inhabitants of the colonies, and of the British non-electors; and, if I succeed, the notion of a virtual representation of the colonies must fail . . . . I would be understood: I am upon a question of *propriety*, not of power; and, though some may be inclined to think it is to little purpose to discuss the one, when the other is irresistible, yet are they different considerations . . . .

. . . .  
. . . . The electors, who are inseparably connected in their interests with the non-electors may be justly deemed to be the representatives of both. This is the only rational explanation for the expression, *virtual representation*. . . .

. . . .  
There is not that intimate and inseparable relation between the *electors* of Great-Britain, and the *Inhabitants of the colonies*, which must inevitably involve both in the same taxation; on the contrary, not a single *actual* elector in *England*, might be immediately affected by a taxation in *America*, imposed by a statute which would have general operation and effect, upon the properties of the inhabitants of the colonies. The latter might be oppressed in a thousand shapes, without any Sympathy, or exciting any alarm in the former. Moreover, even acts, oppressive and injurious to the colonies in an extreme degree, might become popular in *England*, from the promise or expectation, that the very measures which depressed the colonies would give ease to the Inhabitants of *Great-Britain*.

. . . .  
By their constitutions of government, the colonies are empowered to impose internal taxes. This power is compatible with their dependence, and hath been expressly recognized by *British* Ministers and the *British* Parliament, upon many occasions; and it may be exercised effectually without striking at, or impeaching, in any respect, the superintendence of the *British* Parliament. May not then the line be distinctly and justly drawn between such acts as are necessary, or proper, for preserving or securing the dependence of the colonies, and such as are not necessary or proper for that very important purpose?

. . . .  
The origin of other governments is covered by the veil of antiquity, and is differently traced by the fancies of different men; but, of the colonies, the evidence of it is as clear and unequivocal as any other fact.

By these declaratory charters the inhabitants of the colonies claim an exemption from *all* taxes not imposed by their own consent . . . .

It appears to me, that there is a clear and necessary distinction between an act imposing a tax for *the single purpose of revenue*, and those acts which have been made for the regulation of trade, and have produced some revenue *in consequence of their effect* and operation as *regulations of trade*.

The colonies claim the privileges of *British* subjects—It has been proved to be inconsistent with those privileges, to tax them *without their own consent*, and it hath been demonstrated that a tax imposed by Parliament, is a tax *without their consent*.

The subordination of the colonies, and the authority of Parliament to preserve it, have been fully acknowledged. Not only the welfare, but perhaps the existence of the mother country, as an independent kingdom, may depend upon her trade and navigation, and these so far upon her intercourse with the colonies, that if this should be neglected, there would soon be an end to that commerce, whence her greatest wealth is derived, and upon which her maritime power is principally founded. From these considerations, the right of the *British Parliament* to regulate the trade of the colonies, may be justly deduced; a denial of it would contradict the admission of the subordination, and of the authority to preserve it, resulting from the nature of the relation between the mother country and her colonies. It is a common, and frequently the most proper method to regulate trade by duties on imports and exports. The authority of the mother country to regulate the trade of the colonies, being unquestionable, what regulations are most proper, are to be of course submitted to the determination of the Parliament; and if an *incidental revenue* should be produced by such regulations, these are not unwarrantable.

A right to impose an internal tax on the colonies, without their consent, *for the single purpose of revenue*, is denied; a right to regulate their trade without their consent is admitted. The imposition of a duty may, in some instances, be the proper regulation.

Massachusetts Circular Letter, February 11, 1768<sup>1</sup>

*In 1766, Parliament repealed the Stamp Act, while passing the Declaratory Act that reasserted Parliament's right to legislate for and tax the colonies. Attempting to avoid the political opposition to internal taxes in the colonies, it passed the Townshend Revenue Act in 1767, which imposed additional tariff duties on imports into the colonies and strengthened the effort to collect the customs. Although this was an "external" tax deriving from the regulation of trade rather than an "internal" tax like those imposed by the Stamp Act, the colonists quickly objected that these too exceeded Parliament's authority and were unconstitutional infringements on the rights of the local assemblies because their purpose was to raise revenue. Among the most visible protests was this letter, primarily drafted by Samuel Adams, adopted by the House of Representatives of Massachusetts and directed to the popular assemblies of the other colonies. This letter is notable in part for its appeal to "natural rights" that did not depend for their existence on the text of any charter or any particular British precedent, as well as for its strong assertion of a constitution as both source and limit of government authority. It was part of an extended series of exchanges of speeches, public letters, pamphlets, and protests between Massachusetts Governor Thomas Hutchinson, members of the colonial legislature, and the general public.*

Sir,

The House have humbly represented to the ministry, their own sentiments that His Majesty's high Court of Parliament is the supreme legislative power over the whole empire: That in all free states the constitution is fixed; & as the supreme legislative derives its power & authority from the constitution, it

<sup>1</sup> Excerpt taken from *The Writings of Samuel Adams*, ed. Harry Alonzo Cushing, vol. 1 (New York: G.P. Putnam's Sons, 1904), 184-188.

cannot overleap the bounds of it without destroying its own foundation: that the constitution ascertains & limits both sovereignty & allegiance, & therefore, his majesty's American subjects who acknowledge themselves bound by the ties of allegiance, have an equitable claim to the full enjoyment of the fundamental rules of the British constitution. That it is an essential unalterable right in nature, engrafted to the British constitution, as a fundamental law & ever held sacred & irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent: That the American subjects may therefore exclusive of any consideration of charter rights, with a decent firmness adapted to the character of free men & subjects assert this natural and constitutional right.

It is moreover their humble opinion, which they express with the greatest deference to the wisdom of the Parliament that the acts made there imposing duties of the people of this province with the sole & express purpose of raising a revenue, are infringements of their natural & constitutional rights because as they are not represented in the British Parliament, His Majesty's Commons in Britain, by those acts, grant their property without their consent.

The House further are of the opinion that their constituents considering their local circumstances cannot by any possibility be represented in the Parliament, & that it will forever be impracticable that they should be equally represented there & consequently not at all; being separated by an ocean of a thousand leagues: and that his Majesty's royal predecessors for this reason were graciously pleased to form a subordinate legislature here that their subjects might enjoy the unalienable right of a representation. . . .

### III. SEPARATION OF POWERS

British authorities generally exercised their influence over the colonies most directly through the governor, the personal representative of the crown (in the royal colonies) or the proprietor (in the proprietary colonies). The governor in turn was usually advised by a council, or upper legislative chamber, and had the power to appoint judges and executive officers within the colony.

The colonists were generally represented in a lower legislative chamber, the members of which were locally elected. Laws, taxes and appropriations from the colonial treasury had to pass through the legislature, but were subject to an absolute gubernatorial veto (it could not be overridden by a subsequent legislative vote).

The popular assembly held the power of the purse in the colonial government, but the governor held the power of appointment and veto. Since colonial governors not only needed to run the government but also hoped to be compensated generously for their own public service, the assemblies jealously guarded their control over the purse strings and used their authority, modeled on Parliament's, to keep the governor in check. The governors in turn sometimes called on British authorities to grant them fiscal independence from the assembly so as to eliminate this check on their power. London declined to do so until the colonies were nearly in open revolt against the crown. The power of the purse was the central legislative check on the executive in the British system of government, and the colonists used that power to its maximum effect and guarded it jealously.

Richard Jackson, *An Historical Review of the Constitution and Government of Pennsylvania* (1759)<sup>1</sup>

*This pamphlet was published to coincide with Benjamin Franklin's mission to London, where he hoped to win support for tax and political reform in Pennsylvania. The colonial assembly had long been blocked in their efforts to have the proprietors of the colony bear a larger share of its taxes. The assembly sought to go over the head of the proprietary governor by appealing directly to the Penn family to shoulder more of the tax burden or, failing that, by appealing to the king to change or replace the existing charter. Neither appeal was successful, but the Historical Review described how the governor now served "two masters," the Penn family that appointed him and the assembly that paid him. No matter who appointed the governor, so long as the colonial assembly retained the power of the purse and could determine whether to fund the governor's salary, expenses and program it could bend the governor to its will. A few years later, Thomas Pownall, who had served as a governor of both Massachusetts and South Carolina, published a call for reforming the governments of the colonies. Among his complaints was the power that the colonial legislatures had over governors. In effect, "the scepter is reversed," and as a consequence of the assemblies' tight control over the purse strings, "almost every executive power of the crown lodged in its governor, is, where money is necessary, thus exercised by the assembly and its commissioners."*<sup>2</sup>

*Given how important the colonists thought it was for the governor's salary to be under the control of the legislature, why would Article II of the U.S. Constitution prohibit Congress from changing the president's salary during his term of office or offering him any other form of payment? Is this provision consistent the colonists' understanding of the utility of the legislature's power of the purse in a system of constitutional checks and balances?*

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It is by this Time apparent enough, that though the *proprietary* and popular interests spring from one and the same Source, they divide as they descend: That every proprietary Governor, for this Reason,

<sup>1</sup> Excerpt taken from Richard Jackson, *An Historical Review of the Constitution and Government of Pennsylvania* (London: R. Griffiths, 1759), 7-9, 71-72.

<sup>2</sup> Thomas Pownall, *The Administration of the Colonies* (London: J. Dodsley and J. Walter, 1765), 53.

has two Masters; one who gives him his Commission, and one who gives him his Pay: That he is on his good Behavior to both: That if he does not fulfill with Rigor every proprietary Command, however injurious to the Province or offensive to the Assembly, he is recalled: That if he does not gratify the Assembly in what they think they have a right to claim, he is certain to live in perpetual Broils, though uncertain whether he shall be enabled to live at all. And that, upon the whole, to be a Governor upon such Terms, is to be the most wretched Thing alive.

Sir *William Keith*<sup>1</sup> could not be ignorant of this: And therefore, however he was instructed here at Home, either by his Principal or the Lords of Trade, resolved to govern himself when he came upon the Spot, by the governing Interest there.—So that his Administration was wholly different from that of his two Predecessors.

With as particular an Eye to his own particular Emolument he did indeed make his first Address to the Assembly.—But then all he said was in popular Language.—He did not so much as name the *Proprietary*: And his Hints were such as could not be misunderstood, that in case they would pay him well, he would serve them well.

The Assembly, on the other Hand, had Sense enough to discern, that this was all which could be required of a Man who had a Family to maintain with some Degree of Splendor, and who was no richer than Plantation Governors usually are: In short, they believed in him, were liberal to him, and the Returns he annually made them were suitable to the Confidence they placed in him.—So that the proper Operation of one Master-Spring kept the whole Machine of Government, for a considerable Period of Time, in a more consistent Motion than it had ever known before.

Of all political Cements reciprocal Interest is the strongest: And the Subjects Money is never so well disposed of, as in the Maintenance of Order and Tranquility, and the Purchase of good Laws; for which Felicities *Keith's* Administration was deservedly memorable.

#### Boston List of Infringements (1772)<sup>2</sup>

*As resistance to the enforcement Townshend Act and the collection of its taxes grew, Massachusetts Governor Thomas Hutchinson, on the basis of royal instructions, suspended the General Assembly. In the summer of 1772, he announced that the assembly would no longer control his salary and that the colonial government would now be funded out of the parliamentary tax. Under pressure of the tax crisis, the English authorities had finally taken Thomas Pownall's advice and made the governor financially independent of the colonial legislature. Under the guidance of Samuel Adams a public meeting in Boston adopted a series of resolutions denouncing the government, a protest that was later endorsed by towns throughout the state. Within two years, Parliament suspended the Massachusetts charter and replaced Hutchinson with a military governor.*

*The colonial legislators thought the power of the purse was essential to the maintenance of constitutional government. Is this still critical to the constitutional equilibrium outside the colonial context? President Richard Nixon argued for an independent presidential authority to impound, or refuse to spend, funds that Congress had appropriated for projects that the president thought were unwise or wasteful. State courts have argued that their effectiveness in performing their own constitutional duties requires their "fiscal independence" from state legislatures. Is the legislature's exclusive power of the purse a relic of a time of monarchy and empire, inappropriate to a republican government?*

We cannot help thinking, that an enumeration of some of the most open infringements of our rights, will by every candid person be judged sufficient to justify whatever measures have been already

<sup>1</sup> Lieutenant Governor of Pennsylvania, 1717-1726.

<sup>2</sup> Excerpted from *The Votes and Proceedings of the Freeholders and other Inhabitants of the Town of Boston* (Boston: Edes and Gill, 1772), 13-20.

taken, or may be thought proper to be taken, in order to obtain a redress of the grievances under which we labor. . . .

. . . .  
 3dly. A number of new officers, unknown in the charter of this province, have been appointed to superintend this revenue [deriving from the Townshend Act]; whereas by our charter, the great and General Court or Assembly of this province, has the sole right of appointing all civil officers, excepting only such officers, the election and constitution of whom is, in said charter, expressly excepted. . . .

. . . .  
 6thly. The revenue arising from this tax unconstitutionally laid, and committed to the management of persons arbitrarily appointed and supported by an armed force quartered in a free city has been in part applied to the most destructive purposes. It is absolutely necessary in a mixed government, like that of this province, that a due proportion or balance of power should be established among the several branches of the legislative. Our ancestors received from King William and Queen Mary a charter, by which it was understood by both parties in the contract, that such a proportion or balance was fixed; and therefore every thing which renders any one branch of the legislative more independent of the other two than it was originally designed, is an alteration of the constitution as settled by the charter; and as it has been, until the establishment of this revenue, the constant practice of the general assembly to provide for the support of government, so it is an essential part of our constitution, as it is a necessary means of preserving an equilibrium, without which we cannot continue a free state.

In particular it has always been held, that the dependence of the governor of this province upon the general assembly for his support, was necessary for the preservation of this equilibrium; nevertheless his Majesty has been pleased to apply fifteen hundred pounds sterling annually, out of the American revenue, for the support of the governor of this province independent of the assembly; whereby the ancient connection between him and this people is weakened, the confidence in the governor lessened, the equilibrium destroyed, and the constitution essentially altered.

And we look upon it highly probable, from the best intelligence we have been able to obtain, that not only our governor and lieutenant governor, but the judges of the Superior Court of Judicature, as also the king's attorney and solicitor general are to receive their support from this grievous tribute. This will, if accomplished, complete our slavery: For if taxes are to be raised from us by the Parliament of Great Britain without our consent, and the men on whose opinions and decisions our properties, liberties, and lives, in a great measure depend, receive their support from the revenues arising from these taxes, we cannot, when we think on the depravity of mankind, avoid looking with horror on the danger to which we are exposed!

#### IV. JUDICIAL POWER

All sides recognized that it was possible to have a political debate about whether Parliament had reached too far and the British constitution had been violated. What was not recognized in Britain in the mid-eighteenth century was the possibility that there were legal limits on Parliament that could be judicially enforced. That is, there was no judicial review in Britain. There were things that Parliament *should* not do, but there was nothing that Parliament *could* not do.

The colonists challenged that basic assumption. Although the suggestion that the colonial and British courts could refuse to enforce an act of Parliament that they thought violated the Constitution was not universally accepted even in the colonies, it was at least taken seriously. These early suggestions, perhaps implausible as interpretations of the eighteenth century British constitutional system, were highly influential when the former colonists set about creating their own constitutions not so many years later. If judicial review is one of the great innovations of American constitutionalism, it was an innovation already being contemplated more than a decade before the Revolution.

Some form of judicial review would have felt natural to the colonists in part because they had already experienced it. The colonial charters routinely included provisions that guaranteed to the settlers the liberties that they would have enjoyed in England and that prohibited the colonial assembly from making policies that were contrary to the laws of England. These were backed up by charter provisions that allowed appeals in legal cases from colonial courts to the Privy Council. A precursor to the modern British cabinet, the Privy Council was a group of advisors to the monarch who also served as a kind of supreme court. More important, colonial assemblies were required to send a copy of their laws for the Privy Council for its approval. The Council was primarily concerned to insure the supremacy and reasonable uniformity of English law across the empire and to prevent the colonies from making policies that would undercut the policies being pursued by England. In addition to looking out for English interests, however, the Council was also active in blocking the colonial assemblies from violating traditional English liberties. Criminalizing “Devilish practices,” for example, was deemed too vague to satisfy the requirements of due process. The Council agreed with Quaker complaints that Connecticut’s requirement that they be taxed to support Puritan ministers was a violation of the charter’s specific protection of liberty of conscience, and it slapped down assemblies that tried to impose outcomes in legal cases or to issue bills of attainder that imposed criminal punishments on individuals without trials.<sup>1</sup>

That is not to say that the colonial governments welcomed such higher review. The assemblies were creative in finding ways to avoid or minimize the effect of English oversight. In the 1670s, the Massachusetts General Assembly had boldly informed the king, “the laws of England are bounded within the four seas, and do not reach America,” though the assembly was willing (at least under the threat that their charter might be revoked) to replicate those laws if the king wished them to do so.<sup>2</sup> Earlier in that century, they had more pragmatically simply refused to print a statute book on the theory that the Privy Council could not strike down laws it could not see. Colonial legislatures similarly tried sending the Council mere summaries of the laws rather than exact copies, laws written in code and abbreviations, and statute books that were oddly organized or incomplete. Temporary laws and laws that had their effect before word could get back from England that they had been disallowed were also popular. Privy Council review raised all the same issues of the autonomy of the local legislatures that finally came to head in the decade leading up to the Revolution, but the practice familiarized the colonies with the idea that legislatures had legally limited authority and were void when they violated a more fundamental law.<sup>3</sup>

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<sup>1</sup> Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (New York: Columbia University Press, 1915), 141-152.

<sup>2</sup> *Records of the Governor and Company of the Massachusetts Bay in New England*, ed. Nathaniel B. Shurtleff, vol. 5 (Boston: W. White, 1854), 200.

<sup>3</sup> See also Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005).

The colonists also reached back into English legal history to bolster their view that Parliament was hedged in by legal boundaries. Pride of place was given to the 1610 judicial opinion by Lord Edward Coke in *Dr. Bonham's Case*. One of the great innovators of English law, Coke in that case argued, "it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."<sup>1</sup> Coke's claim was controversial in his own day, and it is not clear how far even he thought it extended. In any case, by the end of the seventeenth century – after the Glorious Revolution in which Parliament had won its supremacy over the king – there was no notion of constitutional review of Parliament. At least from the perspective of the Chief Justice John Holt, sitting on the King's Bench in 1702, "an act of Parliament can do no wrong, though it may do several things that look pretty odd," Coke's "very reasonable" saying notwithstanding.<sup>2</sup> William Blackstone (see below) captured the consensus view in England at the time of the American Revolution: the authority of Parliament was absolute and could not be questioned in any court.

In searching about for the means to stop what they saw as parliamentary abuses in America, the colonists took the first tentative steps toward inventing the power of judicial review. The full realization of that effort would have to await independence, when all government could be put under binding legal charters that could not be revoked or set aside at the whim of a foreign sovereign. But in the colonial era, they appealed to Lord Coke and *Bonham's Case* as an authority within the British constitutional system for legal limits on legislative power, and they appealed to colonial judges to refuse to enforce laws that were inconsistent with the constitution. Coke at least hinted that a "acts of parliament" could be judged "void" in a court of law, and that was a powerful idea about what the role of a judge in a constitutional system might be.

In *Dr. Bonham's Case*, Lord Coke quotes a medieval predecessor, Sir William Herle, as saying, "some statutes are made against law and right, which those who made them perceiving, would not have put them into execution," in support of Coke's contention that such statutes are void.<sup>3</sup> How far would this argument extend? Could it form the foundation of modern judicial review?

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William Blackstone, *Commentaries on the Laws of England* (1765)<sup>4</sup>

*William Blackstone was a professor of law at Oxford University, and his lectures there became the basis of the Commentaries. The Commentaries aimed to synthesize the English law, and though it also attracted some critics it was quickly taken as authoritative throughout the British Empire. It was the cornerstone of American understandings of the British common law that they had inherited and incorporated into their own legal and constitutional system, but his understanding of legislative activity was not so easily accepted in America.*

*St. George Tucker was variously a state and federal judge in Virginia after independence, a professor of law at the College of William and Mary, and a states' rights Jeffersonian. He published a popular American edition of Blackstone's commentaries in 1803 that included an extended commentary on the U.S. Constitution by Tucker, along with critical notes on Blackstone. Blackstone argued that there were no legal limits on the power of the English Parliament of the late eighteenth century. Parliamentary power was absolute. The colonists struggled with Blackstone's claim during the revolutionary era, but after the Revolution they were free to take a different path. In his footnote to Blackstone, St. George*

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<sup>1</sup> *Dr. Bonham's Case*, 8 Co. Rep. 107a, 118a (1610).

<sup>2</sup> *City of London v. Wood*, 12 Mod. 669, 688 (1702).

<sup>3</sup> *Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a (1610).

<sup>4</sup> Excerpts taken from *Blackstone's Commentaries*, ed. St. George Tucker (Philadelphia: William Young Birch and Abraham Small, 1803), 1:108-110, 2:160-162.

*Tucker argues that the American constitutions can be distinguished from the British by being “acts of the people, and not of government.” Is this difference enough to support judicial review?*

. . . I know it is generally laid down more largely, that acts of parliament contrary to reason are void.<sup>1</sup> But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* [to this extent] disregard it. . . . [T]here is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

. . . .  
 . . . [O]ur more distant plantations [colonies] in America, and elsewhere, are also in some respect subject to English laws. . . . But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries . . . . The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties) . . . are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modeled and reformed by the general superintending power of the legislature in the mother country. . . .

. . . .  
 The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. . . . It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must, in all governments,<sup>2</sup> reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown. . . . It can alter the established religion of the land . . . . It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and,

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<sup>1</sup> One would imagine that it could not be deemed any great stretch of the freedom of opinion, to pronounce that any legislative act which prescribes a thing contrary to reason, is void; yet the caution of the learned commentator [Blackstone] on this occasion is certainly conformable to the principles of the British government; in which, it seems to be agreed by all their Jurists, the authority of parliament is absolute and uncontrollable; insomuch that it may alter or change the constitution itself. But, in America, the constitutions, both of the individual states, and of the federal government, being the acts of the people, and not of the government . . . the legislature can possess, no power, or obligation over the other branches of government, in any case, where the principles of the Constitution, may be in any degree infringed by an acquiescence under the authority of the legislative department . . . . [Footnote by Tucker]

<sup>2</sup> In the United States this absolute power is not delegated to the government: it remains with the people, whose safety requires that the government which they have themselves established, should be limited. “The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” Amendments to the C. U.S. Art. 12 [now the 10<sup>th</sup> Amendment]. [Footnote by Tucker]

therefore, some have not scrupled to call it's power, by a figure rather too bold, the omnipotence of parliament.<sup>1</sup> True it is, that what the parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge. . . .

It must be owned that Mr. Locke, and other theoretical writers, have held that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for, when such trust is abused, it is thereby forfeited, and devolves to those who gave it."<sup>2</sup> But, however, just this conclusion may be, in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by the people . . . . So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

### Massachusetts Assembly Memorial (1764)<sup>3</sup>

*At the direction of a public meeting in Boston in 1764, Samuel Adams drafted instructions to the Boston delegates to the Massachusetts House of Representatives calling on them to work for the immediate repeal of the Sugar Act. The instructions expressed particular concern with the precedent that the Sugar Act was setting, "if our trade may be taxed, why not our lands? . . . This we apprehend annihilates our charter right to govern and tax ourselves."<sup>4</sup> James Otis was one of those delegates, and he in turn drafted the Memorial, which was passed by the House and sent to London. The Memorial includes the development of a theory of judicial review that did not depend on the existence of a written constitution.*

*James Otis had been the advocate general for the vice-admiralty court in the Massachusetts colony, whose jurisdiction included the enforcement of the navigation acts that regulated colonial overseas trade. His father, the speaker of the house, had expected to be appointed to the colonial superior court, but when a vacancy arose in 1760 the governor passed him by. Lieutenant Governor Thomas Hutchinson was appointed chief judge instead. The younger Otis broke completely with the administration over use of writs of assistance, which authorized customs agents looking for smugglers to conduct forcible searches on their own initiative of private property throughout the Boston area. In 1761, Otis appealed to the Superior Court to refuse to issue such writs on the grounds that they were unconstitutional. The argument of Otis stood out for its reference to Dr. Bonham's Case as an English precedent for a power of judicial review, but Hutchinson rejected the idea that the court had such a power. The reference in the writs of assistance case was brief, but he extended the argument in the Memorial and later pamphlets.*

<sup>1</sup> Since, according to the fundamental principles of both the Federal and State Constitution, and Government, the supreme power . . . resides in the people, it follows that it is the right of the people to make laws. But as the exercise of that Right by the people at large would be equally inconvenient and impracticable, the constitution of the State has vested that power in the General Assembly of the Commonwealth . . . . It is from these express provisions both in the State, and Federal Constitutions, and not from metaphysical deduction, that the State, and Federal Legislatures derive the power of making Laws. . . . [Footnote by Tucker]

<sup>2</sup> This principle is expressly recognized in our government. Amendments to C. U.S. Art. 11, 12. See Declaration of Independence, and Virginia Bill of Rights, Art. 3. [Footnote by Tucker]

<sup>3</sup> Excerpted taken from the appendix to James Otis, *The Rights of the British Colonies Asserted and Proved* (London: J. Almon, 1764), 106-113.

<sup>4</sup> John Adams, in *The Works of John Adams*, ed. Charles Francis Adams, vol. 10 (Boston: Little, Brown and Company, 1856), 294.

Thomas Hutchinson later recounted, “In the year 1761 application was made by the officers of the custom to the Superior Court, of which I was then Chief Justice, for writs of assistance. Great opposition was made by some who professed themselves friends to liberty, and by others who favored illicit trade, and the court seemed inclined to refuse to grant them; but I prevailed with my brethren to continue the cause until the next term, and in the mean time I wrote to England, and procured a copy of the writ, and sufficient evidence of the practice of the Exchequer there, and the writs have ever since been granted here. . . . The Stamp duty, although I always feared the consequence of it would be bad, both to the nation & colonies, and privately & publicly declared my thoughts upon it, yet after the passing the act I could not avoid considering it legally right, the Parliament being beyond dispute the supreme legislature of the British dominions; but our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is *ipso facto* void. This, taken in the latitude the people are often disposed to take it, must be fatal to all Government & it seems to have determined great part of the colonies to oppose the execution of the act with force & to show their resentment against all in authority who will not join with them.”<sup>1</sup> Why did both Blackstone and Thomas Hutchinson think that the doctrine that “an act of Parliament against Magna Charta or the peculiar right of Englishmen is *ipso facto* void” would be “fatal to all government”? What are the dangers of such a doctrine? Within the British constitutional system, who would have the right to say that an act of Parliament was unconstitutional?

....

The absolute rights of Englishmen, as frequently declared in Parliament, from Magna Charta to this time, are the rights of *personal security*, *personal liberty*, and of *private property*.

....

It is presumed, that upon these principles, the colonists have been by their several charters declared natural subjects, and entrusted with the power of making *their own local laws*, not repugnant to the laws of England, and with *the power of taxing themselves*.

This legislative power is subject by the same charter to the King’s negative, as in Ireland. This effectually secures the *dependence* of the colonies on Great-Britain. . . .

....

. . . . The common law is received and practiced upon here, and in the rest of the colonies; and all ancient and modern acts of Parliament that can be considered as part of, or in amendment of the common law, together with all such acts of Parliament as expressly name the plantations; so that the power of the British Parliament is held as sacred and as uncontrollable in the colonies as in England. The question is not upon the general power or right of the Parliament, but whether right it is not circumscribed within some equitable and reasonable bounds? It is hoped it will not be considered a new doctrine, that even the authority of the Parliament of *Great-Britain* is circumscribed by certain bounds, which if exceeded, their acts become those of mere *power* without *right*, and consequently void. The judges of England have declared in favor of these sentiments when they expressly declare, that *acts of Parliament against natural equity are void*. That *acts against the fundamental principles of the British constitution are void*.<sup>2</sup> This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion. It is contrary to reason that the supreme power should have right to alter the constitution. This would imply that those who are entrusted with sovereignty by the people have a right to do as they please. In other words, that those who are invested with power to protect the people, and support their rights and liberties, have a right to make slaves of them. This is not very remote from a flat contradiction. . . .

It is now near three hundred years since the continent of North America was first discovered, and that by British subjects. Ten generations have passed away through infinite toils and bloody conflicts in

<sup>1</sup> Quoted in Horace Gray, “Appendix,” in Josiah Quincy, ed., *Reports of Cases* (Boston: Little, Brown and Co., 1865), 415, 441.

<sup>2</sup> Here Otis inserted a long footnote citing *Dr. Bonham’s Case* and other authorities.

settling this country. None of those ever dreamed but that they were entitled at least to equal privileges with those of the same rank born within the realm.

## IV. OTHER ISSUES

The British constitution was based on government practice and the principles that could be derived from that practice. Consequently, precedents assumed particular importance. The resolution of constitutional disputes turned in no small part on whether the action of the government that was being questioned was similar to other unchallenged actions that the government had taken in the past. Without either a written constitution to specify what the limits of government power were or a judicial process capable of declaring acts government actions void, the colonists were obliged to demonstrate politically that they regarded some government action as innovative and illegitimate. Symbolic actions ranging from resolutions passed by legislatures and town meetings protesting a law, to the publication of pamphlets arguing against a law, to the organization of vandalizing mobs (such as the Sons of Liberty who destroyed the taxed tea in the “Boston Tea Party”) were essential tools to keeping alive colonial claims that parliamentary acts were unconstitutional. The burden was on political leaders to mobilize support for such collective action. One question that those leaders had to ask themselves, and had to answer for their supporters, was whether the effort of mobilizing such protests was worth it in any particular case.

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John Dickinson, *Letters from a Farmer in Pennsylvania* (1768)<sup>1</sup>

*John Dickinson was a philosophically attuned lawyer and politician in Philadelphia. Though a defender of the proprietary government of Pennsylvania against critics such as Benjamin Franklin, he was an early and influential critic of parliamentary taxation of the colonies. He was slow to embrace the call for American independence, but he became a key drafter of the Articles of Confederation. These newspaper articles, published pseudonymously as “Letters from a Farmer” were particularly concerned with the Townshend Act. In this letter, Dickinson addresses the issue of whether the taxes were too small to justify the level of protest that were building in the colonies. When can constitutional violations be overlooked? What are the consequences of accepting a constitutional violation? Should we be as concerned about constitutionally questionable legislation that is of little or no practical consequence? Is Dickinson right to think that how power is “checked and controlled” is more important than how it is actually “exercised”?*

## Letter VII

....

... [I]n truth, all men are subject to frailties of nature; and therefore whatever regard we entertain for *persons* of those who govern us, we should always remember that their conduct as *rulers*, may be influenced by human infirmities.

... Where these laws are to bind *themselves*, it may be expected, that the House of Commons will very carefully consider them: But when they are making laws that are not designed to bind *themselves*, we cannot imagine that their deliberations will be as cautious and scrupulous, as in their own case.

....

Some persons may think this act of no consequence, because the duties are so *small*. A fatal error. *That* is the very circumstance most alarming to me. For I am convinced, that the authors of this law would never have obtained an act to raise so trifling a sum as it must do, had they not intended by *it* to establish a *precedent* for future use. To console ourselves with the *smallness* of the duties, is to walk deliberately into the snare that is set for us, praising the *neatness* of the workmanship. Suppose the duties imposed by the late act could be paid by these distressed colonies with the utmost ease, and that the

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<sup>1</sup> Excerpt taken from John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* (Philadelphia: David Hall and William Sellers, 1768), 33-38

purposes to which they are to be applied, were the most reasonable and equitable that can be conceived . . . yet even in such a supposed case, these colonies ought to regard the act with abhorrence. For WHO ARE A FREE PEOPLE? Not *those*, over whom government is reasonably and equitably exercised, but those, who live under a government so *constitutionally checked and controlled*, that proper provision is made against its being otherwise exercised.

The late act is founded on the destruction of this constitutional security. If the Parliament has a right to lay a duty of four shillings and eight-pence on a hundred weight of glass, or a ream of paper, they have a right to lay a duty of any other sum on either. . . . In short, if they have a right *to* levy a tax of *one penny* upon us, they have a right to levy a *million* upon us: For where does their right stop? . . .

## The Declaration of Independence (1776)

*In 1773, with colonial assemblies in Massachusetts and New York being suspended by imperial officials, Virginia called on extralegal committees of correspondence to form in the various colonies to coordinate the protests against Britain. In 1774, representatives of those committees met in a Continental Congress in Philadelphia. In May 1776, a convention in Virginia instructed the colony's delegates to propose independence from Britain and seek an alliance with the other colonies to secure that independence. The Declaration, principally drafted by Thomas Jefferson, was one of a string of documents that the Congress produced arguing the American case against British transgressions on the rights of the colonies, and it was one of numerous resolutions adopted by towns and assemblies across the colonies explaining their reasons for declaring independence. Thus, after the famous opening paragraphs appealing to natural law and the right of revolution, there is a long list of particular abuses, most of which the colonists regarded as not merely oppressive but as unconstitutional. Notably, the Declaration broke from both Parliament and the King, with the British monarch emerging as a relatively new object of American constitutional and political criticism.*

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the consent of our legislatures.

He has affected to render the Military independent of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us, in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighboring Province, establishing therein an arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these

usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

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### Suggested Readings:

- Bailyn, Bernard. *The Ideological Origins of the American Republic* (Cambridge: Harvard University Press, 1967).
- Bilder, Mary Sarah. *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004).
- Greene, Jack P. *Peripheries and Center: Constitutional Development in the Extended Politics of British Empire and the United States, 1607-1788* (Athens: University of Georgia Press, 1986).
- Hamburger, Philip. *Law and Judicial Duty* (Cambridge: Harvard University Press, 2008).
- Hulsebosch, Daniel J. *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005).
- Kammen, Michael G. *Deputies and Libertyes: The Origins of Representative Government in Colonial America* (New York: Knopf, 1969).
- Lutz, Donald S. *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).
- Maier, Pauline. *American Scripture: Making the Declaration of Independence* (New York: Vintage, 1997).
- McIlwain, Charles Howard. *The American Revolution: A Constitutional Interpretation* (New York: Macmillan, 1923).
- McLaughlin, Andrew C. *The Foundations of American Constitutionalism* (New York: New York University Press, 1932).
- Morgan, Edmund. *The Birth of the Republic, 1763-89* (Chicago: University of Chicago Press, 1956).
- Pocock, J.G.A., ed. *Three British Revolutions: 1641, 1688, 1776* (Princeton: Princeton University Press, 1980).
- Reid, Thomas Phillip. *The Constitutional History of the American Revolution*, four volumes (Madison: University of Wisconsin Press, 1986-1993).
- Russell, Elmer Beecher. *The Review of American Colonial Legislation by the King in Council* (New York: Columbia University Press, 1915).
- Smith, Joseph Henry. *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950).
- Stoner, James R. *The Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992).
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Table 2-1: Major Issues and Statements of the Colonial Era

Major Political Issues	Major Constitutional Issues
French-Indian War	Closer union of colonies
Closer union of colonies	Parliamentary taxation power in colonies
Sugar Act of 1764	Parliamentary trade regulation power in colonies
Stamp Act of 1765	Power of the purse in colonial government
Quartering Act of 1765	Appointment power in colonial government
Townshend Revenue Act of 1767	Privy Council view of colonial laws
Boston Port Act of 1774	Judicial review of Parliament
Massachusetts Government Act of 1774	Martial law
Independence of colonies	Independence of colonies

## Box 2-1: A Partial Cast of Characters of the Colonial Era

Thomas Hutchinson	Loyalist, member and speaker of the colonial Massachusetts legislature (1737-1740, 1742-1749), chief justice of Massachusetts colony (1760-1769), last civilian governor of Massachusetts colony (1771-1774), author of multivolume history of the Massachusetts colony, attempted to reconcile English and colonial forces during the tax act crises leading to the Revolution
Samuel Adams	Anti-Federalist, newspaper writer critical of Parliament, popular leader of protests against parliamentary taxes in the colonies, member of the colonial Massachusetts assembly, member of the Continental Congress, governor of Massachusetts (1793-1797), opposed ratification of the U.S. Constitution
John Adams	Federalist, author of important works on parliamentary authority over the colonies and constitutional government in the new republic, influential member of the Continental Congress, first vice president under Federalist George Washington (1789-1797), last Federalist president of the United States (1797-1801), only president to be defeated for reelection until John Quincy Adams (1828)
James Otis	Patriot, lawyer who argued against the legality of general writs of assistance before Massachusetts colonial court, wrote prominent pamphlets on limits of parliamentary authority over colonies, early proponent of judicial review