Declarations of Rights

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We do need history... we need it for life and action, not as a conve-
nient way to avoid life and action.
—Nietzsche, The Use and Abuse of History

What does it mean for a sovereign people to live under a written constitu-
tion of rights? This is the general question with which I shall be concerned in
the following pages. Let me begin by saying something, first, about the sig-
nificance of the form in which I have put this question, and, secondly, about
the particular context within which I shall want to pursue it.

During the last several decades, an extended debate has taken place in the
United States on the question of how to understand the meaning of a written
constitution, and particularly a written constitution of rights. The amount of
scholarly attention that has been devoted to the issue has been enormous and
the literature that has been produced has been rich and in some ways quite
varied. And yet in an important respect, the discussion has proceeded within
a remarkably narrow frame: in general, the question of how to understand a
written constitution of rights has been conceived as essentially a question of
interpretation—of how to read a text, or how to read a legal text or how to
read a constitutional text. Conceptually prior, however, to the question of how
we should interpret a written constitution of rights (or what it would mean to
interpret it, or even whether what we should be doing is interpreting it) must,
of course, be the question of what such a constitution is; and that ques-
tion—of how to regard, as a matter of democratic theory, the constitution
under which we live—cannot itself be a purely interpretive one.2 Interpretive
theories may simply rest on the assumption that we have already satisfactorily answered the question of what a written constitution of rights is, and that the answer is such that the remaining questions are all questions about interpretation. The discussion that follows, however, proceeds from the belief that we have not satisfactorily answered the question of how we ought to understand such a constitution; and in the next section, I shall describe the traditional answer and indicate why it is neither obvious nor satisfactory.

The general project of this essay, then, is to re-examine the idea of a written constitution of rights. And in posing the question in the form that I have—what does it mean for a sovereign people to live under a written constitution of rights?—my point is to fix attention on the constitutionalist nature of the problem. Two fundamental principles of modern constitutionalism are that ultimate political authority lies with “the people” and that governmental power is limited. But a central issue for modern constitutionalist thought is of the relationship between these principles. If the power of the state rests on the authority of the people, on what basis can governmental power be limited, and what is the nature of that limitation? What is the relationship between the sovereign people, on whose authority the state rests, and the government, whose power is limited? It is from the standpoint of these constitutionalist questions that I shall want to explore the notion of a written constitution of rights. If a written constitution of rights limits governmental power, on what basis does it do so, and what is the nature of that limitation? How shall we understand the relationship between a written constitution of rights, the sovereign people and institutions of government? And what is the significance, in a constitutional charter founded on the authority of “the people,” of declaring rights?

I shall want to explore these questions by returning to the moment in which written constitutional charters grounded on the authority of the people and containing declarations of rights first made their appearance—in the American constitutional founding. My purpose in returning to this moment and to these charters is not, however, to rest an argument on the authority of history or on the intentions of the constitutional framers—and admittedly, I shall be focusing on only certain strands of thought and certain aspects of these constitutions. Rather, I shall want to return to the American founding of rights could, no doubt, be represented as a theory of interpretation. But the effect of framing the issue as one of interpretation has, in fact, been a tendency to neglect, at least as an object of explicit consideration, the fundamental question of the idea of a written constitution of rights, and of what it means to live under such a constitution.

3. I shall use the term “American founding” in the singular to refer, not to a single moment in time, but to the process of founding the American constitutional orders, including the federal constitutional order brought into being by the charter of 1787. I shall also, for the purpose of simplicity, use the term “people” in the singular (as the Declaration of Rights, for example, does), even though the state charters were obviously founded on the authority of thirteen different “peoples.” There is nothing that hangs on these terms and we might just as well refer to the “American foundings” and “peoples.”
because, as I shall suggest, the American founding raised in a particularly poignant way the fundamental constitutionalist problem of the relationship between the sovereign people and institutions of government. And as I shall suggest, the revolutionary American charters and their declarations of rights, which grew (in part) out of an appreciation of this very immediate problem, embody a set of important constitutionalist ideas about the relationship between “the people” and institutions of government, and about the role of a written constitution of rights in a state founded on the authority of the people—ideas that deserve to be taken far more seriously than they have been in contemporary constitutional thought.

I shall focus on these revolutionary constitutional charters specifically against the background of two general questions or sets of issues that, I shall argue, came together in the American founding. The first of these, which was raised directly by the act of founding itself, was the question of what it means to establish a state on the authority of the sovereign people. The declaration of independence from Great Britain was quite explicitly made in the name of “the people,” and both the revolutionary state constitutional charters and the federal charter of 1787 were explicitly and self-consciously founded on the authority of “the sovereign people.” As such, the founding of new constitutional orders presented an immediate and fundamental question. For on the one hand, the act of founding was itself an expression of the sovereignty and the power of the people to “institute new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.” And yet on the other hand, the object of the founding was to create particular institutions that would themselves represent the people. The question thus raised was how to represent a people that was in some sense superior to the institutions that were to be created.

The question of how to represent “the sovereign” people, and of the relationship between “the people,” and particular institutions of government, converged, as I shall argue, with a second set of issues that had been at the heart of the conflict between the colonies and Britain and that concerned the nature of political authority, and the relationship between representation and sovereignty. These issues require a far more lengthy treatment and they are the subject of the extended historical discussion of Section II. As I shall discuss there, for the American colonists, the question of political authority had always been a complex one and the domains of political authority multiple and overlapping. And from the point of view of the colonists, the threat to political freedom came precisely in the claim of the center to complete authority over the colonies, and particularly—in the years preceding the American revolution—from the claim of Parliament to perfect sovereignty over the whole of the empire. For the colonists, then, the events of the years preceding the American revolution presented in sharp form a conflict between just represen-

tation and political sovereignty; and colonial advocates during these years consistently denied the claims of Parliamentary sovereignty over the colonies precisely on the grounds that such sovereignty violated the colonial right to proper representation. The eventual response to the threat of political domination by Parliament was, of course, the declaring of independence; but the founding of independent states did not eliminate the general danger that the former colonists knew only too well: the danger that a particular institution, although not in fact fully representative, would claim complete sovereign power. This problem thus gave particular force, and shape, to the question presented by the act of founding a state on the authority of the sovereign people. In short, the issue presented was how to create institutions that would represent the sovereign people without themselves assuming a kind of sovereignty.

I shall want to examine the revolutionary constitutional charters, and particularly their declarations of rights, specifically as responses to these questions and to these sets of issues. And I shall suggest that, understood in this light, these charters can be seen to represent an important conception of what a written constitution of rights is, and of the place of such a constitution in a state founded on the authority of the sovereign people. As I shall emphasize, the ideas embodied within these charters were hardly fully developed or theorized—they were as much as anything instincts and tendencies implicit in practice and early movements of thought—and they are certainly in need of elaboration and extension. The essential issue for us, however, is not whether they had a well-developed constitutional theory, but whether there is something of importance in their constitutional ideas, instincts and practices that is worth pursuing. I shall suggest that, indeed, there is; that in these early constitutional ideas, practices and instincts lies a significant, but largely neglected, contribution to constitutionalist thought, and an important foundation for thinking, or re-thinking, the idea of a written constitution of rights.

I

The dominant American understanding of what it means to live under a written constitution has its official roots in John Marshall's opinion for the Supreme Court in *Marbury v Madison*. *Marbury* is, of course, commonly read for its holding that courts have the power to review the constitutionality of acts of government. But beneath *Marbury*'s specific arguments for the power of judicial review lies a more fundamental claim about the nature of the Constitution itself. On the *Marbury* view, there are two essential characteristics of the Constitution. The first is that the Constitution is *supreme* because it represents the fundamental "will" of "the people":

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles,
therefore, so established, are deemed fundamental. And as the authority
from which they proceed is supreme, and can seldom act, they are
designed to be permanent.

This original and supreme will organizes the government, and assigns
to different departments their respective powers. It may either stop here,
or establish certain limits not to be transcended by those departments.
The government of the United States is of the latter description.5

The second characteristic of the Constitution, according to Marbury, is
that this fundamental will of the people is an enacted law.

Certainly all those who have framed written constitutions contem-
plate them as forming the fundamental and paramount law of the nation,
and, consequently, the theory of every such government must be, that an
act of the legislature, repugnant to the constitution, is void.6

The power of the judiciary to determine ultimately what the Constitution
means and to deny effect to governmental actions that violate the meaning of
the Constitution simply follows, on the Marbury account, from this idea that
the Constitution is a supreme law.

It is emphatically the province and duty of the judicial department to
say what the law is. Those who apply the rule to particular cases, must
of necessity expound and interpret that rule. . . .
So if a law be in opposition to the constitution . . . the court must
determine which of these conflicting rules governs the case.7

Underlying Marbury's particular arguments for judicial review is thus a
very definite understanding of the relationship between the sovereign people
and a written constitution, and a very definite conception of what a written
constitution is. On this account, the sovereign people expresses its sovereignty
through its "fundamental will" and that will is the Constitution as a law. It
is because the Constitution is the will of the sovereign people embodied as law

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5. Marbury v Madison, 5 US (1 Cranch) 137, 176 (1803).
7. Id at 177-78. Crucial portions of Marshall's argument in Marbury appeared earlier
in Hamilton's Federalist 78:

The interpretation of the laws is the proper and peculiar province of the courts. A
constitution is, in fact, and must be, regarded by the judges as a fundamental law.
It must therefore belong to them to ascertain its meaning.
Max Beloff, ed, The Federalist or, The New Constitution 395, 398 (Basil Blackwell, 2d ed 1987). The same argument was made by James Wilson in his Lectures on Law,
delivered in 1790-91 and published in 1804. Robert McCloskey, ed, 1 The Works of
James Wilson 329-331 (Harvard, 1967). While Marshall's arguments had been made earlier
by others, part of the significance of Marbury was how broadly the power of judicial
review was made to extend. For the dispute in that case hardly involved what could be
said to have been an obvious or gross violation of the Constitution, nor did it involve a
legislative intrusion into an area traditionally within the purview of courts.
that debates about the meaning of the Constitution (in contrast to debates about amending the Constitution) must ultimately be about interpretation—about discovering the meaning of this will. And indeed, because this is a claim about the nature of the Constitution, it is not just an argument about what it means for judges to decide constitutional questions, but about what it must be for anyone properly to deliberate on the meaning of a written constitution. We are not all judges, but when we engage in constitutional debate, what we are doing (if we are doing it properly) is, on this understanding, interpreting the meaning of this fundamental will embodied in the Constitution. In fact, Marshall asserts, it is the very sine qua non of a written constitution that its meaning can, at bottom, be known as a matter of interpretation.

This theory is essentially attached to a written constitution. . . .

[The alternative] reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution. 8

Although Marbury was specifically concerned with a provision of Article III, this conception of the Constitution as a supreme law which embodies the fundamental will of the people and whose meaning is given ultimately as a matter of interpretation has become the basic model for understanding written constitutions in general, and the basic model for thinking about constitutional rights. Thus, constitutional rights are also typically understood as fundamental laws whose authority derives from their having been enacted by “the people,” and whose meaning is to be determined as a matter of interpretation. The question of just how to interpret a written constitution has been the subject of great dispute, but most of the major positions in the contemporary American debate over constitutional meaning have adopted some form of the Marbury view of constitutions. This is obviously true of so-called “textualism” (of which there are, at least in its pure form, few adherents), which holds that the meaning of a constitution is given by the plain words or the structure of the document, and “strict constructionism,” which holds that the meaning of a constitution is given by the narrow intentions of the “framers.” But the primary alternative, what might be called “broad interpretivism,”—of which there are, as with strict constructivism and textualism, quite a number of different versions—also holds onto the basic premise of Marbury that constitutional judgments are fundamentally questions of interpretation. Broad interpretivists often rely on something like the Dworkinian distinction between “concepts” and “conceptions” 9 and insist that proper interpretation of the

9. Ronald Dworkin’s first statement of the difference between concepts and conceptions was in Taking Rights Seriously:

Suppose a group believes in common that acts may suffer from a special moral defect which they call unfairness, and which consists in a wrongful division of
Constitution involves applying the framers' general concepts, rather than their more narrow conceptions. But ultimately, broad interpretivists are interpretivists, and the point of broad interpretivism is to show how the particular meaning of the Constitution, as—in those memorable words of high school civics texts—a “living document,” can change with the times, while still being an interpretation of the “original and supreme will” of the people enacted as a fundamental law.¹⁰

benefits and burdens, or a wrongful attribution of praise or blame. Suppose also that they agree on a great number of standard cases of unfairness. . . . If so, then members of this community who give instructions or set standards in the name of fairness may be doing two different things. First they may be appealing to the concept of fairness . . . ; in this case they charge those whom they instruct with the responsibility of developing and applying their own conception of fairness as controversial cases arise . . . . On the other hand, the members may be laying down a particular conception of fairness. . . . Once this distinction is made it seems obvious that we must take what I have been calling ‘vague’ constitutional clauses as representing appeals to the concepts they employ. . . . The Supreme Court may soon decide, for example, whether capital punishment is ‘cruel’ within the meaning of the constitutional clause that prohibits ‘cruel and unusual punishment.’ It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question the Court now faces, which is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?


10. It is important to be clear about what is meant by the idea of “interpretation” here, and no small amount of mischief has been caused by a slippage in the use of that term. The term “interpretation” is sometimes used in a relatively loose sense to refer to a kind of creative adaption in which one starts from a principle, or a practice, or a work of art, etc. and develops it further, or modifies it, building in some way upon the original, and in which the relation of the new to the old might naturally be described in such terms as “developing out of,” “inspired by” or “giving meaning to.” Robert Cover, for example, who is not a constitutional “interpretivist” in the sense used here, often uses the term “interpretation” in this way. See Robert Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv L Rev 4 (1983); Robert Cover, Violence and the Word 95 Yale L J 1601 (1986). Both articles are reprinted in Martha Minow, Michael Ryan and Austin Sarat, eds, Narrative, Violence and the Law: The Essays of Robert Cover (Michigan, 1993). But the term “interpretation” can be, and often is, used in a different and stronger sense, in which the goal of interpretation is understood to be discerning or articulating an implicit meaning of the thing itself. It is easy to slide between these two uses because in each case, there can be differences of judgment and because in each case, the interpretation itself can add something to the original (in the latter case because some aspect of the original thing is now made explicit.) Nonetheless, there is a crucial difference between these two senses of “interpretation” and we normally distinguish between them—although obviously what is called an “interpretation” may well involve aspects of each of these. So, for example, if someone were to commend Apocalypse Now
The idea that a sovereign people lives under, and in its normal politics is beholden to, and regulated by, a listing of rights two centuries old which represents the will of "those who have framed [the] written constitution[...]" and whose meaning is to be ascertained (as far as possible) from within the thing itself is, nonetheless, a strange one, and it is stranger yet that such an idea has become an article of faith for us. At least part of our willingness to suspend disbelief in such an idea, or at least to continue in public to profess allegiance to it, no doubt comes from accepting Marshall's assertion that such a notion is "essentially attached to a written constitution" and that giving up this idea would "reduce . . . to nothing what we have deemed the greatest improvement on political institutions, a written constitution." It may be thought, that is, that our only choice is to accept the conception of a written constitution of rights as a fundamental law whose force comes from its having been enacted by "the people" at some privileged historical moment, or to abandon the idea as an interpretation of Heart of Darkness, it would be quite beside the point to respond that the film was not a good interpretation because of all the ways in which the film might have stayed closer to the original text. On the other hand, if a man leaves a living will that instructs his family to cease life support when the prognosis for recovery is "hopeless," the obligation of the family in interpreting the will is to discern what he meant by "hopeless," and in this case a suggestion that the family has engaged in creative interpretation would not be meant as a compliment. The difference between these two senses of interpretation is not in whether the interpretation can be mechanically performed or in whether there can be reasonable differences of interpretation. Both cases involve judgments and in both cases reasonable people may disagree. The difference is that in the second case, the standards of what would count as the best interpretation are, in principle, given by that which is itself the object of interpretation—whether that is understood to be the intention of the speaker, the text of a story, etc. Broad interpretivists sometimes slide, with great effect, between these two senses of "interpretation." But in the end, most broad interpretivists, while pointing to the open-ended texture of some provisions of the Constitution, seem to stand on the idea that what courts ought to be doing when they "interpret" a written constitution is, to the extent possible, determining the answer according to some set of standards given by the thing itself. (Of course, an interpretivist of any sort may well acknowledge that there are limits to what can be decided by interpretation, but that is a different question.) Indeed, most interpretivists, strict or broad, seem to accept that the authority of judges to issue binding constitutional pronouncements at all comes precisely from the fact that—to the extent feasible—what they are doing is interpreting in this second sense.


11. The Constitution provides, of course, for its own amendment. And the nature of the amendment procedure may be relevant to how we understand the force of the constitution; for the easier it is to amend the Constitution, the stronger the claim may be, ceteris paribus, that the present constitution reflects present convictions. But the U.S. Constitution is extraordinarily difficult to amend, a fact about it which is often thought (rightly in my view) to be a virtue. Given the difficulty of amendment, however, the mere possibility of amendment leaves open the basic issue of what force the existing Constitution should be thought to have and why.
of a written constitution of rights entirely.
I shall suggest, however, that this is not so. I shall be particularly concerned here with the question of declarations of rights, although I shall say something about written constitutions more generally. And I shall argue that there is indeed another, and more promising, possibility available for thinking about what it means to live under a written constitution of rights. I shall suggest, moreover, that this conception of a written constitution of rights was present, if not fully developed, within revolutionary American thought, and that it grew out of the constitutional conflicts that led to the American Revolution, and out of the very immediate problem raised by that revolution of what it would mean to establish a state on the authority of a sovereign people.

II

In May of 1776, the Continental Congress, declaring that it was "necessary that the exercise of every kind of authority under the said crown should be totally suppressed," recommended to all those colonies in which "no government sufficient to the exigencies of their affairs shall have hitherto been established" that they "adopt such Government as shall, in the Opinion of the Representatives of the People, best conduce to the Happiness and Safety of their Constituents in particular and America in general." Although the Congress would not formally declare independence for another two months, the May resolution, calling for the creation of constitutional orders "under the authority of the people of the colonies," was a kind of precursory declaration of independence, a "Machine," (in the words of James Duane from the New York delegation) "for the fabrication of Independence." For it was, with that resolution, apparent that these polities "were to be considered as no longer colonies but states"; and this "transmutation of colonies into totally self-governing commonwealths" was, indeed, "the heart of the Revolution as a practical fact."

The new political orders were brought into being by the adoption of constitutional charters. These charters proclaimed the right of the people to form governments, established various governmental bodies and specified their power within the new constitutional system, declared the mode of election or appointment to office, and provided for various other basic governmental operations. As a matter of constitutional theory, there are several aspects of these frameworks of government that are significant and that I shall touch upon later. But my primary concern here will be with another feature of these

charters. In addition to establishing the basic organization of governmental bodies, most of these state charters also contained some listing of rights, whether within the body of the document or as a separate declaration. Why? What is the point of declaring rights within a constitutional charter founded on the sovereignty of the people? What was the relationship between these declarations, the sovereign people, and the governmental institutions that the charters established?

To try to answer these questions, I shall want to examine these charters as a response to the problem of establishing a state on the authority of the sovereign people. And, as I shall suggest, the particular understanding of that problem for the founding generation was shaped to an important extent by the constitutional conflicts between the colonists and Great Britain which culminated in the American Revolution. It is these conflicts which are the subject of this section.

Ultimately, I shall want to focus on the conflicts between Great Britain and the colonists in the years immediately preceding the American Revolution. Those conflicts, however, had deep roots, and in the first part of this Section (Sections IIA and IIB) I shall want to explore two of these (interconnected) roots. The first was a longstanding dispute between the center and the colonists about where ultimate political authority over the colonies lay. This dispute, which began virtually with the establishment of the earliest settlements, is the subject of Section IIA. In several crucial respects, the constitutional controversies in the years preceding the American Revolution were rooted as well, however, in the seventeenth century contests between Parliament and king. The eventual institutional consequence of those contests was the supremacy of Parliament within the realm—and in the view of Parliament, within the whole of the empire. But to Parliament's claim of sovereignty, the colonists responded with an assertion of a fundamental constitutional right to just representation; and that claim, and the conception of representation that it entailed, was also partly an outgrowth of the seventeenth century battles. In Section IIB, I shall take a detour, then, from the discussion of the controversy between the center and the colonies to explore the nature of the seventeenth century English constitutional contest, the idea of representation that was given expression during that contest, and the conception of Parliament as an institution that grew out of it. In the light of this background, I shall then, in Section IIC, turn to the conflict between the colonies and the center as it emerged in the years immediately prior to the American Revolution. And in the brief Section IID and in the course of my discussion in Section III, I shall suggest how the conflicts of the colonial period helped to raise, in a particularly

16. I shall use the term “declarations of rights” to refer to the listings of rights within these charters, whether set out separately or within the body of the charter.

17. The convenient term “center” to refer to the realm or the metropolis (and represented variously by crown officials and Parliament) is taken from Jack P. Greene, Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1607-1788 (Norton, 1986).
profound form, the problem of what it means to establish a state on the authority of a sovereign people.

I shall return to the charters in Section III, and I shall there examine these charters, and particularly their declarations of rights, as a response to this fundamental problem. In Section IV, I shall conclude by summarizing what I take to be the central contributions of these charters for constitutionalist thought and by suggesting, in general terms, the relevance of these ideas for our own constitutional thought and for specific practices such as judicial review.

A

At the heart of the conflict between Britain and the American colonies in the years leading up to the Revolution was a dispute over the nature of the British constitution and of the status of the American colonies within it. But while these years saw a dramatic intensification of the constitutional dispute, the dispute was hardly a new one; indeed, the nature of political authority over the colonies had been a matter of contention from virtually the moment of their establishment. On the view of crown officials, and later of Parliament, all political authority flowed from the top downward and ultimate political authority remained in the center. The colonists did not deny the idea that political authority flowed from above, but neither did they accept it as the whole of the matter. Within the colonies, there had also existed from the early colonial period onward a second understanding of constitutional authority, in which authority flowed from the bottom up; and for the colonists the relationship between these two sources of authority was never simple. Similarly, the question of the division of authority between the center and local institutions—an issue that was related to, but not just the same thing as, the issue of the relationship between top-down and bottom-up authority—was, for the colonists a complex one. In the colonial conception, local and central power overlapped and the precise nature of the power of each remained somewhat ambiguous. For most of American colonial history, the colonists’ and the center’s competing views of political authority existed in a state of rough, and not always peaceful, co-existence. At times, the tension between the center and the colonies over the nature of the constitutional order was quite pronounced; at times, more subdued. But the friction between them, however well-managed, was never entirely absent.

Legally, the first American colonies were born into the world as the creature of trading company charters. These charters, which offered the crown a convenient means of raising money and an opportunity to increase trade in raw materials for the realm without the need for an expensive centralized apparatus, granted to the recipients rights to land in the New World and provided in very general language for the establishment and administration of settlements. The first Virginia Company charter in 1606 established a form of royal governance, but beginning with the amended Virginia charter of 1609, the crown simply delegated to the companies the power to govern, so long as regulations were
"not contrary to the Laws and Statutes of . . . England." It was the proprietors of these companies who, for a variety of reasons—to attract settlers from England, to govern more effectively overseas colonies, and in some cases for idealistic reasons—first granted to settlers some of the “same privileges that” they themselves “enjoyed . . . that of gathering the ‘generality’ into an assembly for the making of wholesome laws and ordinances pertaining to the safety and welfare of the colony.”

In 1624, the Virginia charter was revoked, making Virginia the first royal colony, and the question was presented to crown officials of what to do with the assembly that the company had authorized six years previous. For whatever reason—no doubt, in part from of a recognition of the difficulties in governing a far-away colony, perhaps from a desire to meet the wishes of the colonists and perhaps from simple apathy—the decision was made to retain the assembly; and in doing so, the crown established the model for what would be the basic internal governing structure of royal colonies: a royally appointed governor and council and a popular assembly. During the course of colonial history, most colonies would find themselves at one time or another existing as royal colonies, but aside from the brief experiment in centrally governing the colonies under the Dominion of New England from 1684-89, the crown would not attempt to govern without representative assemblies. (And from 1632 on, proprietary charters would include provision for governance by the lord or lords proprietor with the “advice, assent and approbation of the freemen” or some similar phrase.)

From the point of view of the crown, none of this amounted to a recognition of any sort of colonial right to self-government. Constitutionally, the colonies were created from above and existed for the purposes for which they had been formed—to serve the interests of their proprietors and the realm. In governing the colonies, the proprietors might allow for the establishment of assemblies, but the proprietors could not change the constitutional status of the colonies. And

18. Benjamin Perley Poore, ed, 2 The Federal and State Constitutions, charters and other organic laws of the United States 1905 (GPO, 2d ed 1878). The language differed somewhat in subsequent charters. See, for example, id at 925, 941.

In Massachusetts, the establishment of popular assemblies took a different route. Like the Virginia Company charter, the Massachusetts Bay Company charter was a trading-company charter, but the Massachusetts Bay Company quite quickly distinguished itself from other trading companies by moving its charter from England to Massachusetts—unlike the Virginia charter, the Massachusetts charter did not require the company to meet in England—and soon thereafter began to admit all church members into the corporation. The early government of the colony was dominated by the governor and assistants, but in 1634, and on the basis of their reading of the charter, a group of freemen protested this oligarchical structure and demanded a system of representation for all freemen. For a fuller account of these events, see Andrew McLaughlin, The Foundations of American Constitutionalism 41-44 (New York, 1932).
while the crown itself might grant various privileges, it did so, not as a matter of right, but as a matter of grace and for the purposes of better governing overseas colonies. As plantations and trading posts developed into colonial societies, this view of central officials as to the fundamental constitutional status of the colonies remained essentially unchanged. By the early eighteenth century, it had become the reigning view in England that granting privileges of self government to distant colonies was the way to "us[e] them well"; for the only alternative was governing by force, which was expensive and likely to be counterproductive. But such privileges were, nonetheless, contingent and provisional delegations of power from above and were granted ultimately for the good of the realm.

The settlers themselves did not reject the top-down view of political authority, but neither did they accept it as the whole of the story. The settlers certainly treated their charters as a basis of authority, and they did not deny in principle their status within the system as a whole. But there were several factors that, for the colonists, pressed against this model of political authority. First, the settlers had emigrated from an England that was localist in political organization: early seventeenth-century English towns, boroughs, counties and guilds still operated to a great extent as self-governing (although partially overlapping) entities. Second, the early settlers themselves had witnessed and participated in the creation of their own political societies. (In most cases, these societies were created formally under the auspices of charters, but not always. Most notably, in New England, following the Pilgrim landing, a number of fishing and trading villages were established in the area from Southern Maine to Massachusetts Bay without any effective form of government granted from above and in some cases without receiving permission from the New England Council to settle at all.) And in the New England settlements, there was a third important factor: the powerful influence of the covenanting theory of English separatism—the vision of an "independent gathering of a few believers into a self-governing body relying on the scriptures as their guide." These factors contributed to a different understanding of the source of political authority, in which authority flowed not from the top down, but from the bottom up.

Within colonial political thought, then, there existed from the very beginning two different kinds of stories concerning the roots of political authority. In one story, the settlements were created by law from above and owed their political authority to the crown. In the other, the colonies were inherently self-governing communities whose institutions grew from below and rested on a foundation of consent. To be sure, the second kind of story differed in many respects between

23. McLaughlin, Foundations at 32 (cited in note 19). As McLaughlin argues, this separatist idea itself owed much to the tradition of English boroughs and merchant guilds, and as well to the tradition of unincorporated joint-stock agreements and the old "sea law" by which seafarers established a government for the duration of the passage. Id at 18-34.
regions, and the New England version represented a more radical form of the "bottom-up" story. But some version of the bottom-up account of political authority ran through each of the settlements. And the colonists neatly combined these two kinds of stories in what became the prevalent origin myth throughout the colonies: that of a group of settlers who, at great risk, left England to found new societies in the wilderness to bring prosperity to themselves and to England and who, in consideration of those risks and the promise of great rewards which England would receive from their trade, had been granted leave to establish themselves as political communities in America. Thus, whereas the center maintained, in principle, a relatively simple view of the constitutional basis of colonial authority, for the colonists themselves that issue was, from the beginning, notably more complex.

The question as to the source of colonial political authority overlapped with the issue of the scope of that authority and of the relationship between central power and local power. From the perspective of the center, the answers to these two questions were, indeed, the same; ultimate political authority originally rested with the center and ultimate political authority continued to rest with the center. For the colonists, however, these two questions did not fully map onto each other. For even if authority was originally granted from above, it did not follow that it could be revoked from above. And as the colonists came to claim that certain matters were, of right, within the province of local institutions, they could, and did, justify the authority of those institutions as derived both from above and from below.

If the early settlers had tended to think of themselves as self-governing municipalities on the model of the English borough, increasingly they would come to think of themselves as virtually distinct political societies and their assemblies as miniature Houses of Commons. The terms "House of Commons" and "Parliament" were, indeed, used quite early on in Virginia, Maryland, the Carolinas and the Bahamas, and in form and procedure, the assemblies tended to model themselves on the English House of Commons. More importantly, the assemblies, largely through their control of finance, began to exercise a power of governance over their internal affairs that was comparable in many respects to the power of Commons; and by the 1660s, many of the colonial assemblies had come to regard themselves as the very "epitome of the House of Commons."

24. This was an extraordinarily complicated issue. In most cases, the grant of colonial privileges and liberties was directly from the proprietors and only indirectly from the king. Moreover, the colonists sometimes described this grant of power from above as part of a "contract," a term which allowed an analogy both with borough or merchant charters (which under certain circumstances could be legally revoked), but as well with the compact that, it was commonly said, the king had made with the English nation to govern justly (and that could not be legitimately revoked by the king).

25. Thus they demanded (with varying degrees of success) the right to render decisions about qualifications, seating and discipline of their members and the right to establish various rules for the conducting of legislative business. Andrews, Colonial Background at 7-9 (cited in note 19); Greene, Peripheries and Center at 31 (cited in note 17).
The rising power of the assemblies was well noted by crown officials in the colonies, some of whom themselves occasionally slipped into speaking of colonial assemblies on an analogy with Parliament and who objected that, in their incursions into the prerogative power, the assemblies went (in the words of Governor Hunter of New York in 1711) “even beyond what they were imagined to be in England.” By the 1670s, officials in England were “condemning the assemblies for trying to ‘grasp all power’” and by the early eighteenth century, governors in the colonies were frequently complaining that “the assemblies had ‘extorted so many powers from’ their ‘predecessors, that there’ was ‘now hardly enough left to keep the peace, much less to maintain the decent respect and regard that is due to the Queen’s servant.’”

However, as with the relationship between the top-down and bottom-up models of political authority, the relationship, for the colonists, between the authority of the center and the authority of colonial assemblies remained complex and the proper domain of each somewhat vague. Thus while, on the one hand, the assemblies claimed increasing powers over local affairs, they never denied in principle that their economies could be regulated to serve the needs of the center, or that their laws were subject to the review of the Privy Council. But nor, on the whole, did they feel the need to distinguish sharply between the authority of the center and the authority of local institutions, for as a practical matter, the center’s regulation of the colonies was limited. Beginning in the 1650s, Parliament passed a series of navigation acts intended to insure that the colonial economies served the interests of the realm, and in the 1670s, crown officials began a concerted effort to bring the colonies further under the control of the crown, which included plans for greater oversight of colonial legislation, stricter instructions to governors, revocation of charters and a short-lived attempt to govern New England as a single dominion. But the success of these attempts was restricted by the inherent difficulties of trying to manage colonies on the other side of the ocean, by the distraction of other matters, by the relative ignorance on the part of secretaries of state and the Privy Council of conditions in America, and by a lack of domestic political support in Britain.

While the attempts of central authorities to exert a stronger control over the colonies were limited, one result of these efforts, especially in the half-century from 1670 to 1720, was, however, to prompt colonial assemblies to defend their privileges more explicitly in legal and constitutional terms. In doing so, the colonists continued to appeal both to claims of delegation of authority from above and to claims of authority from below; they argued, on the one hand, that the royal grants of power to the colonists had become a matter of “ancient”

28. Id at 39-40.
30. Id at 13-17.
31. Id at 17, 44.
32. Id at 15.
usage and custom and, on the other, that political authority was “inherent in themselves as representative bodies of the people.” The attempt to articulate the precise scope of local power as against the center was, however, owing to the very nature of the colonial relationship, difficult; and the assertions as to the domain of local power remained indefinite. Thus while claiming “full legislative powers” to choose the Laws by which we will be governed and to be governed only by such Laws,” so long as they were not contrary to the Laws of England, colonial advocates left open a number of questions concerning the meaning of this significant last proviso. The assemblies did, however, deny the right of the crown to bind them through instructions to the governor and, by the mid-eighteenth century, would come to claim a virtually complete power to regulate their own “internal” affairs.

If the center thus maintained a relatively simple view of the constitutional order as essentially “top-down” and “center-out,” the colonists held a more complex and pluralist view, in which authority originated from multiple points and in which the relationship between the authority of central and local institutions was divided and overlapping. But despite these fundamentally conflicting views, outright confrontation between central authorities and the colonies over constitutional issues remained relatively contained for most of colonial history. In large part, this was due to the fact that, in practice, neither of the two accounts required the denial of the other, and to the fact that neither side had an interest in pressing its version too far. The colonists themselves certainly admitted the authority of their charters, they regarded themselves always as subjects of the crown, and until very late, they never denied in principle their position within the system or the general notion that their economies could be regulated for the benefit of the mother country. Indeed, mercantilist policy brought the colonists a good number of advantages, particularly the protection against competition for their commodities; and when the burden of restrictions on trade seemed to weigh too heavily, there were usually ways of getting around them. For its part, the crown, although never accepting the colonial constitutional view, had neither the incentive nor the capacity (without fundamentally restructuring the system of colonial administration) to restrict colonial power over matters that were internal or to enforce customs regulations strictly. The distances involved made it difficult for the crown to regulate colonial activities too closely, and the crown was convinced that maintaining the benefits of trade depended on keeping the colonists happy. In the late seventeenth and early eighteenth centuries, there was increased tension between the center’s and the colonists’ accounts of the constitutional order, but beginning with the government of Robert Walpole in 1720, each side again moved to restrain its claims of fundamental principle. As Jack Greene has written, Walpole applied to “colonial affairs ... many of the underlying principles and techniques he had employed with such brilliant success

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34. Greene, Peripheries and Center at 40 (cited in note 17).
35. Id at 37 (quoting New York Justice William Smith).
in managing domestic affairs”: avoiding “issues involving fundamentals and all
debates over basic principles … restrict[ing] the active role of government as
much as possible and act[ing] only when it was expedient or necessary to do
so … attempt[ing] to bind potentially disruptive groups to the administration by
catering to their interests … seek[ing] to adjust all disputes by compromise and
manipulation, and, if a choice had to be made between competing interests,
always … align[ing] the government with the strongest.”36 And the response
of colonial assemblies “seems to have been to secure local rights against the
power of the center in much the same way that those rights had been achieved
within the metropolis itself: through practice and usage that with the implicit
acquiescence of the center would gradually acquire the sanction of custom.”37
From the point of view of the center in the first half of the eighteenth century,
the accommodating strategy was an entirely successful one. By the middle part
of the century, “it had become a widely accepted ‘Maxim’ among British colonial
experts ‘that Liberty and Encouragement’ were ‘the Basis of [successful]
colonies’” and that the robust development of the British colonies as compared
to the colonies of other powers was a direct consequence of Britain’s having
“indulged” her colonies.38 And from the perspective of colonial representatives,
who had been more worried about the crown than about Parliament, the reliance
on pragmatic, rather than constitutional, arguments had succeeded in promoting
colonial interests within the ministry and in forging alliances with factions within
Parliament—factions which, fighting the prerogative at home, were ready to
oppose it overseas and which were, naturally enough, far warmer to arguments
about the dangers of royal prerogative than to arguments of colonial rights.

For a century and a half after the establishment of the first settlements, then,
the constitutional theory of the center and that of the colonies existed together
in a state of restrained tension. So long as the exercise of local power was seen
to benefit the realm, the central authorities had little incentive to push the
constitutional issues too far. And so long as they were allowed the liberty to
govern their internal affairs, colonial assemblies had little to gain by pressing the
issue of principle too far. At various times (especially between 1670 and 1720)
the tensions between the two constitutional accounts became particularly
pronounced. But, on the whole, central authorities permitted the growth of local
colonial institutions, while maintaining the principle that ultimate authority
rested with the center: that the colonies existed for the sake of the center, and
that colonial self-government existed by grace, not by right. On the other side,
colonists could, for most of their history, regard themselves as comprising
distinct and self-governing societies while, at the same time, acknowledging the
principle that the colonies existed to serve the interests of the realm. And so long
as the center was willing to maintain its policy of “indulgence,” colonial advo-

36. Id at 45-46.
37. Id at 47-48.
38. Archibald Kennedy, Observations on the Importance of the Northern Colonies
under Proper Regulations (New York, 1750), quoted in Id at 45.
cates and assemblies did not need to define the precise relationship between local authority and the authority of the center.

In the mid-eighteenth century, the issue of the constitutional relationship between center and colonies would, however, be pressed and the conflict between the two constitutional accounts would become especially manifest. Shortly, we shall turn to consider this contest over the nature of colonial authority as it arose in the years preceding the American revolution. But the conflict of those years would be intimately bound up with another constitutional conflict which we shall need to consider first—the conflict within England between Parliament and the king. 39

The English constitutional conflict would be significant for the colonial constitutional conflict for several reasons. The first is analogical. The parliamentary opposition to the Stuarts’ use of the prerogative power drew upon, and gave further definition to, fundamental English constitutionalist ideas of political freedom, specifically about the relationship between government and the rights and liberties of subjects. These ideas became part of the intellectual heritage of English colonists, and in important respects, the arguments of seventeenth-century parliamentarians were reproduced in the constitutional claims of colonists in the eighteenth century. The second significance of the seventeenth-century English constitutional conflicts for our discussion is institutional. The ultimate outcome of the struggle between Parliament and king was, of course, the establishment, by about the middle of the eighteenth century, of Parliamentary sovereignty within Britain, and, on Parliament’s view, within the empire as whole. Each of these legacies of the English constitutional battles will be important to our discussion in its own right. But especially important will be how each side in the colonial conflict perceived the relationship between them. From the perspective of the center, Parliamentary sovereignty realized the constitutional ideals that were given voice in the seventeenth century conflicts. From the perspective of the colonists, however, for whom political authority had always been complex and divided, and whose self-government depended on the center’s not pressing its claim of complete political authority, the assertion of Parliamentary sovereignty threatened those constitutional ideals. In Sections IIC, I shall describe the nature of the threat of Parliamentary sovereignty as it was perceived by the colonists in the decade preceding the American Revolution. And in that section and in Section III, I shall suggest how the nature of that threat importantly influenced revolutionary American constitutional thought. Because, however, both Parliament’s claim of sovereignty over the empire and the colonists’ claim of at least partial immunity from Parliamentary sovereignty drew on the legacy of the conflicts of the seventeenth century, we shall need to take a step backwards and to examine the constitutional terms of that conflict.

39. Unless otherwise indicated, the term “king” will refer to the king-in-council. And, similarly, *mutatis mutandis*, the terms “queen” and “monarch.”
To appreciate the nature of the constitutional issues at stake in the controversies between Parliament and the king in the seventeenth century, it is necessary to place those controversies within the context of an evolving constitutional order. And it is necessary to consider that order at two levels: the level of constitutional ideology and the level of constitutional practice. For virtually any political system, there is a difference between the reigning ideology and existing practice, and because of this difference, it is often impossible to say precisely what the “constitution” is. The difference was especially important, however, in the constitutional context that we shall be examining, for while in the sixteenth century, the role of Parliament had been changing significantly, this change had occurred largely within the cocoon of traditional constitutional theory and rhetoric. In discussing the seventeenth-century English constitution and the constitutional contests of the period, we shall need, then, to be attentive to matters of constitutional ideology and rhetoric; but we shall also need to be attentive to developments in constitutional practice that were not well articulated or theorized in constitutional terms.

The place to begin is with royal power. In theory, all power rested with the king and that power was absolute. Even a member of Commons as ardent a spokesman for the liberty of subjects as was Sir John Eliot would concede that the king “hath supreme power, and is umpire and lord of his own actions, to alter them upon good occasion of the state” and that, even with respect to natural laws, “a prince may declare them, and with due weighing of the circumstances apply them to the diversity of facts with equity, for *varietas circumstaniarum variat . . . ius.*

But if even ardent defenders of the liberty of subjects would concede that the power of the king was absolute, even James I would concede that such a power was not arbitrary and that a true king ruled under God and law. Just as God, who once “spake by oracles and wrought by miracles,” “settle[d] a Church,” and thereafter governed “his people within the limits of his revealed will,” so, James held, was it with kings. While for early kings their mere “will served for

40. The term “constitutional” in its modern sense was just beginning to come into use during this period. The term in its modern sense, however, offers a particularly useful construct for describing the conflicts of the period, as it refers both to existing political practices and to legitimate authority. On the changing conception of the term “constitution”, see Charles McIlwain, *Constitutionalism: Ancient and Modern* (Cornell, 1947); Charles McIlwain, *Constitutionalism and the Changing World* (Cambridge, 1939); Gerald Stourzh, *Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century* in Terence Ball and J.G.A. Pocock, eds, *Conceptual Change and the Constitution 35-54* (Kansas, 1988); Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution*, in J. Jackson Barlow, Leonard Levy and Ken Masugi, eds, *The American Founding 159-193* (Greenwood, 1988).

soon as kingdoms began to be settled in civility and polity, then did kings set down their minds by laws, which are properly made by the king only, but at the rogation of the people, and the king's grant being obtained thereunto. And so the king became to be *Lex loquens*, after a sort, binding himself by a double oath to the observation of the fundamental laws of this kingdom: tacitly, as by being a King, and so bound to protect as well the people as the laws of his kingdom, and expressly, by his oath at his coronation. . . . And therefore a king governing in a settled kingdom leaves to be a king and degenerates into a tyrant as soon as he leaves off to rule according to his laws.\(^4\)

The analogies ran easily between kings and shepherds, kings and husbands, and kings and queen bees; each ruled in accordance with the laws of the kingdom and of nature, and for the good of the whole.\(^4\) A king who ceased to rule in accordance with these laws and for the *salus populi* was not a king, but a tyrant, such as—in a standard contrast—the Turkish Sultan, whose subjects and people "do call themselves his slaves," for in such an empire no man "can assure himself of his life, much less of his present fortune or [e]state, longer than it pleaseth the Sultan."\(^4\)

The obligation of the king towards God was a matter left to the two of them. The obligation of the king to act in accordance with the law was, however, a more complex issue and involved both the abstract theoretical question of the relationship between king and "the law" and an institutional question of how that power was to be exercised. The abstract relationship between the king and the law could be described in three different ways: in one sense, the king could be said to be below the law; in another, the king could be said to be the prolocutor of law (*lex loquens*); and in a third, the king could be said to be above the law. In part, the difference between these concerned the meaning of the term "law" and in part, it concerned the difference in the nature of the royal action. The king was always required to act under the law of nature—to act in accordance with right and in the interests of his kingdom. It was at least this sense of law that was implied in Bracton's phrase, famously recited by Coke, that the king is under no man, but is under God and the law.\(^4\) But "law" was used as well in a more earthly sense to mean something like the common law, or common law and equity, or the expressed law in general, and this law was the law declared by the king as the fountain of justice. It was widely accept-ed—including by the early Stuart kings themselves (as reflected in the passage I


\(^{43}\) Hinton, *Was Charles I a Tyrant?* at 77-82 (cited in note 41).

\(^{44}\) Id at 74.

\(^{45}\) Henry Bracton, *De Legibus et Consuetudinibus Angliae* 39 (Sir Travers Twiss, ed) (G.P Putnam's Sons, 1878-83). The phrase was invoked by Coke in *Prohibitions Del Roy 77 Eng Rep 1342-3* (K.B. 1607).
just quoted)—that with respect to “ordinary” cases, the king had bound himself to act according to this “law” as well. And as to the institutional question of how this law was to be decided, while James I and Charles I were willing to remove judges who opposed them and to attempt to influence the judges’ decisions, and while neither ever formally conceded the constitutional principle, in practice they accepted that decisions of common law were to be made by the king’s judges and not by the king himself. It was, indeed, in the service of this principle—in order to “assure James I that he was not in fact, what he was according to admitted theory, the highest judge in his realm”\footnote{F.W. Maitland, The Constitutional History of England 269 (Cambridge, 1931).}—that Coke invoked Bracton’s phrase.

However, if “ordinary” exercises of royal power were bound by the established law of the realm, the king possessed as well a “reserve” power that was above, or beside, the ordinary law of the kingdom and that was bound only by God, the law of nature and the good of the kingdom. This power was variously referred to as the power of “government” or “policy,” the power over “matters of state” or the \textit{ius majestatis}. Such an “absolute” power was “to be employed and the normal course of the common law superseded, not arbitrarily and ‘without cause,’ but only ‘for reasonable cause’ or ‘great and necessary cause’”\footnote{Francis Oakley, Jacobean Political Theology: The Absolute and Ordinary Powers of King 29 J Hist Ideas 323, 344.} and ‘because of the public utility of the church or the people.’\footnote{Bates’ case, in Tanner, ed, Constitutional Documents of James I 338, 340-341 (cited in note 42). Other well-known articulations of this distinction appear in the} One of the more famous articulations of the distinction between the “ordinary” and “absolute” powers of the king was that offered by Chief Baron Fleming of the Court of Exchequer in Bate’s case, which arose from John Bate’s refusal to pay a custom duty to the crown on the grounds that the duty was illegal:

The King’s power is double, ordinary and absolute, and they have several laws and ends. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of \textit{meum}; and this is exercised by equity and justice in ordinary Courts, and by the Civilians is nominated \textit{jus privatum} and with us Common Law: and these laws cannot be changed without Parliament, and although their form and course may be changed and interrupted, yet they can never be changed in substance. The absolute power of the king is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people and is \textit{salus populi}; as the people is the body and the king is the head; and this power is [not] guided by the rules which direct only at the Common Law, and is most properly named policy and government; and as the constitution of this body varieth with time, so varieth this absolute law according the wisdom of the King for the common good; and these being general rules and true as they are, all things done within these rules are lawful. The matter in question is material matter of State, and ought to be ruled by the rules of policy.\footnote{Bates’ case, in Tanner, ed, Constitutional Documents of James I 338, 340-341 (cited in note 42). Other well-known articulations of this distinction appear in the}
The idea that there was an "area of policy formation where the king (although normally bound by the ordinary law)" might "initiate extra-legal actions affecting his subjects' rights and liberties, sometimes in association with, sometimes independently of, the spokesmen for the universitas [regni]" had, according to Brian Tierney, developed as early as the thirteenth century, "linked to the growth of ideas of the state and the public welfare." In matters of public utility, kings and popes had "demanded of their subjects 'a sacrifice of private rights and of the law that protected them.'" And as Francis Oakley has shown, the distinction between ordinary and absolute powers of the king appears as early as the fourteenth century in the work of other students of Roman law, and a similar distinction concerning the power of the Pope is present in the canonist literature as early as the thirteenth century. The distinction between the two kinds of power in the case of the Pope was made by analogy to God himself who normally does not interfere with the laws of the world, but who, "for some special reason" "can act 'aside from' (praeter) the common laws of nature and perform a miracle." And Professor Oakley has suggested that the theological distinction between God's absolute and ordinary powers served, in the early seventeenth century, as a model on the basis of which the power of the king was conceived; so that while the king had consented to act through the common law in the exercise of his "ordinary prerogative," his "reserve" power was absolute and not limited by the law. The analogy with God's absolute and ordinary powers suggests that the relationship between the king's absolute and ordinary powers was conceived of as something like a distinction between justice and a particular instantiation of justice within the ordinary law. In such a conception, while the king could be said to be required to act through the ordinary law in those circumstances in which the ordinary law represented justice or the common good overall, in those cases in which the ordinary law was in

arguments of the attorneys general in Darnel's case, see T.B. Howell, ed, 3 A Complete Collection of State Trials 1, 36-37 (Hansard, 1816) and the Ship-Money case, Howell, ed, 3 State Trials 826, 1016.

49. Brian Tierney, Bracton on Government 38 Speculum 309 (1963). Tierney notes that this idea "spread from Roman law first to canon law (where a complex doctrine on status ecclesiae had grown up by 1200), then slowly into the law and constitutional theory of various secular kingdoms. Status regni was a common expression by the mid-thirteenth century, and from certain medieval usages of the term there developed eventually the Renaissance "reason of state." Id at 310.


51. Oakley, Jacobean Political Theology at 332 (cited in note 47).

52. Id at 333.

53. Id at 337. As opposed to the absolute power of God which was truly unbounded (save for the principle of non-contradiction), the "absolute" power of the king was, Professor Oakley points out, nonetheless thought, both by civilians and common lawyers, to be limited, although the nature of those limits were not very clearly articulated. Id at 339-40.
some way deficient or partial, the king’s absolute powers allowed him to act in the interest of what was, all told, actually just or for the good of the whole. Indeed, as Holdsworth has argued, the distinction between the ordinary and absolute powers of the king was developed by crown lawyers during the Tudor period on the model of the old and familiar conception of the distinction between law and equity.\textsuperscript{54}

As to these theoretical powers of the king, there was little serious dispute. However, to say that matters of state were to be decided by the king and were not bound by the ordinary law still left open the crucial institutional issue on which the great conflict would turn; for as James Whitelock argued in Commons, the “sovereign power is agreed to be in the king: but in the king is a twofold power—the one in parliament, as he is assisted with the consent of the whole state; the other out of parliament, as he is sole and singular, guided merely by his own will.”\textsuperscript{55} The question, in the words of Oliver St. John (arguing in the Ship-Money case), was thus not simply

\textit{de persona}, in whom the \textit{suprema potestas} . . . doth lie, for that is in the king; but the question is only \textit{de modo}, by what medium or method this supreme power, which is in his Majesty, doth infuse and let out itself into this particular . . .

His majesty is the fountain of justice; and though all justice which is done within the realm flows from this fountain, yet it must run in certain and known channels . . .

And as without the assistance of his judges, who are his settled counsel at law, his Majesty applies not the law and justice in many cases unto his subjects; so likewise in other cases neither is this sufficient to do it without the assistance of his great Council in parliament.\textsuperscript{56}

In the view of James and Charles, however, where matters of “government” were concerned, the \textit{suprema potestas} lay with the king alone, for such matters were “far above” the “reach and capacity” of subjects or their representatives in Parliament.\textsuperscript{57} Parliament, was “nothing else but the head court of the King and


\textsuperscript{55} Whitelock’s Speech on Impositions, in Tanner, ed, \textit{Constitutional Documents of James I} 247, 260 (cited in note 42).


\textsuperscript{57} \textit{Letter of James I to the Commons} (1621) in Carl Stephenson and Frederick George Marcham, eds, \textit{Sources of English Constitutional History} 427, 427 (Cornell, 1937).
his vassals,” and, when reasons of state were involved, nothing more than an advisory council. In Parliament, the “laws are but craved by his subjects,” but “only made” by the king “at their rogation and with their advice.” And although monarchy is, James affirmed, “the stronger and the surer built” “by the advice and assistance of Parliament,” yet, as Charles would put it, if there were not a “correspondency between” the king and the Houses of Parliament, the king “should be enforced to use new counsels.” One of the clear manifestations of this view was the willingness of James to bypass Parliament in creating new legal offenses—enforced by the Star Chamber—and, indeed, to do so even after the practice was opined to be unlawful by the king’s judges. And Charles showed himself to be entirely willing to “use new counsels” for the eleven years between 1629 and 1640 when no Parliament was called.

The conflict over the place of the king-in-Parliament within constitutional order—the question, that is, “by what medium or method” the “supreme power . . . doth infuse and let out itself” in a particular case—owed a great deal to the institutional changes in Parliament that had occurred during the Tudor period. Two such developments are particularly noteworthy here. First, while Parliament continued to be spoken of as a court, it had come to be much more than that; during the Tudor years, the conception of Parliament as simply declaring law could hardly any more “easily be applied to those powers of taxation and legislation which were fast coming to be [its] most important

king had an absolute power that was not subject to the ordinary law. Combining the two allowed the “prerogative lawyers of the seventeenth century to deduce” “the theory that the king had, inseparably attached to his person, a general absolute prerogative to act as he pleased, which he could use whenever he saw fit.” Holdsworth, 4 The History of English Law at 204-07 (cited in note 54).


59. Id.

60. Id.

61. Speech by Sir Dudley Carleton, House of Commons (May 12, 1626) in Kenyon, ed, Stuart Constitution 45, 45 (cited in note 56) (referring to the king’s message).

62. Under Henry VIII, Parliament had given the king the power to issue proclamations with the force of law. The act was repealed in the first year of Edward VI, but Elizabeth in particular continued to issue proclamations, which were not illegal, but had only whatever force they had under the common law. The use of proclamations, however, increased under James, and in 1610, the House protested on the grounds that “it is the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament.”

In his answer to the petition, James consulted Coke, who was then Chief Justice of the Common Pleas, on the legality of proclamations and attempted to elicit from him approval. After consulting with three other judges, Coke responded that while a proclamation might aggravate an offense that was already illegal, it could not create a new offense or make an offense punishable by the Star Chamber that was not already so. See Maitland, Constitutional History at 256-58 (cited in note 46) and J.R. Tanner, English Constitutional Conflicts of the Seventeenth Century: 1603-1689 37-38 (Cambridge, 1962).
functions.” The second important development was of the bill procedure. While decrees of the king-in-Parliament had once been merely the responses of the king’s council to petitions—“the Government’s vague reply to vaguely worded complaints,” often drafted after a Parliament had been dissolved—by the end of the sixteenth century, the bill procedure had taken on an essentially modern form in which legislation was watched by “the lawyers in Commons and the judges in the Lords” and became a “deliberate adoption of specific proposals embodied in specific texts.” The initiative for legislation generally still rested with the monarch, and as a matter of constitutional rhetoric, the monarch was still said to be the ruling element in Parliament; but as a matter of fact, the Houses had clearly become participants in the governing process. Together, these two features of Parliament—the evolution of Parliament into a legislative body and the development of the modern statutory form—represented, at least as a matter of practice, a significant change in the role of the Houses. “So long as legislation took the form of a petition to the king,” as Holdsworth says, “those petitions which resulted in legislation did not differ materially from petitions which resulted in a judicial decree. . . . But there could be no talk of petition in connection with the many important bills which during this period originated with the crown; and as they required the consent of both Houses, their passage emphasized the fact that Parliament was a partner in the work of legislation.”

The developments in the nature and role of Parliament during the period of the Tudors had both contributed to, and had grown out of, a broader evolution in the conception of kingship. With the development of the “territorial state” and the “definite subordination of the church to” it in the sixteenth century, the king had come increasingly to be understood as the head of a state; and with this evolution, the old medieval metaphor of the king as head of the body politic assembled in Parliament was resuscitated and put to new use.” In 1522, Chief Justice Fineux could thus refer to Parliament as a corporation of the king, lord and commons,” a conception that had become familiar by the last years of the century when Coke described Parliament as the “great corporation or body
In Holdsworth’s words, the English king at the time of the Tudors “was the representative of the state, his prerogative was the source of the executive authority in the state, and he and this [sic] Council had large judicial powers; but he was not the sole source of all authority. The state was conceived, not as centering in him alone, but as consisting of a body politic composed of himself as head, and the three estates of his realm as members.”

The Tudors had been willing to accede to the idea that a certain amount of royal power was to be exercised by the king-in-Parliament partly because their Parliaments had been so compliant, but also because the exercise of Parliamentary power did not much encroach into matters that involved pure reasons of state. Indeed, the authority of the king-in-Parliament under the Tudors had not so much grown at the expense of the power of the king outside of Parliament, as alongside an increase in the prerogative. Moreover, the expanding authority of Parliament and the expanding use of the prerogative had been accompanied by a general increase in the prosperity of the subjects who sat in Parliament. For most of the Tudor period, then, the monarchs had not thus experienced Parliament as a constraint on their governing power, nor had the great subjects in Parliament experienced the prerogative power as a great threat to their property or liberty. And while the Houses had well accepted that many matters of government were the exclusive concern of the king-in-council, the Tudors had been quite willing to respect the authority of Parliament in certain kinds of matters and to treat the Houses as partners in those areas.

But what precisely, were those matters and those areas? What kind of institution was Parliament becoming? In a famous and influential book, Charles McIlwain described the medieval and early modern English constitutional order in terms of two spheres of royal power: one, the power of government (guber-
naculum), which, McIlwain argued, resided entirely in the hands of the king and over which the king enjoyed unfettered discretion to promote the interests of the state; and the other, the power to decide matters of law (jurisdictio) which resided in the king’s courts and in Parliament as the highest court in the realm. However, this way of describing the distinction, as it was developing during the Tudor period, between the power of the king outside of Parliament and the power of the king-in-Parliament is, for several reasons, too simple. First, although there was still no firm delineation during the Tudor period between the king’s wealth and the common wealth, much of the supply that the king requested from Parliament was used for matters of state, and Parliaments were more generous with revenues when they felt the needs of the state to be greater. Although Parliament did not presume to limit the way in which the revenues would be spent, the decision as to how large of a supply to grant itself clearly involved matters of government. A second and more important problem with the McIlwain characterization of the legitimate domain of Parliament’s power is that it assumes that Parliament was still essentially a court. But although the distinction between declaring existing law and enacting new law was still not that sharply made at this time, it is clear that Parliament was increasingly doing a good deal of the latter. And the legislation of Parliament clearly touched upon matters of “government.” There was, to be sure, a large area of governing into which Parliament would not normally intrude; but the distinction between that which might be a legitimate concern of Parliament and that which was out of Parliament’s hands could no longer be accurately described (if it ever could

74. See generally McIlwain, Constitutionalism: Ancient and Modern (cited in note 40). McIlwain claimed that the distinction between the power of the king over matters of government (gubernaculum) and the power of the king over matters of law (jurisdictio) is apparent even in Bracton. Id at 67-92. That claim, however, has been disputed by Tierney, Bracton on Government at 293-217 (cited in note 49); and Ewart Lewis, King Above Law? ‘Quod Principi Placuit’ in Bracton, 39 Speculum 240 (1964).

McIlwain’s interpretation of the early Stuart constitutions has been criticized by Corinne Comstock Weston and Janelle Renfrow Greenberg in Subjects and Sovereigns: The Grand Controversy over Legal Sovereignty in Stuart England, 8-18 (Cambridge, 1981), and Oakley, Jacobean Political Theology (cited in note 47). Even these critics, however, have generally accepted the notion that in matters of government, the discretionary power of the king was in his own person and have focussed their criticism on the claim that the sphere of jurisdictio was a “coordinate,” rather than subordinate, sphere. The acceptance of the idea that matters of government were in the hands of the king alone may be due to the tendency to focus on the constitutional rhetoric of the period, rather than on the institutional practices, which were not always accompanied by well-developed theories.


76. According to Tanner, the Subsidy Bill of 1624, which granted money for the particular purpose of fighting a war with Spain, was the first attempt of Parliament to regulate the use of the revenues it granted; an “experiment” that “was not at once repeated.” Tanner, English Constitutional Conflicts at 50 (cited in note 62).

77. For McIlwain’s view that Parliament was, indeed, still essentially a court, see Charles McIlwain, The High Court of Parliament and its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England (Yale, 1910).

be) simply in terms of a distinction between adjudicatory and non-adjudicatory functions.

To a large extent, the distinction between those matters that were dealt with through the royal prerogative and those that were submitted to, or taken up by, Parliament, was governed by tradition and by accommodation to the needs of the moment. But if we want to try to characterize in a general way the distinction, as it was developing especially during the later Tudor years, between those kinds of matters thought to be within the power of the monarch alone and those issues that were most clearly thought to be within the province of Parliament, we would do better to put it in terms of the degree to which the issue directly affected the property and liberty interests of subjects, rather than in terms of whether it involved, strictly speaking, an interpretation of existing law. There was, of course, no such clearly stated rule to this effect and certainly a king could, if he so desired, introduce any question into Parliament for its consideration. (During the Tudor period, bills had been brought before the Houses that concerned constitutional matters which it was thought by the monarch necessary or advisable to be decided on the authority of the whole nation assembled in Parliament: transferring to the king authority as supreme head of the church of England; altering the succession to the throne; voiding and validating marriages; dealing with Mary Queen of Scots; and so forth. 79) But the heart of Parliament's work, and the work that was most thought to be in the domain of Parliament, involved matters that more directly affected the property and liberty of subjects: legislation that would change common law rights and duties between individuals, that would erase Henry's debts, that would attain individuals or restore blood, that would regulate wages and terms of apprenticeship, that would regulate dress, that would regulate trade and the trades in various ways, that would regulate the use of land and agricultural production, and so on; and, as well, of course, revenue measures. These acts directly affected the subject's property and liberty, and as such, it was generally thought they should receive the consent of Parliament; for in Parliament "every Englishman is intended to be there present, either in person or by procuration and attorneys" and therefore "justlie no man can complaine, but must accommodate himselfe to finde it good and obey it." 80

The criteria of whether an act imposed a significant and direct burden on the property or liberty of subjects is hardly a very precise or absolute one and there were certainly areas—for example, emergency powers—in which the king clearly might impose even very substantial burdens without Parliamentary consent. As


I have noted, the domain of prerogative powers was partly defined by tradition, and while the traditional delineation of the prerogative was itself not unrelated to the issue of the burden on the property and liberty of subjects, traditional prerogative powers often continued to be thought of as such even as they came to impose more direct and substantial burdens on these interests. Nonetheless, the role of Parliament tended to be understood in terms of representing the property and liberty of subjects; and with respect to issues that significantly affected those interests, "the parties in Parliament (in those things that concern the publique) meddle not as meere Judges, but as Parties interessed, with things that concern every one of their own Rights," for "it is neither Law nor Reason that some of the Parties should determine of that that concerns all their mutuall interests, \emph{invita altera parte}, against the will of anyone but the parties."

The distinction between matters that directly imposed on the property and liberty of subjects and those that did not was relevant, for example, to the question of the power of the Houses to introduce a matter for consideration by Parliament. With respect to matters that they considered purely matters of state, the Tudors remained jealous of their power to initiate discussion in Parliament, for they understood the "embarrassment" to "the conduct of government" that was threatened by unrestrained Parliamentary privilege. In his address to the Houses in 1559, the lord keeper Sir Nicholas Bacon strongly implied that the Houses should stay away from "matters of state," and at the end of the Parliament of 1571, he criticized those members "although not many in number, who in the proceeding of this Session, have shewed themselves audacious, arrogant, and presumptuous" by "calling her Majesties Grants and Prerogatives also in question" and "spending much time meddling with matters neither pertaining to them nor within the capacity of their understanding." Elizabeth was particularly concerned with the attempts of various members of Commons to introduce bills "into the House against the prerogative of the Queen," and admonished Commons "to meddle with no matters of state" and to avoid matters that "pass the reach of a subject's brayne." Elizabeth was not always successful in enforcing this view and the Houses often attempted to initiate discussion on matters that only indirectly involved property and liberty interests. But while on

81. Dudley Digges, \emph{A Review of the Observations upon some of his Majesties late Answers and Expresses} (1643), quoted by Judson, \emph{Crisis of the Constitution} at 79 (cited in note 72). These words were uttered during the reign of Charles I. But they express well the role of Parliament as it was well-developing in the Tudor period, and particularly the late Tudor period. It is significant that it is a view of Parliament's role that had become sufficiently conventional by the 1640s that it would be made, as it was, by a supporter of Charles and even after the outbreak of civil war.

82. Holdsworth, \emph{4 English Law} at 178 (cited in note 54).

83. Quoted in McIlwain, \emph{Constitutionalism: Ancient and Modern} at 109 (cited in note 40).

84. Tanner, ed, \emph{Tudor Constitutional Documents} 557 (cited in note 73).

85. Queen's Answer, through the Lord Keeper, to the Speaker's claim of Privilege, 4 April 1571, in Tanner, ed, \emph{Tudor Constitutional Documents} at 556 (cited in note 73).

86. Quoted in Holdsworth, \emph{4 English Law} at 90 (cited in note 54).
occasion, the queen found it prudent to allow discussion to proceed, "she always refused, whenever possible, to allow members to discuss topics which she disliked," and in general the House of Commons was "inclined to acquiesce in the crown's claim to the initiative"\(^7\) in high matters of state. When in 1587, Peter Wentworth raised the issue of the privilege of the Houses in the context of a bill proposing a new book of common prayer, he was immediately sent to the tower, with little opposition from the House; and when, six years later, he and others again raised the question of the royal succession, he was again imprisoned, this time, apparently, until his death three years later.\(^8\) And in 1593, the lord keeper closed his address to Parliament by instructing the Speaker of "her Majesties Pleasure" that if any "idle Heads" who "will not stick to hazard their own Estates" "exhibite any Bill to such purpose, that you will receive them not, until they be viewed and considered by those, who it is fitter should consider of such things, and can better judge of them."\(^9\)

And yet, at the same time that Tudor monarchs jealously guarded the power to initiate discussion in matters of state (which is to say, to prohibit their discussion altogether if so desired), they recognized the liberty of the Houses to initiate discussion and to introduce bills on a range of matters that directly concerned the property and liberty of subjects. It had always been the case that the most important function of the House of Commons was to resolve grievances of the subject, and this function did not change as Parliament moved towards being a legislative body.\(^9\) In the same address, in 1559, in which he suggested that the Houses should stay away from discussing matters of state which had not been put to them, the lord keeper Bacon described part of the mission of the Houses as determining whether "any laws be too severe and too sharp, or too soft and too gentle," for, as he put it in his speech four years later, laws which were too severe "may put in peril both the nocent and the innocent."\(^9\) Similarly, while in matters of religion, foreign policy and foreign trade, Elizabeth insisted on the right of the crown to initiate discussion, in domestic "social and economic matters the official role was often one of accepting, rather than

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87. Id at 178-79.
89. Quoted in Mcllwain, *Constitutionalism: Ancient and Modern* at 110 (cited in note 40).

The question of Parliament's privilege to initiate discussion really involved two different issues which, for reasons of brevity, are not distinguished in the text. The first was whether a matter was proper for Parliament at all and the second was whether, even if it was, discussion should be initiated by the Houses. Thus certain acts of "government" that might impose significant burdens on subjects if passed might be sent to Parliament for approval; but at the same time, the monarch might resist an attempt by the Houses to introduce the matter for.

initiating policy.”92 Thus did Elizabeth “work[] out what in effect was a new constitutional rule, according to which issues debated in Parliament fell into two categories—matters of the common weal, to be raised by anyone,” and those issues more purely matters of state “which could be discussed only if she invited the Parliament to do so.”93

However, as economic developments in the sixteenth century began to expand dramatically the range of liberty and property interests (at least for the great subjects of the realm who sat in Parliament), and as prerogative powers began to be used in ways that imposed heavier burdens on subjects (particularly those subjects who mattered) and in ways thought by many members of Parliament not to be in the common good, the conflict between the prerogative power and the private interests of subjects grew sharper. The power of “government” included, of course, the power to impose on individual property and liberty in the interests of the common good, and it was well agreed that in, for example, cases of emergency, the monarch might exercise all sorts of powers that involved imposing on the liberties and property of subjects without Parliamentary consent. But as to the crown’s power to impose these burdens during times of peace without Parliamentary involvement, the issue was far more controversial and became more contentious as the burden of the prerogative power came to be more keenly felt.

The question, once again, was not whether the monarch had the power, but whether that power should be exercised by the monarch alone. And the fear of many in Parliament was that if the monarch did not act through Parliament, where the liberty and property interests of subjects were represented, burdens might well be imposed on liberty and property, and grievous burdens at that, for reasons not sufficiently justified by the common good. The power to grant monopolies, for example, was long regarded as firmly within the scope of the prerogative—“the head Pearl in” the “Crown and Diadem”94—and in 1571, Elizabeth rebuked members of Parliament for questioning it.95 But the power, which had been intended to be used to encourage enterprise and invention, had become “primarily a means of “gratifying courtiers and officials”96 and the burden from Elizabeth’s expansive use of the monopoly power was deeply felt in the depression that prevailed in the last years of the century.97 The issue of monopolies was thus taken up by Parliament in 1597, and, in response, the queen promised to end the abuses. When she failed to make good on these promises, the issue was taken up again by the Parliament of 1601 and became the central issue of the Parliamentary session, in which members of the House

92. Hartley, Elizabeth’s Parliaments at 28 (cited in note 91).
94. Thomas Egerton, quoted in McIlwain, Constitutionalism: Ancient and Modern at 120 (cited in note 40).
95. Holdsworth, 4 English Law at 347 (cited in note 54).
97. Holdsworth, 4 English Law at 347 (cited in note 54).
complained that monopolies were putting “general profit into a private hand” while the country “groaneth and languisheth under” their burden, and subjects were reduced to a state of “beggary and bondage.”

Francis Bacon, reminding members of the House of the common good that monopolies were intended to serve, and reiterating the high place of the monopoly power within the prerogative, urged the House to proceed humbly by petition, rather than by bill. But the “grievance was so seriously felt” that many in Parliament insisted on proceeding by statute and in the end, the queen was forced to revoke the most unpopular of the patents and allow the others to be tested through the ordinary courts.

Here we see the complex position of Parliament with respect to matters of government. The monopoly power was conceded by all to be a high part of the prerogative and no one would have suggested, for example, that the granting of patents should be in any hands but of the queen and her council. And yet when the exercise of the monopoly power was felt to grieve the subject, the House claimed the right to call into question whether certain exercises of the prerogative were genuinely in the common good, and if not, to take action against them. Was Parliament here acting simply in the ordinary judicial role of a court, “declaring” the law? To some extent it was; the language of law and of the rights of subjects were certainly very much present in these debates and some of the proposals would have done nothing more than restate the law and subject the patents to review by ordinary courts. And yet even such an action as that would have, in practice, changed the law, for the ordinary courts had been prevented by the queen’s council from hearing challenges to most of these grants on the grounds that the question of whether the grants were for the common good was one left to the determination of the queen; and the ordinary courts themselves recognized the queen’s power to restrict their jurisdiction in matters of state. A statute that left all monopolies to be tested by these courts would thus, even to the extent that it merely repeated the existing law, have amounted to a definite change in the legal order.

100. MP Francis Moore, quoted by Williams, *Crown and Counties* at 134 (cited in note 96).
101. “[T]his is no stranger in this place but a stranger in this vestment; the use [that is the normal procedure] hath been ever to humble ourselves unto her Majesty, and by petition desire to have our grievances remedied, especially when the remedy toucheth her so nigh in point of prerogative.” Francis Bacon in the Debate on Monopolies, 1601 in Tanner, ed, *Tudor Constitutional Documents* 573, 574 (cited in note 73).
104. Part of the difficulty in saying whether Parliament was merely interpreting law comes from the fact that the term “law” was used in more than one way. It was sometimes used to refer to the common law or the “ordinary course of law,” but it also
yond this and would have modified the standards by which monopolies would be judged. In general, the House did not seem to be preoccupied with the question of whether it was, or to what extent it was, reforming the law rather than enforcing it; what it was moving against were grievous burdens on the subject that had no sufficient justification in the common good. “What shall become of us, from whom the fruits upon our own soil and the commodities of our own labor... shall be taken away by warrant of supreme authority which the poor subject dares not gainsay.” In responding to such grievances, Parliament was not merely acting as a court (in the ordinary sense), but as a kind of mediating institution between the subjects, represented in the Houses, and interests of government. Matters of government were, it could still be said, the province of the queen. But the greater the felt imposition of such policies on the liberties and property of subjects, the more forceful the move by the Houses to bring the issue in the arena of the queen-in-Parliament where the burdens on subjects might be better considered in the determination of the common good.

I have been dwelling on the Tudor years, and especially the later Tudor years, to emphasize the kind of role that Parliament had been coming to play, a role that was, in part, traditional—the role of presenting grievances and voting money grants—but that was taking on a different form as Parliament developed into a legislative body. And it was this function of Parliament as a mediating body between the interests of government and the property and liberty of subjects that was centrally contested in the constitutional conflicts of the early (and late) Stuart reigns.

Many of the most famous constitutional controversies during the period of the early Stuarts were connected to judicial cases in which the question was raised of the power of courts to restrain the prerogative. And in most of these cases, the courts held that the prerogative power over matters of state was not, in fact, restrainable by the ordinary law. In Bate’s case, for example, the Court of Exchequer held that the imposition of customs duties, being part of the king’s absolute power to act for “the general benefit of the people” and not “guided by the rules which direct only at the Common Law,” were not justiciable in ordinary courts. In *Rex v Hampden*, a majority of the judges of the high courts sitting *en banc* similarly held that the king’s demand for so-called ship-money was not reviewable because the king’s “averment of the danger was not...
traversable, it must be binding when he perceives and says there is a dan-
ger."\textsuperscript{108} And in Darnel's Case (the Case of the Five Knights), the King's Bench held that defendants, who had been imprisoned by the Privy Council \textit{per speciale mandatum Domini Regis} for refusing to pay Charles's forced loan of 1626 and had sued out a writ of \textit{habeas corpus}, were not entitled to be bailed by the common courts. Perhaps because such cases as these indicated the power of the prerogative over the ordinary law, the constitutional issues of the Stuart years have sometimes been discussed as essentially involving a clash between the prerogative power and the law.

However, the question of the power of ordinary courts to restrain the prerogative was secondary, in a rather straightforward sense, to the larger constitutional issue of the relationship between the prerogative power and the power of Parliament. For, needless to say, none of these royal policies would have been at all problematic if they had been enacted through Parliament. By this, I do not mean primarily that Parliament might have lent additional credibility to the use of prerogative courts or royal proclamations—although this is true as well and was true during the Tudor period—but rather the much more obvious point that these policies, if pursued through Parliament, would not have required the use of extra-ordinary legal measures at all; that is, what raised a fear when called a proclamation and enforced by the Star Chamber would have been a statute when passed by Parliament and would have been enforceable through the ordinary courts. What raised the concern and what led to these famous judicial cases were policies that imposed direct and often serious burdens on subjects without any Parliamentary participation.

The view of James and Charles was that no such Parliamentary involvement was necessary, for all these policies were acts of government. For parliamentarians, however, these policies imposed substantial burdens on the property and liberty of subjects and, as such, required Parliamentary approval. What was at issue in this dispute was thus not (in general) whether interests in "government" could override interests in the liberty and property of subjects or override the ordinary law, but rather whether matters of government that did so were properly decided by the king alone or by the king-in-Parliament. From the point of view of parliamentarians, the danger, of course, was that if the king could impose duties and fines by prerogative, take property by prerogative, proceed through the prerogative courts and so forth (and if his reasons for doing so were "not traversable" by the ordinary courts) the king could, in practice, impose these burdens for any reason at all and out of all proportion to what the common good would in fact justify. So long as the king could claim to be acting for reasons of state, he might impose any burdens on the rights and liberties of private vessel in time of war or to demand payment in lieu of the ships. But by 1636, it had become clear that Charles had meant to use the writs—which were now issued to inland counties as well—as a general and permanent tax. Tanner, \textit{English Constitutional Conflicts} at 77 (cited in note 62).

subjects and might do so without those interests of the subject being represented, as they were in Parliament. And especially if the king could raise sufficient revenues to get on without Parliament, there would be no institution that might properly mediate between the concerns of government and the rights and liberties of subjects.

In their desire to establish firm limits to the king’s discretionary power, members of the House of Commons often did appeal to “the law.” And sometimes, they claimed, indeed, to be doing no more than defending the existing municipal law. In the debate on Impositions in 1610, for example, Hakewill began by declaring that after long consideration and research, he had decided that the decision of Bate’s case was mistaken; and Whitelock argued that impositions violate even the “municipal law of the land . . . the law of property and private right.” But these were desperate arguments born of fear—even Hakewill had been “very confident” of the opinion in Bate’s case—and they inevitably led to the extreme conclusion that even “in time of war or other the greatest necessity or occasion that may be,” the king could not lay any impositions on any subject “without assent of Parliament.” More often, the arguments of “law” were made in the context of a bill that would, in fact, change the existing, expressed law; for while ordinary courts were bound to the “strictness of the law,” Parliament might, and did, appeal to general principles of law in responding to exercises of the prerogative that were “according to the strictness of law” and “yet grievous.” Moreover, while Parliament often appealed to “law,” the principles of the law to which it appealed included the “natural frame and constitution of the policy of this kingdom,” which in turn included Parliament’s role as a representative of the interests of subjects.

The claim of “law” was thus often a quite broad one and could refer to the general right of subjects to enjoy life, liberty and property free from “arbitrary”

109. After the decision in Bate’s case, Commons took up the issue of impositions. James’s response was to command the House not to debate the king’s prerogative. The House responded with the Petition of Right, in which it asserted the “ancient, general, and undoubted right of Parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved.” Petition of Right, in Tanner, ed, Constitutional Documents of James I 245, 246 (cited in note 42). The conflict over this point led to James’s dissolving of Parliament.


111. Id at 248.

112. Id at 259.

113. As I have already noted, even the passage of a statute that increased the jurisdictional authority of common law courts vis-a-vis prerogative courts involved a substantive change in the “law” (broadly used); for it would affect the degree to which “reasons of state” would figure into the decision.

114. The phrases are those of Francis Bacon, quoted in Mcllwain, Constitutionalism: Ancient and Modern at 125 (cited in note 40).

government. In appealing to law, the parliamentarians were not, then, claiming that the ordinary law could restrain the power of "government," but rather that, especially because it could not, it was necessary that matters of government that directly and significantly imposed upon the property and liberty of subjects normally be decided by the king-in-Parliament. For only in Parliament were the subject's interests in property and liberty represented, and only in Parliament could the determination of whether reasons of state justified particular burdens on property and liberty properly be made. While many parliamentarians accepted in principle the right of the king to impose, for certain reasons of state, even substantial burdens on the liberty and property of subjects without Parliamentary approval, the Stuarts' expansive use of the prerogative highlighted the danger that, under the guise of these reasons, Parliament's role as an institution where reasons of government met the property and liberty interests of subjects could well be destroyed.  

If the Stuarts' expansive use of the prerogative was increasingly felt to threaten the property and liberty of subjects, the expanding range of interests of the great subjects who were represented in Parliament also threatened the realm of traditional prerogative powers. In areas once thought to be the exclusive province of the king and his council, the Houses now claimed a voice. Even in the area of foreign affairs, Commons, beginning in 1621, "discussed . . . questions freely, criticized policies advocated by the king, suggested counter policies," and while admitting "that the king could make a treaty," "insisted that if the effect of any such treaty constituted a grievance to the people, Parliament must do its duty and consider the question."  

James once again asserted the power to initiate discussion in such areas; but as the direct interests of subjects expanded, the distinction that Elizabeth had introduced between "matters of the commonwealth" on which anyone might begin discussion and "matters of state" to be initiated only by the monarch, was becoming more difficult to maintain. In its Protestation of December 1621, the Commons thus described its privileges broadly: to "propound, treat, reason and bring to conclusion" all matters "concerning the king, state and defence of the realm, and of the Church of England," as well as "the maintenance and making of laws, and redress of mischiefs and grievances which daily happen within this realm."  

In trying to strengthen Parliament's role as the institution which mediated between matters of government and the property and liberty of subjects, the Houses had a limited number of weapons. One, of course, was the power to tax. However, another weapon which it possessed and which it used to promote its

116. In requisitioning "ship-money," for example, the king—as the historian J.R. Tanner put it—"claimed to possess the power for the benefit of a conspiracy-threatened commonwealth; it was actually being used by him to force men to pay taxes in an extra-Parliamentary way." Tanner, *English Constitutional Conflicts* at 272 (cited in note 62).  
118. See id at 285-86.  
conception of Parliament, was its power as a court to try subjects. While the person of the king was under the jurisdiction of no tribunal, a subject who violated the rights of other subjects was liable to punishment unless he could prove that his actions were authorized by law. And beginning in the later years of James's reign, the Houses increasingly used this power to limit exercises of the prerogative that imposed what they considered to be unjustifiable burdens on the property and liberty of subjects. The traditional form of the charge against the royal officer was that his action had not, in fact, been authorized by the king; and the charge could thus be made good only if the king was willing to acquiesce in it and remove his protection from his officer. But as Edmund Morgan has shown, the Houses (particularly Commons) steadily moved from the claim that the person of the king had not actually authorized an action of an official to the quite extreme claim that the "divine king" had not authorized such action even if the natural person of the king had been mistakenly led to believe (and, indeed, even if he continued to insist) that he had. For as God's lieutenant, the argument went, the king could do no wrong. And because "the king in his body politic always wanted what was best for his subjects," it followed that if the natural person of the king had, indeed, commanded another to do wrong, this could only have been because a "host of ambitious schemers . . . continually caught the king's natural ear and misinformed him in order to procure benefits to themselves."120 "It was proper for Parliament as the highest tribunal in the land to punish those who misled the king, to deprive them of the special privileges they had extracted from him by their lies, to reduce them to the level of other subjects."121 This argument, that certain exercises of the prerogative could not possibly have been authorized by the "divine" king, in whom was vested absolute power to act for the underlying salus populi, was, of course, simply a backhanded way of asserting that those actions could only be authorized by the king-in-Parliament. In punishing royal officials, who claimed to be acting in the king's name and for the common good, for violations of the liberty and property of subjects, the Houses were thus, once again, appealing to "law"; but, again, doing so as part of an attempt to strengthen what they considered to be Parliament's constitutional role as a mediating body.

The deep conflict between the king and the Houses over the role of Parliament could, however, hardly be resolved by such measures. There is no need here to recount the events leading to the outbreak of civil war or to discuss the particular conflicts after the restoration that led to the Glorious Revolution. But what is relevant for our discussion are the consequences of the long battles that ensued, bloody and bloodless, for the structure of the constitutional order.

The first fundamental consequence was a change in the conception of the

120. Edmund Morgan, Inventing the People: The Rise of Popular Sovereignty in England and America 30 (Norton, 1988). As one member of Commons said, if "for want of" "faithfull counsell" the king had commanded his officers to "doe anie thing against the law, their guilt and punishment is not lessened but aggravated by his command." Id at 34.

121. Morgan, Inventing the People at 31 (cited in note 120).
role of the Houses within Parliament. While in the years before the outbreak of
civil war, Parliament was still talked about as divided between the king as ruling
element and the Houses as representatives of subjects, with the advent of
civil war, the Houses would begin to claim explicitly a share in the ruling power
and to do so (particularly Commons) as representatives of “the people.” And
with the Glorious Revolution, the conception of Parliament as composed, not of
a ruler on one side and subjects on the other, but of three ruling elements—king,
lords and commons—would become the new constitutional orthodoxy. The
second fundamental consequence concerned the relationship of Parliament as an
institution to the prerogative power. Especially after the Glorious Revolution, the
Houses (again, particularly Commons), would, on behalf of Parliament and the
nation embodied within it, steadily move to limit the prerogative power of the
king. The battle over the prerogative would continue over the course of more
than six decades, but by the middle of the eighteenth century, the basic constitu-
tional transformation would be largely complete and the relationship between
Parliament and the prerogative resolved in the complete domination of Par-
lament. Ultimate political authority would now be said to be seated in one
institution: the institution in which the whole of the people or the nation was
embodied.

These institutional and constitutional transformations would eventually be
quite significant for the conflict between Britain and the American colonies. And
it is one of the many ironies of the colonial relationship that the colonists saw in
the Glorious Revolution and in the struggles by the Houses of Parliament over
the ensuing six decades to reduce the prerogative power, not, on the whole, a
threat to their privileges of self-government, but a confirmation of it. The
Glorious Revolution itself had a profound impact within the colonies, where the
struggle was viewed as one between the liberties of English subjects everywhere
and the prerogative power of the king. And indeed, English policy toward

122. This is a shorthand way of putting it. Technically, of course, Commons sat as
representatives of subjects, while the Lords sat in their own right.
123. The language of “the people” and popular sovereignty had a mixed history in
seventeenth and eighteenth century English rhetoric. Although the language of popular
sovereignty was common during the later years of the reign of Charles I and during the
period of the interregnum, after the restoration, and in large part because of the reaction
against the government of the Commonwealth which had claimed to represent the people,
the language of popular sovereignty was much less used. Morgan, Inventing the People:
ch 1-5 (cited in note 120). In eighteenth-century Britain, the term “the people” might be
used to describe the “better sorts” to whom the responsibilities of government should be
entrusted, or, alternatively, might be used in distinction to the aristocracy and gentry. And
at the time of the Reform Bill of 1832, the term was often used to describe the middle
1956).
124. After rumors of William’s successful “invasion” landed on New England shores,
colonists in Massachusetts staged their own successful rebellion against Edmund
Andros—the governor of the recently established Dominion of New England—and restored
their previous system of government without a charter. Other New England colonies fol-
lowed suit, falling back on their pre-Dominion forms of political organization. In Mary-
the colonies subsequent to the Glorious Revolution could easily be interpreted by
the colonists in this light. While William and Mary and their successors con-
tinued to attempt to insure that the colonies were being administered for the sake
of the realm, the Glorious Revolution in fact resulted in a general increase in the
power of localities both inside and outside England, and the colonies found
themselves enjoying a period of increased local autonomy over their own internal
affairs.125 Throughout the first half of the eighteenth century, there were vari-
ous proposals within Parliament to intervene in the internal administration of the
colonies, but these proposals were largely abandoned, as it was widely believed
that the costs of provoking opposition were likely to outweigh any benefits the
policies might bring.126 And although Parliament continued to assert in prin-
ciple its right to legislate for the colonies, during the first half of the eighteenth
century, colonial political leaders saw in Parliament less a threat to self-gov-
ernment than a source of protection from royal officials.

By the 1760s, however, the greatest threat to colonial autonomy began to
appear from Parliament itself; and the expansion in the institutional power of
Parliament would take on a very different valence.

C

The political and economic context within which the particular constitutional
conflicts between center and colonies developed in the mid-eighteenth century is
complex, and I shall not endeavor here to discuss that context in any detail. We
might just note, however, three developments of this period that are particularly
relevant for our concerns. First, as already noted, Parliamentary supremacy
within Britain was, during this period, becoming well-settled. Second, colonial
economies had by this period become quite prosperous, fueled in significant part
by various illegal trading avenues and smuggling activities, and assisted by a
generally lax system of customs enforcement. At the same time, one of the
consequences of their increasing prosperity was that the colonies (particularly the
New England colonies) had come to serve as a lucrative market for British manu-
factured goods; and with colonial manufacturing and trade hampered by
mercantilist regulations (despite the weak enforcement of customs regulations),
the colonies had, since 1755, begun to find themselves with a balance of trade

land and New York, revolutionary governments "proclaimed" William and Mary, and
having unseated the existing authorities, carried on, along with New England, for some
time without any formal charter or royal organization. Shortly after their ascension to the
throne, William and Mary thus found themselves, in the words of the historian David
Lovejoy, "presented with a number of colonial governments in America that they were
unaware they had lost." David Lovejoy, The Glorious Revolution in America, 270
(Wesleyan, 1972). Indeed, as Lovejoy puts it, "England's revolution was imported by its
colonists before some Englishmen had accepted it at home." Id. The colonists had
enthusiastically joined the struggle with their brethren in England who had not been en-
tirely aware that they were united in such a fraternity.
126. Id at 61.
deficit, financed by credit from British merchants. Colonial attempts to improve their financial situation through monetary and other policies were met by a series of Parliamentary enactments concerning debt, bankruptcy, coinage and paper currency that were meant to protect the interests of British merchants.\textsuperscript{127} And in the early 1760s, Parliament passed a new series of navigation acts and customs regulations and reorganized the customs service in an effort to insure that the colonies, whose interests in many respects had begun increasingly to appear at odds with the interests of the realm, continued to serve the needs of the British economy. Third, in the midst of this, and following the cessation of hostilities with France, the question began to be raised within Britain of how the costs of empire should be allocated between the center and the colonies. The ministry’s answer was a series of policies designed to increase revenue through new customs duties, stricter enforcement of existing duties (including the increased use of vice-admiralty courts) and direct impositions, such as the Quartering Act of 1765 (which required the colonies to furnish provisions for royal troops stationed within their borders) and the Stamp Act.

There is certainly room for speculation about how the emerging issues of the period might have been dealt with by a more skillful and sensitive ministry. But as the center began to impose more severe regulations on trade and on the colonial economies, and as it began to demand that the colonies pay a larger share of the costs of empire, it pressed the issue that had long divided center and colonies: of the basic constitutional relationship between them. If the conflict over that issue had been a longstanding one, it would now, however, take on a new form, one that would involve competing interpretations of the significance of the changes in the institutional relationship between Parliament and the king. The conflict, as it now appeared, would be, that is to say, specifically over the constitutional relationship between Parliament, now the sovereign power within Britain, and the rest of the empire.

From the perspective of the colonists in the 1760s, the institutional developments that had taken place within Britain in the three-quarters of a century following the Glorious Revolution had not substantially affected the basic constitutional relationship between the colonies and the center. In fact, in an important sense, the colonists could believe that these developments had strengthened their longstanding claim that certain kinds of issues were, by right, within the province of local institutions. In the eyes of many colonists, Parliament’s struggle to limit the prerogative power within Britain and the struggle of colonial assemblies to limit the prerogative in the colonies had been parallel battles, each fought in the name of the rights and liberties of subjects. And the triumph of Parliamentary power over the prerogative was widely interpreted by colonists as a realization of the principle that property could be taken, and (other) rights and liberties of subjects limited, only for the common good as determined by representative institutions. In the mid-eighteenth century, this principle of representation—that “the subjects” were “bound only by such laws to which they themselves con-

\textsuperscript{127}. Andrews, \textit{Colonial Background} at 115 (cited in note 19).
sent"—came to be regarded by the colonists as, indeed, the very foundation and "chief excellency of the British Constitution." Of course, the general constitutional principle of representation did not, standing alone, logically imply any right to local representation or any other particular form of representation. The colonists, however, argued that for certain purposes, the proper unit of representation was necessarily local. In making that claim, the colonists argued that they could not adequately be represented in Parliament; and as well, they continued to appeal both to their charters—which, it was claimed, had become settled by "ancient usage and custom"—and to their "inherent rights" as distinct (if dependent) political societies founded on consent. And from these two general premises—that representation was the fundamental principle of the British constitution and that, for certain purposes, the requisite unit of representation was local—the colonists drew the following conclusion: that the imperial constitution was necessarily a federalist one, a constitution of various relatively self-governing peoples under a common sovereign.

However, if the colonists had consistently defended the view that, for certain matters, the proper locus of political power was local, crown officials and Parliament had just as consistently held a different view: that fundamental authority over the colonies rested with the center, and that all privileges of self-government were conditional devolutions of power by grace which continued at the favor of the center. And from the perspective of Parliament, the changing relationship between Parliament and the king hardly changed this constitutional fact. From this perspective, the triumph over the prerogative meant that Parliament was now the sovereign power, not only within the realm, but within the whole of the empire; and in the view of many in Parliament, it was, in fact, this principle, of Parliamentary sovereignty, that was the fundamental principle of the British constitution. Indeed, if colonists could see in the growth of Parliamentary power a strengthening of their claims to self-government, members of Parliament could well regard the consolidation of sovereign power within that institution as solidifying the power of the center over the colonies. For when power had been divided between king and Parliament, the colonists could claim (with some support from the king) that the particular power of Parliament over the colonies was limited. At the same time, while asserting themselves to be under the sovereign power of the king, the colonists could seek to limit the power of the prerogative by arguing (mirroring the parliamentarians' "de modo" claim) that for certain kinds of issues, the royal power was properly exercised through the "king-in-legislature"—in this case, the "king-in-colonial-legislatures." Through the opening between the power of the king and the power of Parliament, the colonies could thus attempt to protect their claim to a certain measure


129. The claim that Parliamentary sovereignty was the fundamental principle of the British constitution was not universally held. See John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 76-77, 104 (Wisconsin, 1991).
of self-government against the center. But the idea of Parliamentary sovereignty was patently incompatible with any such claims. For if, as Parliamentary spokesmen claimed, “there must be in every State one supreme Legislative Jurisdiction”; and if in Great Britain “this one Supreme Legislature is the British Parliament,” the power of colonial legislatures must necessarily be subordinate. 130 From the perspective of a Parliament that claimed to be sovereign, the colonial view that certain matters were of right within the province of local legislatures amounted, then, either to an assertion of independence or to the “political solecism” of imperium in imperio.

As we have seen, despite the longstanding differences between the constitutional theory of the center and that of the colonists, an accommodation of sorts had prevailed, in which each side continued to maintain its view of the constitutional order while, in general, pursuing a strategy that did not force the issue. In the 1760s, the more conciliatory elements within the British government, within Parliament and within the colonies, aware of the deep divisions between the center’s and the colonists’ view of the constitutional order, continued to urge such a course. And, in some respects, Parliament’s repeal of the Stamp Act and its tempering of some of the harsher provisions of the Sugar Act could be seen to follow the traditional pattern. Those acts had been opposed, not only by colonists, but as well by British merchant-creditors who feared a diminution of trade (especially in the light of colonial boycotts) and the draining of precious specie from the debt-ridden colonies. And once again, the center’s adoption, for pragmatic reasons, of a more lenient policy was accompanied by an assertion of complete authority over the colonies—in this case, the Declaratory Act. But if in form these events continued, to some extent, an old pattern, the conflict between the constitutional view of the center and that of the colonists would not this time be so easily resolved. Within important sectors of the maturing colonial economies, the protections afforded by the special relationship to the mother country were increasingly outweighed by the costs of central regulations. And as Parliament moved beyond issues of trade to the allocation of the costs of empire, Parliamentary policies increasingly appeared to the colonists to threaten the very existence of a meaningful realm of colonial self-government.

For the colonists, there were two conditions necessary for the preservation of such a realm. First, it was necessary that there be a recognized distinction between matters that were properly within the realm of local authority and matters that were properly within the realm of central authority. By the mid-eighteenth century, colonists had commonly come to articulate the distinction between these realms of authority in terms of a distinction between “internal” and “external” matters. The internal-external language was actually used by colonists in several different ways. It was sometimes used to describe the content of the distinction between local and central authority. One way in which colonists sometimes conceived of this distinction was in physical or geographical terms: “internal”

regulations were, in this sense, regulations imposed inside the colonies, while "external" regulations were those imposed at or beyond the borders. This account of the distinction between local authority and central authority was not an entirely accurate reflection of constitutional practice—restrictions on American manufacturing, for example, which the colonists had, for the most part, long accepted, were certainly "internal" regulations in this sense—but it could nonetheless be maintained as a very rough and general description of the constitutional relationship between the colonies and the center so long as such "internal" central regulations were sufficiently few and relatively unobtrusive. An alternative formulation of the substantive distinction between local and central power also used the language of "internal" and "external." On this conception, the distinction was between matters that directly concerned relations between parts of the empire—"external" relations as it was often put, and which most centrally included issues of trade—and those that did not. (This conception of the distinction between central and local authority overlapped with the geographical one, and there was plenty of room for conflating the two.) But in addition to characterizing the content of the distinction between local and central authority, the internal-external language could be used to refer simply to the distinction itself; that is, to the distinction between a realm of local or "internal" authority, whatever it included, and a realm of central or "external" authority. And as a matter of constitutional theory, this was the most essential distinction. The precise substantive character of local authority might be conceived in various ways, and might, although it need not, be understood in the spatial terms that the internal-external language suggested. But the very possibility of colonial self-government depended on the existence of a distinct realm of local authority—on a distinction between matters that were properly decided "internally" and matters that might be decided by central authorities.

If a distinction between matters properly within the realm of local authority and those properly within the realm of central authority was necessary for the existence of colonial self-government, it was, however, not sufficient. As we have noted, because of the very nature of colonialism, the relationship between local authority and central authority was necessarily one of overlapping, rather than mutually exclusive, realms. And because of this, even "external" regulations (however conceived), if severe enough, could well subvert the ability of colonists to exercise a meaningful degree of autonomy over their own affairs. If the first condition necessary for (meaningful) colonial self-government was thus a distinction between internal and external matters, the second was the preservation of a proper balance between the two. And in the eyes of colonists, each of these would be threatened by Parliament's claim of sovereignty. The very claim of complete authority over the colonies "in all cases whatsoever" denied any inherent realm of local authority. And Parliamentary policies undertaken in the

spirit of that sovereignty, whether or not they directly challenged the distinction between internal and external matters, appeared to the colonists to threaten the balance between local and central power.

Perhaps the most direct and forceful threat to the distinction between a realm of local and a realm of central authority, at least in the earlier years of the period between the end of the wars with France and the American Revolution, appeared in the form of the Stamp Act. The Stamp Act simultaneously challenged at least three different ways in which colonists had articulated the distinction between local and central authority. First, the Stamp Act clearly threatened the distinction between local and central authority understood in geographical terms, for the tax that it imposed appeared as geographically "internal." Second, the Stamp Act threatened the idea that the power of Parliament was limited to imposing "indirect" customs duties as opposed to "direct" impositions. And third, and most importantly, because the purpose of the Stamp Act was to raise revenue, it directly challenged the idea that the power to raise revenue was exclusively within the authority of local governments. While colonial assemblies and advocates had maintained that local institutions possessed complete authority over "internal" matters, they had not often articulated precisely what that meant, and they did not always clearly differentiate between, for example, these three different conceptions of the distinction between local and central authority; for in many cases, these distinctions had, in practice, mapped onto each other. But in simultaneously threatening each of these conceptions of the distinction between local and central authority, the Stamp Act represented, for the colonists, a fundamental challenge to the very idea of a division of authority between local and central institutions.

The Stamp Act was, at the level of principle, an easy case for the colonists precisely because it challenged directly, and in such a deep way, the distinction between local and central authority. And in the desire to try to protect a realm of local authority, the temptation of colonists was to assert a sharp distinction between that which fell within and that which fell outside of their authority, and to articulate that distinction in terms that could be relatively easily applied in practice—for example, between customs duties and "direct" impositions. But relying too heavily on such distinctions was dangerous; customs duties, for example, if abused, could destroy a colonial self-government as effectively as any direct imposition. As John Dickinson argued in 1767-68, if the Stamp Act was "unconstitutional" and "destructive to the liberty of these colonies," no less so were the Townshend duties, though they did their work by placing an "external" duty on essential articles.132 Or as Thomas Hutchinson himself put it, the "fallacy" of relying on a distinction between "internal" and "external" impositions was that it

suppos[ed] duties upon trade to be imposed for the sake of regulating

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trade, whereas the Professed design of the duties by the late act is to raise a revenue. . . . [Parliament] might find duties on trade enough 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.\textsuperscript{133}

Dickinson thus argued (as Daniel Dulany had done several years earlier in the context of the passage of the 1764 Sugar Act) that the important distinction was not the form of the act, but whether its purpose was to regulate trade or to raise revenue.\textsuperscript{134} But this criterion, as Dickinson well recognized, was difficult to apply in practice. Parliament might well "retain" the "forms of liberty," while nonetheless destroying the "substance"; and in "government as well as in religion, 'The letter killeth, but the spirit giveth life.'"\textsuperscript{135} The real problem, then, was that Parliament was acting in a spirit, not of federalism, but of sovereignty; and even if Parliament did not directly challenge the realm of local authority, as it had in the Stamp Act, it could destroy any meaningful degree of colonial self-government by pressing too far, and for the wrong reasons, the powers that even the colonists acknowledged that it had. Just as the mixed constitution in Britain could be destroyed by abuse of the royal power to appoint peers, so too, Dickinson argued, could the balanced constitution of the empire be destroyed, for example, by Parliament's employing its power to restrict manufacturing and then imposing customs duties to raise revenue. Although Parliament "unquestionably possesses a legal authority to regulate the trade of Great-Britain and all her colonies,"\textsuperscript{136} once Parliament begins to "lay duties upon her exportations to us" for the purpose of revenue, "she then will have nothing to do but to lay those duties on articles which she prohibits us to manufacture—and the tragedy of American liberty is finished."\textsuperscript{137}

If Parliament's enactment of new customs duties and other impositions for the purpose of raising revenue threatened, in the eyes of colonists, to destroy the balance between central and local power, the threat appeared to colonists as well in a series of additional acts, most of which were adopted as part of the general effort to enforce the revenue acts, but which burdened other important colonial rights and liberties. The threat to the constitutional balance thus also appeared in such exercises of central power as the closing of ports, the stationing of troops in colonial towns, and the use of writs of assistance as general search warrants. It appeared in Parliament's direct interference with local government; for example, in its suspension of the New York legislature for failing to vote all of the


\textsuperscript{134} Dickinson, Letters from a Farmer 312-16; 328-35 (cited in note 132). See also Daniel Dulany, Considerations on the Propriety of Imposing Taxes in the British Colonies (1765), reprinted in Bailyn, ed, 1 Pamphlets 608, 637 (cited in note 128).

\textsuperscript{135} Dickinson, Letters From a Farmer at 347 (cited in note 132) (emphasis in original).

\textsuperscript{136} Id at 312.

\textsuperscript{137} Id at 320.
supplies required by the Quartering Act of 1765, and in its altering of the Massachusetts constitution and its suspension of Massachusetts town meetings in 1774. And it appeared as well in a number of regulations that shifted responsibility for the administration of justice from institutions that were more responsive to local concerns to centrally-administered bodies. The Revenue Act of 1764 (the Sugar Act), for example, limited the personal liability of custom officials for their actions in enforcing customs regulations; and three years after the passage of that act, Parliament established a new set of Vice-Admiralty Courts to hear customs cases. Such courts, which bypassed local juries, took "away the ancient right of being judged only by peers"; and the power of such courts to grant immunity to officials from a common law suit (on a showing that they were acting for "probable cause") further "weaken[ed]," in the eyes of colonists, "the best Security of our Lives, Liberties and Estates."  

While some of these acts, standing alone, may well have evoked colonial protests, collectively they represented a fundamental threat to the balance between central and local power. The objection to most of these measures was not that they were inherently outside of the realm of central authority, but rather that they were excessive exercises of that authority; and in many cases, given their underlying purpose, that they were outright abuses of that authority. Thus, while they maintained the "forms" of legitimate central power, they were, in Dickinson's words, destroying the "substance" of "American liberty." As Dickinson said in the context of the suspension of the New York legislature, the problem was not that the legislature had a right to meet; for various reasons the Crown might legitimately "have restrained the Governor of New-York, even from calling the Assembly together, by its prerogative in the royal governments." The real problem was that the suspension had been imposed by Parliament and for an illegitimate reason; it was being used "to COMPEL New-York into a submission of" unconstitutional Parliamentary "authority."  

Similarly, the problem with the use of Vice-Admiralty Courts was not that such courts represented an inherently illegitimate use of central power. As John Phillip Reid has noted, the use of such courts was probably necessary if Parliament was going to have any of its trade acts enforced, and such courts had existed for seventy-five years in the colonies without raising "constitutional issues, for Parliament had promulgated them by virtue of its constitutional authority to regulate imperial trade." 140 But the increased use—and in the eyes of many colonial merchants,

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138. Reid, 1 Constitutional History 51-53 (cited in note 129). The second quotation is from the Instructions of Boston, 18 September 1765, cited by Reid.  
139. Dickenson, Letters from a Farmer at 310 (cited in note 132).  
140. Reid, 1 Constitutional History 52 (cited in note 129).
Declarations of Rights

abuse of such courts to enforce controversial customs measures, and the power of these courts to grant immunity to royal officers from common law suits, appeared to colonists as a dangerous extension of central power. The jury itself functioned as a representative of the community's sense of justice; and without a jury, "legislative and judicial mandates" could not "be tempered to conform to a local constitutional consensus." Colonial defendants would thus be subject to the judgment of "[e]nglish common lawyers appointed by London" who had "a greater attachment to imperial rule" than to "impartial" justice, and the community would be at the mercy of royal agents and soldiers who would be held accountable to no local tribunal. Taken together, these policies, pursued in the spirit of Parliamentary sovereignty, appeared to colonists as a broad-scale assault on colonial self-government and part of a program to centralize power in Parliament, a body "who cannot be supposed to have the least care or concern for" the colonists' "real interest."

The colonists' fears, it goes without saying, were not assuaged by the ministry's reaction to their complaints. In responding to the colonial claim of a right to self-government and to the claim that the power of Parliament was limited to managing trade and other general affairs of the empire, representatives of the center reasserted the completeness of Parliamentary sovereignty: that the power of Parliament was "absolute, uncontrollable, and accountable to none"; that it was "supreme, absolute and unlimited," that it entailed the "full power and authority to make laws and statutes . . . to bind the colonies and people of America . . . in all cases whatsoever", and that "no Line . . . can be drawn between the supreme Authority of Parliament and the total Independence of the Colonies." And to the colonists' claim that they were

141. Vice-Admiralty Courts had the power to issue certificates that a custom official, even if wrong in his seizure of a vessel and its wares, acted with "probable cause," which would immunize the official from a civil suit. Colonial merchants commonly complained that this power was abused. See for example, Henry Laurens, Extracts from the Proceedings of the Court of Vice-Admiralty, reprinted in Merrill Jensen, ed, Tracts of the American Revolution 185-206 (Bobbs-Merrill, 1967).

142. Reid, 1 Constitutional History 51-52 (cited in note 129). As Professor Reid notes, not only did juries enforce a "local constitutional consensus" to "protect local citizens from imperial prosecutions," but also to punish "royal officials 'guilty' of enforcing 'unconstitutional' imperial law." Id at 53.

143. Id at 51.


146. The words are those of the Earl of Egmont, cited by John Phillip Reid, in 3 Constitutional History 48 (cited in note 130).

147. Declaratory Act in Greene, ed, Colonies to Nation 84, 85 (cited in note 131).

148. Address of Governor Hutchinson in The Speeches of His Excellency Governor Hutchinson; to the General Assembly of the Massachusetts-Bay. At a Session begun and
not represented in Parliament, and that the colonies stood towards Parliament only as self-governing corporate entities, Parliamentary spokesmen responded that Parliament's power came from its representing all the subjects of the empire as such. True, it was said, the colonists did not themselves elect members of Parliament, but neither were "Nine Tenths of the People of Britain Electors," and like them, the colonists could nonetheless be "virtually" represented in Parliament.

It is important to see how this argument of virtual representation was connected to the idea of Parliamentary sovereignty: how it was, indeed, a conclusion from that idea. The argument of virtual representation did not begin from a thesis about what would constitute proper representation; rather, it began with the premise that "the King in Parliament, is the sole and absolute sovereign of the whole British Empire," and then asked what form of representation would be compatible with that sovereignty. Because the colonists could not be represented directly—by virtue of their distance, "the right of having a share in the Imperial Legislature" was simply "impracticable"—the colonists had to be represented virtually. The point made by Parliamentary spokesmen that most Britons within the realm did not choose their representatives simply went to show that virtual representation was not an impossible form of representation.

For the colonists, however, for whom the fundamental principle of the constitution was the principle of representation, the issue did not begin with Parliamentary supremacy, but with the question of proper representation itself. As subjects, the colonists argued, they could not properly be represented within a Parliament whose members they had no share in electing; and the idea of virtual representation was thus a "fiction of law," a "Phantasie," a "far-fetched' notion of 'late date' that had been fabricated for the sole purpose of arguing the colonists 'out of their civil rights." True enough, the colonists recognized, most subjects in Great Britain did not themselves participate in electing representatives; but, as a number of colonists argued, most notably, Daniel Dulany, while in Britain "the interests of the non-electors, the electors and the representatives, are individually the same . . . [such that the] security of


151. Id at 10-11.


153. Maurice Moore, The Justice and Policy of Taxing the American Colonies in Great Britain, Considered (1765), quoted in Greene, Peripheries and Center at 82 (cited in note 17).
the non-electors against oppression, is that their oppression will fall also upon the electors. . . . [t]here is not that intimate and inseparable relation between the electors of Great Britain and the inhabitants of the colonies . . . ; on the contrary, not a single actual elector in England might be immediately affected by a taxation in America." While Parliament could thus be trusted to weigh the overall good of a policy against the burdens that it imposed on subjects within Britain, it could not be trusted to do the same with respect to the rights and liberties of the colonists, for these rights and liberties Parliament could not adequately represent. For colonists, then, who began with the issue of representation, the question was not what form of representation was compatible with Parliamentary sovereignty, but whether Parliamentary sovereignty over the whole of the empire was compatible with just representation. And their answer, of course, was that it was not.

The criticism of virtual representation was not that Parliament would impose burdens for the sake of harming colonial interests; the criticism was rather that Parliament would be insufficiently sensitive to the burdens its policies imposed on the colonists. This argument against Parliament's having fundamental authority over all matters of governance throughout the empire was grounded deeply in English constitutional thought; in an important sense, it was simply a new version of the argument made by the parliamentarians themselves against the royal prerogative: that property and liberty could only be harmed for the common good and that the question of what burdens were justified by the common good could only be properly determined by a body that represented the interests of subjects. Just as the prerogative power, it was feared by seventeenth-century parliamentarians, would be used to take property and restrict liberty in ways not genuinely for the common good, so the danger now was that Parliament, in acting for what it took to be the common good, would fail to give proper respect to the interests of colonial subjects. Does a member of Parliament "know us? Or we him?" Arthur Lee asked. "Have we any restrictions over his conduct? . . . Is he bound in duty and interest to preserve our liberty and property? . . . Is he acquainted with our circumstances, wants &c.?" Because Parliament did not, and could not properly represent the liberty and property of colonists and because it considered the common good only from the point of view of the center, the consequences of Parliamentary government were clear: the subversion of liberty and "taxes without end." Rather than being a coordinating power in a federalist constitution of empire, Parliament would become the legislature for the whole, absorbing the colonists into the realm as second-class subjects.

156. Id.
James Otis's influential pamphlet, *The Rights of the British Colonies Asserted and Proved* described the constitutional relationship between the colonies and the center in a way that was, indeed, remarkably homologous to the arguments of seventeenth century parliamentarians against the prerogative power. Just as, in the period of the early Stuarts, it was axiomatic that all authority was in "the king," so did Otis similarly accept that "as over subordinate governments, the Parliament of Great Britain has an undoubted power and lawful authority to make Acts for the general good, that by naming them, shall and ought to be equally binding, as upon the subjects of Great Britain within the realm." But in the same breath in which parliamentarians asserted the absolute power of the king, they also asserted that no man's property can be taken without his consent, that (in the words of Coke) "Magna Carta is such a fellow, that he will have no sovereign," and similarly did Otis claim that "no parts of His Majesty's dominions can be taxed without their consent." For the parliamentarians, the possibility of reconciling the absolute power of government and the rights of subjects lay in the institution of the king-in-Parliament; and so, too, did Otis argue that if the colonies were to be taxed by Parliament, they would need to be represented "in some proportion to their number and estates, in the grand legislature of the nation." Moreover, just as the parliamentarians responded to exercises of the prerogative that they regarded as violative of their liberties and property in part by using Parliament's own power as a court to drive a wedge between the king's two bodies, so, too, did Otis, in a rather interesting move, attempt to respond to the policies of a Parliament that did not represent the colonists and that, Otis believed, violated the colonists' liberty and property, by driving a wedge between what might be called Parliament's two bodies. While asserting that "the power of Parliament is uncontrollable, but by themselves, and we must obey," Otis insisted—repeating a classic constitutional distinction—that "absolute and arbitrary is a contradiction."

Parliament are in all cases to declare what is for the good of the whole; but it is not the declaration that makes it so. . . . Should an Act of Parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity, and justice, and 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 have been mistaken, in having declared them to be for the public good, when in fact they were not so.

But suppose that Parliament did not recognize or repeal its "mistaken" act?

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160. Id at 470.
161. Id at 448.
162. Id at 454-55.
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. . . . If the supreme legislative errs, it is informed by the supreme executive in the King's courts of law.\textsuperscript{163}

While thus recognizing Parliament's "absolute" power, Otis suggested that the "supreme legislature" and the courts act as "a perpetual check and balance to each other."\textsuperscript{164} And the two seemingly disparate ideas were made compatible under just the same rationale that earlier parliamentarians had used for explaining how it was that punishing an officer of the king who was carrying out the king's command (even as confirmed by the person of the king himself) was nonetheless in obedience to the king. Just as the parliamentarians had argued that, because the king "is just, so we doubt not but he doth justly intend to performe,"\textsuperscript{165} similarly Otis argued that, in upholding "eternal truth, equity, and justice" the king's courts would in fact be upholding the genuine will of Parliament itself.

The suggestion was, however, hardly plausible. Punishing the king's officers for carrying out the direct commands of the person of the king was a symptom of constitutional crisis, not the foundation of a stable constitutional order. And relying on the king's courts to mediate between a non-representative-Parliament's conception of the needs of the realm and the property and liberty interests of the colonists was an equally strained solution. Even under the fantastic supposition that the crown would have allowed royal courts to assume such a role, it would necessarily be limited, as Otis suggested, to "evident and palpable" mistakes.

The problem was far deeper and it consisted in the fact that, because colonists were not actually represented in Parliament,\textsuperscript{166} Parliament was not capable of properly representing their interests and could not be counted on to act "for their good."\textsuperscript{167} The alternative to representation was federalism. But in the eyes of many colonists, Parliamentary policies threatened the balance between central and local power and with it the existence of a meaningful realm of colonial self-government. And without such a realm, colonists would be left with only the hope that Parliament would come to share their concerns and protect their interests; and it was, the colonists believed, a vain hope that "Life, Liberty [and] Property . . . will be effectually secured by a Government, which the Proprietors of them have no Power in the Direction of, and over which they

\textsuperscript{163.} Id.
\textsuperscript{164.} Id.
\textsuperscript{165.} Morgan, \textit{Inventing the People} at 29 (cited in note 120).
\textsuperscript{166.} Colonial advocates did not, in general, argue for actual representation in Parliament; and Otis argued that such representation was second-best to a "subordinate legislative among [the colonies] themselves," Otis, \textit{Rights}, in Bailyn, ed, \textit{Pamphlets} at 445 (cited in note 128).
\textsuperscript{167.} Wilson, \textit{Considerations of the . . . Legislative Authority} at 724 (cited in note 154).
have no Power or Influence whatever.\textsuperscript{168}

In response to Parliament's assertions of an authority "supreme, absolute and unlimited," and to the difficulty in offering a clear distinction between central and local authority that did not itself depend for its preservation on Parliament's adopting a federalist "spirit," colonial advocates were forced to make increasingly severe claims about the constitutional position of the colonies. In the years immediately preceding the American Revolution, many colonial advocates thus came to describe the relationship of the colonies to Britain as that of essentially two states under a common king. Under this conception, the relationship between the colonies and Britain was something like the relationship between Scotland and England had been in the century between the unification of the crown in James I (James VI of Scotland) and the union of the two kingdoms in 1707.\textsuperscript{169} As James Madison put it a quarter century after the revolution:

[T]he fundamental principle of the Revolution was that the colonies were coordinate members with each other and Great Britain of an empire united by a common executive sovereign, and that the legislative power was maintained to be as complete in each American parliament as in the British parliament.\textsuperscript{170}

As a matter of historical practice, this view of the constitutional relationship was, at the very least, debatable. Parliament had long been a participant in governing the empire; since the mid-seventeenth century, it had regulated trade with the colonies through a series of navigation acts and other related measures, restricted manufacturing of various goods, prohibited private banks of issue, and regulated the issuing of legal tender and the value of foreign coins.\textsuperscript{171} And while there had been some opposition in the colonies to such measures,\textsuperscript{172} and while colonists sought to circumvent those regulations that were most onerous, in general the colonists had come to accept Parliament's power to "model the Trade of the whole Empire, so as to subserve the Interest of her own."\textsuperscript{173}

Some colonial advocates, however, now simply denied that the colonists had ever accepted any central authority over them and claimed that earlier regula-

\textsuperscript{168.} Reid, ed, Briefs at 43 (cited in note 148).
\textsuperscript{169.} The famous case on the question of the relationship between Scotland and England was Calvin's Case or The Case of the Postnati. Howell, \textit{State Trials II}, 638-96 (1608). On the relevance of this case for the American colonies, see Wilson, \textit{Considerations on the . . . Legislative Authority} at 735-39 (cited in note 154); Reid, ed, Briefs at 132 (cited in note 148); Charles McIlwain, \textit{The American Revolution: A Constitutional Interpretation} 92-106 (MacMillan, 1924); Barbara Black, \textit{The Constitution of Empire: The Case for the Colonists} 124 U of Pa L Rev 1157 (1976).
\textsuperscript{170.} Quoted in Andrews, \textit{Colonial Background} at 42 (cited in note 19).
\textsuperscript{171.} Greene, \textit{Peripheries and Center} at 61 (cited in note 17).
\textsuperscript{172.} Id at 55, 58.
\textsuperscript{173.} Petition of the General Assembly of the Colony of New York to the House of Commons, October 18, 1764, reprinted in Greene, ed, \textit{Colonies to Nation} 33, 37 (cited in note 131).
tions had been approved by colonial assemblies at the “request” of the king. Others denied only that Parliament had ever had any authority over them and characterized the early Parliamentary regulations as enactments of the king, consented to by the king’s subject’s in Parliament, and then accepted by the colonists, either explicitly through their legislatures or implicitly through practice. According to this view, while the center did have power to impose regulations in the interests of the realm and in the interests of the empire, that power rested with the king alone, who was responsible for maintaining the relations between the various entities that made up the empire. As James Wilson argued in 1774, the “dependence of the Americans” on Great Britain is not as subjects of the Kingdom, but “as subjects of the King of Great Britain” and

[from this dependence . . . arises a strict connexion between the inhabitants of Great Britain and those of America. They are fellow subjects; they are under allegiance to the same prince. . . . To the king is intrusted the direction and management of the great machine of government. He therefore is fittest to adjust the different wheels, and to regulate their motions in such a manner as to co-operate in the same general designs. . . . The connection and harmony between Great Britain and us, which it is her interest and ours mutually to cultivate, and on which her prosperity, as well as ours, so materially depends, will be better preserved by the operation of the legal prerogatives of the crown, than by the exertion of an unlimited authority by parliament."

This was an awkward argument. If the colonists were to concede that the king had power to regulate the affairs of the empire, they were left to explain—as John Adams, who saw the difficulty, put it—why it was that “that authority [is] lessened by the concurrence of the two Houses of parliament.”

174. This argument appears in the Massachusetts’s House of Representatives’ answer to Governor Hutchinson’s address in Reid, ed, Briefs at 66 (cited in note 148). Professor Reid notes in his introduction to the section that the argument was probably written by John Adams.

175. The argument that allegiance was to the natural person of the king was supported by reference to Calvin’s Case. See note 169. The implication further followed from the claim made by some that the king’s lands in America were his alone and his rights to them had not been granted to the British state. Reid, ed, Briefs at 121-22 (cited in note 148).

176. Wilson, Considerations on the . . . Legislative Authority at 744-45 (cited in note 154).


A number of American whigs nonetheless argued that the king had a duty to keep Parliament out of colonial affairs. Reid, ed, Briefs at 42 n 9, 72 (cited in note 148); Thomas Jefferson, A Summary View of the Rights of British America, in Julian P. Boyd, ed, 1 The Papers of Thomas Jefferson 121-37 (Princeton, 1950).

In his speech to the Massachusetts General Assembly, Governor Hutchinson argued that the colonists had, in fact, recognized William and Mary, whose succession to the throne had been based on an act of Parliament and who themselves swore to govern according to the statutes of Parliament. The Massachusetts House claimed in response that
But if some of the specific historical and constitutional arguments were problematic, they were motivated by a very real constitutional threat. For the colonists, political freedom had depended on preserving a proper balance between a realm of central and a realm of local power; Parliamentary policies, however, both challenged the division of power, and the balance, that had existed between central and local institutions. The very necessity on the part of colonists to articulate a precise boundary between central and local authority itself indicated the breakdown of the balance; and in the face of a Parliament that showed little indication of being concerned with preserving such a balance, the colonists increasingly despairs of finding any principle short of complete autonomy on the basis of which they could defend a meaningful realm of self-government. "The more I have thought and read on the subject," Benjamin Franklin wrote as early as 1768, "the more I find myself confirmed in the opinion that no middle ground can well be maintained. I mean not clearly with intelligible arguments. Something might be made of either of the extremes: that Parliament has a power to make all laws for us, or that it has a power to make no laws for us." In the eyes of many colonists, Parliamentary policies, pursued under the former of these principles, were destroying the realm of colonial self-government and instituting in its place a government of the center, with the disparagement of rights and liberties that comes from being governed by the will of another. What was at stake, then, in the choice between Franklin's "extremes" was the very existence of genuine representative government and colonial political freedom: the freedom of the colonists to act on their own political judgments, and to protect liberties in accordance with their own collective conception of the common good.

By the early 1770s, many colonists had come to share the view that no federalist "middle principle" would be both sufficiently strong and sufficiently

the king's oath was to govern according to the Statutes of Parliament and the "Laws and Customs of the Same," including (it was argued) the right to "freely debate and consent to such Statutes as are made by themselves or their chosen Representative." On this view, William's and Mary's oath to govern under Parliamentary statutes was also an oath to govern the colonies through their own assemblies. Reid, ed, Briefs at 140 (cited in note 148) (emphasis in original). According to Professor Reid, this rejoinder "appears to be the work of John Adams." Id at 119.

178. For defenses of the colonial view by modern scholars, see McIlwain, American Revolution (cited in note 169); and generally Black, Constitution of Empire 124 U Pa L Rev 1157 (cited in note 169). For a well-known criticism of McIlwain's views, see Robert Schuyler, Parliament and the British Empire (Columbia, 1929).

179. Letter of Benjamin Franklin to William Franklin, March 13, 1768, in Leonard Labaree, et al, eds, 15 The Papers of Benjamin Franklin 75-76 (Yale, 1959). See also Wilson, Considerations on the . . . Legislative Authority at 735-39 (cited in note 154): "[T]he writer informs, that, when he began this piece, he. . . . entered . . . with a view and 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 his inquiries, he 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." (Emphasis in original.)
definitive in practice to be able to serve as the basis for defending against a Parliament that acted in the spirit of sovereignty; that there was no precise and formal line that could distinguish a realm of colonial power and a realm of Parliamentary power and that could maintain the balance between them; and that against a Parliament that acted under the principle of sovereignty, the only viable response was a claim of complete colonial autonomy from Parliamentary regulations. From the colonial perspective, such a claim did not, of course, imply a claim of independence from the empire—though from the perspective of a Parliament that claimed to be the sovereign power in the empire as a whole, it could imply nothing less.

D

In discussing the constitutional fears and the constitutional claims of colonists in the decade or so leading up to the Revolution, I have noted some of the continuities with the constitutionalist arguments made by the parliamentarians in the conflict between the Houses and the king in the seventeenth century. The most central common issue in these two sets of conflicts concerned the proper mediation between considerations of "government" (as it was put in the seventeenth century) and the property and liberty of subjects; like the seventeenth century parliamentarians, the eighteenth-century colonists argued that political freedom required that the common good be determined by institutions that adequately represented these latter interests. While this general constitutional issue was fundamental to both conflicts, there was, however, an important difference in the context within which the issue appeared.

The claims made by the parliamentarians were on behalf of an institution that was commonly said to embody the whole of the nation. Parliament had traditionally been depicted as the fullest embodiment of the whole kingdom and as we have seen, it had become common (again) in the sixteenth century to refer to Parliament in such terms as the "great corporation or body politic of the kingdom." The issue with respect to Parliament was not, then, whether it was the highest embodiment of the whole kingdom—even James referred to the

180. The exact meaning of that idea, changed over time, but it had definite medieval roots. Parliament as a whole was sometimes referred to as the embodiment of the whole kingdom as, for example, when Edward I pledged that no new aids or taxes would be imposed but by "common assent of the whole kingdom and for the common benefit of the same kingdom." Confirmation of the Charters in Stephenson and Marcham, eds, Sources of English Constitutional History 164, 164-65 (cited in note 57). In one medieval conception, the body politic did not exist but in Parliament. It was in Parliament, on this view, that the body politic materialized, the Lords sitting in their own right and the commons representing "the plebs organized and combined in corporate communities," "the 'communitas communitatum,' the general body into which for the purposes of parliament these communities are combined." William Stubbs, Constitutional History of England 212 (Clarendon, 1906). In the fourteenth century, Commons sometimes described itself as representing every Englishman, although this was an idea that would be resisted for several centuries. Morgan, Inventing the People at 48 (cited in note 120).

181. See note 68 and accompanying text.
members of Commons as “you who are presently assembled to represent the body of this whole kingdom”\textsuperscript{182}—but rather what kinds of decisions should be made by that institution that embodied the whole. And the eventual establishment of parliamentary supremacy answered that question in the idea that the institution that was the highest and fullest representation of the whole of the nation or the people was, for that reason, sovereign.

The conflict between the colonies and England was, however, of a different sort. As we have seen, the idea of political authority had always been a complex one for the colonists. While political authority was partly understood to come from the consent of the governed, the colonists well accepted that their authority, at least in part, had been granted from above and through their charters. And while they held that authority over certain matters now irrevocably resided within themselves, the relationship between local authority and the authority of the center remained necessarily somewhat indefinite. Until the conflict pressed colonial advocates to increasingly extreme conclusions about the constitutional relationship between the center and colonies, colonists did not deny that they were “but parts of a whole,”\textsuperscript{183} and that, as such, they were subject to the “Authority of the Parliament . . . to model the Trade of the whole Empire”\textsuperscript{184} and their laws were subject to the review of the Privy Council. But if for some purposes, the colonists conceded that, as parts of the whole, they were under the authority of the center, for other purposes, they argued that authority lay, not with the center, but with the colonial legislatures, and that the interests of the center were represented \textit{within} those legislatures themselves in the person of the governor. From the perspective of the colonists, the issue was thus not over the question of whether decisions of government should be made by the body that represented the whole, for there was no single body that represented the whole for all purposes. To the government of the empire belonged those “many things of a more general nature . . . which it is necessary should be regulated, ordered, and governed”; while to local government belonged the authority of matters which could not be well-represented within Parliament—the authority “to take care of it’s \textit{sic} interests, and provide for it’s peace and internal government.”\textsuperscript{185} Parliament’s view in the mid-eighteenth century was, of course, that it represented the whole and did so \textit{in all respects and for all purposes}. In the conflict between Parliament and the colonies, then, the point that had well been \textit{assumed} in the seventeenth-century contest between Parliament and the king was precisely \textit{at issue}; namely, \textit{whether} the whole was fully embodied within any particular institution.

While the struggle of the Houses’ to limit the prerogative and the struggle of

\textsuperscript{183} Dickinson, \textit{Letters From a Farmer} at 312 (cited in note 132).
\textsuperscript{184} Petition of the General Assembly of the Colony of New York to the House of Commons, in Greene, ed, \textit{Colonies to Nation} at 37 (cited in note 131).
the colonists against the incursions of central power proceeded under a set of common general premises about the relationship between representation and political freedom, the institutional characters of the two conflicts were thus quite different. And the particular institutional character of each of these conflicts significantly affected the constitutional order that arose out of it. The eventual result of the conflict between Parliament and the prerogative power was the sovereignty of that particular institution that had already been understood to embody the whole. The American Revolution, however, was explicitly fought in the name of “the people” itself; and unlike in Britain, where popular sovereignty arose with (or as we might even say, in) parliamentary sovereignty, in the American case, “the people” was proclaimed sovereign independently of, and antecedently to, its attachment to any particular institutional form. The American revolution, then, opened, rather than settled, the question of the relationship between this people in whom sovereignty resided and particular institutions of government. If it was “the people” itself that was sovereign, and sovereign antecedent to any particular institution, the question precisely raised by American independence was how was that sovereignty to be realized.

It was certainly possible that the new states could have adopted the Parliamentary model and proclaimed that sovereignty now lay in the assemblies or provisional congresses as the highest embodiment of the people. But they did not do so. And that they did not was likely a consequence, at least in significant measure, of the fact that for the colonists neither “the people” nor “sovereignty” had ever been easily incorporated into a single institution. Indeed, the greatest threat to political freedom—from the perspective of the colonists—had come precisely from an institution that claimed to embody all the subjects of the empire. The constitutional charters that emerged from this history thus understandably resisted the notion that “the people” was reducible to a particular institution and struggled with the problem of how a sovereign people was to be represented by political institutions in which “the people” was not fully contained.

III

Let us return now to the events with which we began. As noted earlier, in May of 1776 the Continental Congress, in what amounted to a kind of preliminary declaration of independence, called for the withdrawal of allegiance from the crown and for the enactment of new charters on the authority of the people. The particular response to this resolution varied somewhat by colony. South Carolina and New Hampshire had already adopted charters in accordance with earlier Congressional recommendations; however, these charters were clearly provisional and meant to be in effect only during the course of hostilities, and they were replaced with revised charters in 1778 and 1784, respectively. In the charter colonies of Connecticut and Rhode Island, where day-to-day “government sufficient to the exigencies of their affairs” had already been independent of the direct involvement of the crown, the assemblies simply declared that the government now existed on the authority of the people rather than the king. In
Virginia, work began on a charter shortly after the provincial congress instructed its delegates to the Continental Congress to vote for independence, and a charter was adopted in the final days of June. New Jersey passed its charter on July 2, the day on which Richard Henry Lee’s resolution of independence was adopted. The remaining seven colonies enacted their first independent charters after Congress’s formal declaration of independence; in each colony but that of Massachusetts within the following year. (In Massachusetts, proposed drafts of a constitutional charter led to widespread public debate about the proper nature of a constitutive assembly and of a constitution; and after popular rejections of several proposed charters, Massachusetts finally adopted a constitutional charter in 1780.)

One of the notable features of the charters enacted after the May resolution is that, excluding the exceptional cases of Connecticut and Rhode Island and including the revised charters of South Carolina and New Hampshire, each contained some listing of fundamental liberties, either within the body of the document or as a separate bill of rights. It is this feature of the charters on which I shall want to concentrate, and in a moment I shall turn to these declarations of rights. But before doing so, it is worth focusing very briefly on an initial question that was raised by the proposal to write new charters of government and that posed quite starkly a question of the relationship between the sovereign people and particular institutions of government; namely, who was to write these charters?

The constitutional charters enacted before the passage of the Declaration of Independence (the charters of Connecticut, Rhode Island, Virginia, New Jersey and the provisional charters of South Carolina and New Hampshire) were each written by existing assemblies or provisional congresses. However, for each of the charters written after the Declaration (including the revised charters of South Carolina and New Hampshire) the new states adopted the procedure of holding special elections to choose the body that would be responsible for writing the charter. With the exception of Massachusetts’s and New Hampshire’s revised

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187. Delaware’s declaration of rights was added later by statute, although it is referred to by the constitutional act. Because it was added by statute, it has not been included in most of the standard reprints. It is reprinted in 2 *American Archives* 286-87 (5th series). On Delaware’s Bill of Rights, see Max Farrand, 3 *The Delaware Bill of Rights of 1776* 641-50, American Historical Review (1897-98).
188. In Delaware and Pennsylvania, special conventions were called for the purpose of enacting a charter, although the conventions engaged in some ordinary legislative work as well. In Maryland, North Carolina, Georgia, New York and South Carolina (in the case of its revised charter), the constitutional charters were enacted through regular assemblies and congresses, but only after a special election had been held with the understanding that the elected representatives would be charged with writing constitutional charters. In Massachusetts, after a long debate on the issue, it was decided that the charter would be drafted by the house of representatives, after a special election, and then submitted to the towns for comment and approval. Adams, *First American Constitutions* at 68-93 (cited in note 12). The revised charter of New Hampshire was enacted through a convention after
charter, these charters were not submitted directly to voters for ratification. Nonetheless, despite some opposition, there seems to have been a widespread belief that a charter that was to be grounded on the right of the people to institute new government should be written by representatives especially chosen for that task. As a committee of New York's provisional congress put it in recommending new elections: "The right of framing, creating, or remodelling Civil Government is and ought to be in the People. As the present form of Government by Congress and Committees in this Colony originated from, so it depends on, the free and uncontrolled choice of the inhabitants thereof."

Now, at first glance, and for we who are accustomed to special procedures for writing or amending constitutions, the idea that the body charged with writing a new charter should be specially elected for that purpose may hardly seem a striking proposition. But on deeper thought, the idea behind such a procedure is not obvious at all; and, indeed, it certainly seemed a significant point to many at the time. Why, after all, should the writing of a new constitutional charter have required new elections? It may be tempting to say simply that such a procedure was grounded on the idea of popular sovereignty: that the charter was meant to come from "the people." But to leave it at this would be to say both too much and too little. If it is meant to imply that constitutional charters could only be enacted by a vote of "the people" directly, it says too much; for as we have noted, most states did not even submit the completed charters to the electorate for ratification. On the other hand, if the power of the people to create a new form of government could be exercised through an ordinary legislative assembly, why was there a need to elect new assemblies? The new assemblies were in some cases elected on a different basis than the sitting assemblies, but they were not, on the whole, obviously either more or less representative than the old. Elected assemblies certainly did, and do, routinely decide issues for which they have not been specifically elected, and this is not normally thought to present a problem for democratic governance. And under the theory of Parliamentary sovereignty as it developed within Great Britain, a sitting Parliament might change the constitution without announcing in advance its intentions to do so and without calling a special election. Why, then, were these sitting representative bodies in the new American states, to whom the earlier drafts had been submitted to town meetings for approval or amendment. Poore, ed, 2 Federal and State Constitutions at 1280 (cited in note 18).


190. In some cases, the calling of a special convention to draft a constitution was used as a method of overcoming opposition within existing assemblies to the enactment of a new constitution. Nonetheless, the arguments for holding a special election or convention were made in terms of the propriety of such a procedure and seem to have been received with a great deal of support. See Adams, First American Constitutions at 72-86 (cited in note 12).

191. Quoted by Adams, First American Constitutions at 84 (cited in note 12).

192. See Adams, First American Constitutions at 72-86 (cited in note 12).

193. I shall use the term "assembly" here in a generic sense that includes provisional congresses and constitutional conventions.
everyday business of government was entrusted, not appropriate for the purposes of drafting a constitutional charter?

The thought that they were not appropriate and that a constitutional charter should be written by a body specially elected for that purpose is significant and it reflects an appreciation of the problem of the relationship between “the people,” on whose behalf these charters were to be written, and “representative” assemblies. Indeed, in a sense, this issue presented in a new form the question of the relationship between what we earlier referred to as “top-down” and “bottom-up” authority. For on the one hand, the authority of the constitutions came upwards from the people: it was the people and not their existing governments that had the right 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.” On the other hand, the constitutional charters and the new forms of government that they were to bring into being were necessarily to be formulated by an existing and pre-constitutional body and it was for this body to determine how the people itself would, in the future, be represented and governed. If governmental power flowed from the people upwards, in a very real sense it also flowed from the government down.

The particular analogy need not be pushed too far. But the colonists, as we have seen, had always held a complex view of the relationship between “the people” and political institutions and it is not surprising that in the waking moments of independence and in the context of the question of who should write the foundational charter of government, the question of the relationship between existing assemblies and “the people” should be immediately raised. The idea that the assemblies charged with writing charters should be specially elected for that purpose did not imply that existing assemblies were corrupt or unrepresentative. It seems rather to have come out of a recognition that even “representative” assemblies are imperfectly representative and that even an assembly elected by “the people” is not identical with that people, but is a particular and partial embodiment of it.

Of course, if representative institutions are imperfectly representative, it must follow that even the assemblies elected for the purpose of drafting a constitution would not be identical with the people. The idea of holding special elections may, indeed, have been partly symbolic: at a moment of political independence

194. Even in Massachusetts where the charter was submitted to the people, some body had to decide how voting should take place, how proposals from the towns and counties should be considered and so forth. In fact, in the spirit of popular sovereignty, it was left to local communities to decide how they would respond to the proposed charter of 1780. The result was that some communities ended up voting on the entire document, others on each individual provisions and others returned their votes with various qualifications. The difficulties in interpreting the results for the charter as a whole were so great that in the end the constitutional convention simply declared that the charter had passed. See Oscar Handlin and Mary Handlin, *The Popular Sources of Political Authority: Documents on the Massachusetts Convention of 1780* 25 (Harvard, 1966). A similar situation occurred in the adoption of the revised New Hampshire charter of 1784. See Poore, ed, 2 *Federal and State Constitutions* at 1280 (cited in note 18).
founded on the sovereignty of the people, it may be quite natural and desirable to signify the idea of popular sovereignty by providing for some form of direct public participation in the process by which the constitutional charter is brought into being. But in addition to whatever symbolic significance there may have been to holding special elections, there was another evident motivation for adopting such a procedure—namely, to create assemblies that were simply more representative of the people for the particular purpose of writing a constitutional charter. The goal of having special elections would thus be to produce a body that would be better representative of the constitutional concerns of the people, for the members of these new assemblies would be chosen in large measure specifically on the basis of constitutional considerations. This rationale for holding special elections may, again, seem quite obvious, and yet the distinction between ordinary representation and "constitutional" representation suggests an important constitutionalist idea; it suggests that "the people" has a constitutional identity or character that may be better or worse represented within even elected and "representative" governmental institutions.

The question of precisely what it means to say that "the people" has such a constitutional identity was obviously not developed in this context, and the particular context did not require a fully-developed answer. Nonetheless, the notion that a special form of election is necessary for the body charged with writing a constitutional charter entails not only the significant idea that, in a system founded on popular sovereignty, the relationship between "the people" and particular institutional representations of the people is itself at issue, but also, more specifically, that the nature of that relationship is a particularly important question where fundamental or "constitutional" concerns are at stake.

The concern with the problem of how to represent "the sovereign people" within institutions that did not fully embody it was thus present in the very election of new assemblies to write the charters. It was also well reflected within the charters themselves. And nowhere is this more evident than in their declarations of rights.

Earlier, after emphasizing the fact that the declarations of right in these charters were attached to constitutions that were acts of political sovereignty, I asked the question of how we should understand the relationship between political sovereignty and these declarations of rights. That question has, however, two components. The first is the question of the relationship between political sovereignty and the rights to which these declarations refer. The second, which is a quite different question, is about the point of declaring those rights.

The essence of the colonists' constitutional claim against the center had been that, for certain matters, the question of the common good, and of how rights and liberties were to be accommodated to it, could properly be determined only by local institutions. The colonists had often used constitutional language in asserting the protection of property, specific liberties and the like against parliamentary regulations; but the foundations of the constitutional claim were collective and institutional, and the constitutional arguments were almost always put explicitly in those terms. The argument, for example, was not that property
could not be taken, but that it could not be taken unless the owner “shall in person or by his Representative, think fit to part with the whole or any portion of it.” Similarly, the complaints about the quartering of troops, the use of admiralty courts, the closing of harbors, and so forth were not that such measures would be, on any occasion and for any reason unjust, but rather that such policies were being imposed unjustly by a Parliament that did not genuinely represent colonial interests. The claim of right, that is, was not a claim of absolute protection against governmental interference (although there were certainly thought to be some things that no just government would under normal circumstances do), but a claim against “arbitrary” governmental interference.

The establishment of sovereign states on the authority of “the people” meant that the determination of the common good, and of the accommodation of rights and liberties to it, was to be made, in all cases, from within. In this sense, sovereignty itself was the grandest of all rights, for it included the right to adjust all other rights in the name of the public good. And the new charters were, in their entirety, thus attempts to give effect to this grandest of all rights. Indeed, given the significance of this right, and the history from which these charters grew, it is perhaps not surprising that in many of the state charters, we should find this right articulated explicitly. The expression of this general right is most clear in those charters in which the declaration of rights appears at the beginning and forms a kind of general manifesto on the principle of just government. Virginia’s declaration of rights, for example, after stating the natural and inalienable rights of all men to “the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety,” asserts that “all power is vested in, and consequently derived from, the people,” that “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community,” and that “all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.” Statements to the effect that an individual’s property can be taken, and their liberty restrained, only by their consent or the consent of their representatives can be found as well in the charters of Pennsylvania, New Hampshire, Massachusetts, Delaware, Maryland, Connecticut and North Carolina.

195. From the Town of Boston’s List of Infringements and Violations of Rights (1772), reprinted in Greene, ed, Colonies to Nation 179, 179 (cited in note 131).
196. Va Const of 1776, Bill of Rights §§ 1-3, 6 (superseded 1830).
197. The declarations of rights in the charters of Pennsylvania, New Hampshire (in its revised charter of 1784), Delaware and Massachusetts follow the basic structure of Virginia’s. They each begin with an assertion of natural rights and a declaration that all power resided in the people, and each then goes on to declare that property may be taken and liberty constrained only by the consent of individuals or their representatives. See Pa Const of 1776 Declaration of Rights, Art I, III-VIII (superseded 1790); NH Const of
This, however, now takes us to the second part of our general question. For the issue that is naturally raised is this: if the point of the charters was to protect this grand right by creating a representative system of government and one in which the interests in “life . . . liberty . . . property . . . happiness and safety” would be properly considered in the determination of the common good, what was the point of declaring, not only this grand right, but more importantly, a set of other, more specific “rights”? Many of the specific rights articulated in these charters were, to be sure, among those felt by the colonists to have been violated by the central government during the years prior to the Revolution, and if there were to be a listing of rights, we would well expect that these would be included. But if the idea was not that these interests were absolute, but rather that they had been harmed unjustly by a government that had not properly represented colonial interests, why was there thought to be a need to proclaim specific rights at all against these new governments, whose power came from the people and which were meant to represent the people? And what was the connection between these governmental bodies that were established to represent the people and this declaring of rights?

We can get a sense of how these declarations were meant to stand towards government and the role they were meant to play from the language in which they were written, a language that is immediately striking to the modern reader. In setting up the structure of governmental institutions, the state constitutional charters tend to speak in the imperative. “The legislative,” it is said, “shall be formed of two distinct branches”;198 “a quorum of the house of representatives shall consist of two thirds . . . ”;199 “the senate and house of representatives shall each choose their respective officers by ballot”;200 “the president of the
executive council, in the absence or sickness of the governor, shall exercise all the powers of the governor"; and so on. In contrast, however, the language of rights and liberties in these constitutions is less that of command and more that of general principle and is admonitory or conditional. To take just a few examples, the Virginia Bill of Rights says, not that excessive bail shall not be required, but that it “ought not to be required”; that “in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred”; not that the freedom of the press shall not be abridged, but that “the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.” Pennsylvania’s Declaration of Rights says that no “man, who acknowledges the being of a God [can] be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments”; that “the people have a right to freedom of speech, and of writing, and publishing their sentiments” and that “therefore the freedom of the press ought not to be restrained.” The Maryland Declaration of Rights holds that “sanguinary laws ought to be avoided, as far as is consistent with the safety of the state”; the Georgia constitution that all “persons whatever shall have the free exercise of their religion . . . provided it be not repugnant to the peace and safety of the state”; and the Delaware Bill of Rights that “trial by jury . . . is one of the greatest securities of the lives, liberties, and estates of the people,” that “retrospective laws . . . are oppressive and unjust, and ought not to be made,” and that “for redress of grievances, and for amending and strengthening the laws, the Legislature ought to be frequently convened.” And similar language can be found in the declarations of rights of North Carolina, Massachusetts and the revised constitution of New Hampshire.

The admonitory and conditional language of these declarations of rights does not, of course, imply that the principles articulated were regarded as less important or less “constitutional” than the structural provisions of the charters. Certainly when these constitutions declare, for example, that “the freedom of the press ought not to be restrained,” just as when they declare, as most of them do, that elections for the legislature “ought to be free,” they are not merely expressing a foggy hope. The principles expressed in these charters were meant to be taken quite seriously, and the intention was that government should act with

201. Ga Const of 1777, Art XXIX (superseded 1789).
203. Id at § 11.
204. Id at § 12.
205. Pa Const of 1776, Declaration of Rights, Art II (superseded 1790).
206. Id at Art XII.
207. Md Const of 1776, Declaration of Rights, Art XIV (superseded 1851).
208. Ga Const of 1777, Art LVI (superseded 1789).
209. Del Const of 1776, Bill of Rights § 13 (superseded 1831).
210. Id §11.
211. Id § 8.
212. NC Const of 1776, Declaration of Rights (superseded 1868); Mass Const of 1780, Declaration of Rights; NH Const of 1784, Bill of Rights (superseded 1792).
them firmly in mind. And yet the form of the provisions needs to be appreciated. It was not that there was no other language available for articulating rights and liberties, and these constitutions occasionally do speak of the protection of rights and liberties in the imperative; in fact, there are two of these first constitutional charters, New York's and New Jersey's (as well as South Carolina's revised charter213) which consistently do so.214 The language in which most of these declarations were written was rather a reflection of what those declarations of rights were meant to be and what they were meant to do. These declarations of rights were not, on the whole, conceived of as enactments of fundamental law beyond the reach of government, but were rather articulated as principles of government. As Edward Corwin has written, while these charters "illustrated and realized the doctrine that all just government rests upon the consent of the governed," "it was a corollary from this doctrine, that a government established upon this foundation had the right to govern." Of governmental institutions, it was "the legislative department" which was "supposed to stand nearest the people"; and "legislative" power, as Corwin says, was "undefined power" which "like the British Parliament and like colonial legislatures before it, exercised all kinds of power."215

However, we should not conclude from the idea that these declarations of rights were not generally thought to be enforceable against the legislature by another official agency representing "the people," that therefore the legislature

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213. SC Const of 1778 (superseded 1790).
214. For example: "No acts of attainder shall be passed," NY Const of 1777, Art XLI (superseded 1821) (emphasis added), criminal actions "shall not work a corruption of blood," id, "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed . . . ," id at Art XXXVIII, "there shall be no establishment of any one religious sect . . . " NJ Const of 1776, Art XIX (superseded 1844) (emphases added).

It may be relevant that of the first constitutions, New York's and New York's alone, provided a state body with the power to declare laws unconstitutional, and it may be that the more legalistic language of the New York constitution is attributable in part to the existence of such an institution. However, it should be said that the criteria of the council of revision was broad: to determine whether the laws were "inconsistent with the spirit of this constitution, or with the public good," and its decision could be overturned by a two-thirds majority of each House. NY Const of 1777, Art III (superseded 1821). In these ways, the power of the council (which was composed of the governor, the chancellor and the justices of the supreme courts, or any two justices and the governor) was as much like the veto power of a modern executive as it was like the power of a modern court.

Pennsylvania's constitution established a council of censors, but it had no direct power to hold a law unconstitutional. It did, however, have power to censure, to impeach, to recommend to the legislature repealing laws that seemed to the council to be contrary to the principles of the constitution, and to call for a convention to revise the constitution. (It is notable that under the Pennsylvania Constitution one response to a law that was thought to violate the constitution was to change the constitution.)

was thought to be a perfect embodiment of the people. It is certainly true that of all the agencies of government, the legislature was that body that tended to be most closely identified with the people. But as we have already noted in discussing the enactment of these constitutional charters, the understanding of the relationship between the legislature and the people was not a simple one. And, indeed, most of these early charters divided power in a bicameral legislature, which suggests that even with respect to the legislative branch, the drafters did not adopt a simple view of the relationship between the people and representative institutions. (In the successive waves of constitution-making that followed this earliest period, the tendency was to move yet further towards a balanced constitutional separation of powers and yet further away from the identification of the legislature with the people.) Similarly, these declarations of rights, while they were not, on the whole, meant to establish legally enforceable claims against the government, represent very clearly a recognition of the distinction between the people and representative institutions. Such declarations, indeed, necessarily imply that there is at least potentially a difference between “the people” and the representation of “the people” in the legislature, for if “the people” was perfectly embodied in the legislature, the legislature could never fail to represent the people’s fundamental interests, and it is precisely because of the possibility that the legislature could violate or neglect fundamental principles of the people that it was thought necessary to specify those principles in a written declaration of rights. In fact, after these constitutional charters were enacted, a number of citizen movements protested certain legislative decisions on the grounds that they violated fundamental rights of the people. In so doing, these movements thus claimed to represent rights of the people against the government; and the form of the claim was that the government had failed to give proper due to those rights. As one antifederalist writer would later note in the debate over the need for a bill of rights in the federal constitution: “we [that is, the people] have found by experience the great advantage of a Bill of Rights in our State Constitutions; when the legislature passed sundry laws infringing on the Bill of Rights, we had it in black and white to show them they were wrong; and to their honour be it spoken, they have repealed one; and so far as the necessities of the people would admit the other.”


217. Even Gordon Wood and Bernard Bailyn (exhibiting in this respect a different sort of whiggishness) have tended to see these early expressions of right as an immature stage in the development of the idea of a constitution as a fundamental law on the Marshallian model. See Gordon Wood, The Creation of the American Republic, 1776-1787 273-82 (Norton, 1972); Bailyn, Ideological Origins at 184-198, especially 189-90 (cited in note
think about their efficacy, these declarations are quite intelligible on their own terms, not as enactments of determinate fundamental law (or proto-fundamental law) and also not (as it has sometimes been put) merely as "moral" principles. What they represented, quite simply, were constitutional principles. And the idea of declaring these principles as part of a constitutional charter founded on the authority of the people, and as part of the same charter that also created particular governmental institutions to represent "the people," is, again, quite significant and quite understandable given the history from which these constitutions emerged.

We have discussed the traditional English constitutional concern for the existence of institutions that would properly mediate between interests of "government" and the liberty and property of subjects, a concern that had been central to the English conflicts of the seventeenth century and central to what those conflicts came to stand for in eighteenth-century constitutional ideology. But if in Britain, the eventual result of those conflicts was the supremacy of a single institution that was said to embody the whole and, as such, to represent both concerns of government and the rights and liberties of subjects, in America, the former colonists had particular reason to be suspicious of the idea that a single institution might adequately represent the whole. After all, for the colonists, the threat to representative government had come precisely from a Parliament that had claimed sovereignty and had claimed to represent all the subjects of the empire; the threat of Parliamentary domination, that is, had been the threat of an essentially foreign parliament that presumed to act as a legislature for the subjects of the whole, but that would, in pursuing its understanding of the good, fail to respect adequately the interests of colonists. While American independence would eliminate this threat from the British Parliament, it did not solve the general problem that colonists had learned only too well: that a "supreme" governmental body, even while claiming to be representative and even if acting for what it took to be the general welfare, might well neglect certain important rights and liberties. Of course, if elected bodies could be made to represent the people perfectly, there would be no danger of this. But if no system of representation was, or could be, perfect, the danger remained that, even governmental bodies elected by "the people" would neglect certain kinds of rights and liberties.

The idea, then, of declaring certain rights and liberties likely to be neglected...
in the process of governing and doing so as part of the very charters of these states was a quite understandable and sensible reaction. The point of declaring such rights, however, was not thus to enact a law, but to articulate certain aspects of the nature of the people and the state—aspects which might otherwise tend to be poorly represented. Of course, if these principles at issue could be described both absolutely and with sufficient precision, it would be logical to do so; to declare that the government may never do x or invade y. But the drafters of the early state constitutions surely knew better; they knew that given the variety of exigencies that arise in the life of a polity, it is rarely possible to specify exactly what “the necessities of the people would admit.” The idea of declaring certain foundational constitutional principles was nonetheless to provide a counterpoint to the tendency of governmental bodies to represent poorly these principles, to increase the presence of these principles within political deliberation and political discourse. In declaring fundamental rights and liberties, these charters were thus creating constitutional landmarks of sorts, providing a common basis for “frequent recurrence to fundamental principles” which was necessary for any “free government.” While these constitutional charters thus marked a moment of political sovereignty, at the same time, they signaled the difference between “the people” on whose sovereignty they stood and particular political representations of that people. And in articulating aspects of the people's constitutional character that might tend to be lost in the ordinary course of governing, these declarations attempted to help represent some part of that difference.

I have thus far been focusing on the early state constitutional charters. But these same ideas continued to echo in the debates over the inclusion of a bill of rights in the federal constitutional charter of 1787. In proposing a stronger national government that would assume some powers once exercised by the states, in proposing a legislature divided between one house appointed by state legislatures and one directly elected by voters, and in proposing a relatively strong executive and a relatively independent judiciary, the 1787 constitutional plan offered a yet more complex and pluralistic institutional structure for representing “the people.” And in calling for special conventions to vote on

220. Va Const of 1776, Bill of Rights §15 (superseded 1830).
221. See generally Beloff, ed, The Federalist, and particularly Federalist 62 (cited in note 7). In his Lectures on Law, James Wilson expressed and expanded on many of the ideas articulated several years earlier by the federalists, but in a language that referred far more explicitly to the relationship between a single “people” and divided representation. After describing the people or the state as “an artificial person or body politic,” a “moral person ... united together for their common benefit,” Wilson argued that it was necessary to represent this artificial person through different government bodies with different characters.

The house of representatives, for instance ... diligently inquire into grievances, arising from both men and things. ... Their sentiments, and views, and wishes, and even their passions, will have received a deep and recent tincture from the sentiments, and views, and wishes and passions of their constituents. Into their counsels, and resolutions, and measures, this tincture will be strongly trans-
ratification of the Constitution, the constitutional plan pointed once again to the imperfect relationship between representative institutions and "the people" on whose authority the Constitution was to rest. By the same token, those who opposed the plan did not, in general, do so on the grounds that it divided representation of "the people" into various different institutions, but on the grounds that the institutions that it established would not sufficiently represent some part or aspect of the people—that, for example, in the new constitutional system the "aristocratical element" or some other group would be overly represented in national institutions—and that the national institutions it established would come to dominate state institutions, which represented the people in a very different way. Running through both the arguments in favor of the constitutional system and the arguments against it was thus a concern with the ways in which national and state institutions would each represent "the people" or fail to represent some part or aspect of the people. And a similar concern ran through many of the arguments in favor of a bill of rights.

The issue of a bill of rights for the federal constitution was a somewhat more complicated one than it had been in the case of the states, for partly what was at stake was the relationship between national and state power. In response to the argument of some federalists that a bill of rights was not needed because the national government had only those powers expressly delegated to it, and that the inclusion of a bill of rights might do more harm than good by falsely implying that the government otherwise had general plenary powers, supporters of a bill of rights frequently argued that a bill of right was necessary to

If, at any time, the passions or prejudices of the people should be ill directed or too strong; and the house of representatives should meet, too highly charged with the transfusion; it will be the business and the duty of the senate to allay the fervour. . . .

In fine; the senate will consider itself, and will be considered by the people, as the balance wheel in the great machine of government. . . .

Wilson, 1 Lectures on Law at 401-16 (cited in note 7.)

222. See Herbert J. Storing, ed, The Complete Anti-Federalist (Chicago, 1981) and particularly the Essays of Brutus, New York Journal, October 1787-1788, in Storing, ed, 2 The Complete Anti-Federalist 358; and the Federal Farmer's Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations to It. In a Number of Letters from the Federal Farmer and An Additional Number of Letters From the Federal Farmer to the Republican Leading to a Fair Examination of the System of Government Proposed by the Late Convention; To Several Essential and Necessary Alterations in It; And Calculated to Illustrate and Support the Principles And Positions Laid Down in the Preceding Letters, January 20, 1788, in id at 214-357.

223. This argument was perhaps first made by James Wilson and was most often associated with him. See Speech in the State House Yard, Philadelphia, October 6, 1787, in Merrill Jensen, ed, 2 The Documentary History of the Ratification of the Constitution, (State Historical Society of Wisconsin, 1976) 167-68. The argument appears as well in Federalist 84 (Hamilton) in Beloff, ed, The Federalist (cited in note 7). For other instances of this argument by federalists, see Herbert J. Storing, ed, 2 The Complete Anti-Federalist at 356 note 116 (cited in note 222).
"carefully describe[] the powers parted with and powers reserved" to the states. The federal bill of rights was thus conceived by its advocates partly as a clarification of the domain of delegated national power and a means of protecting states—and the particular kind of representation of the common good that the states afforded—from encroachment by national institutions; as a means, that is, of trying to prevent the federal government from becoming a supreme Parliament. And this conception of a bill of rights was no doubt partly responsible for the language in which it came to be written—a language more absolutist than that found in most of the state declarations of rights. But a federal bill of rights was not only advocated as a way of protecting the power of states from the expansion of national power. For however national power was defined and circumscribed, the power left to the national government would be the power to govern; and no clarification of the general powers of the national government would eliminate the danger that in the course of governing, certain aspects of the people, certain important rights and liberties, would not be well represented. Indeed, if this had been a concern with regard to state governments, it was, for many, far more of a concern with respect to a central government.

The conception of a bill of rights as reinforcing certain aspects of the people against the tendency to neglect those aspects in the course of governing can be seen in the response to one of the common arguments against the need for a bill of rights. It was claimed by some that a bill of rights was unnecessary in a popular government because in such a system all power resided with the people. As Alexander Hamilton, for example, argued, bills of rights were "in their origin, stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of right not surrendered to the prince." The English Bill of Rights, which was adopted in reaction to the conflicts between Parliament and the king over the limits of the prerogative power, was meant as an explicit statement of those limitations and thus as a support for future resistance by "the people" to a king who violated those limits. The limitations were, however, on the prerogative power, not on the power of Parliament, for Parliament embodied the people itself. "It is evident, therefore," the argument went,

224. Storing, ed, 2 Complete Anti-Federalist at 248 (cited in note 222).
225. In this sense, a bill of rights would function something like the obverse of Article I, Section 8, which sets out the powers of Congress.
226. For example, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . abridging the freedom of speech, or of the press"; "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"; "No soldier shall, in time of peace, be quartered in any house," etc. United States Constitution, Amendments I-III (emphases added).
227. Madison famously argued, however, that just the opposite was true. Federalist 10 in Beloff, ed, The Federalist at 41-8 (cited in note 7). He nonetheless also favored a federal bill of rights, although with some reservations, and eventually came to act as its prime advocate in the first Congress. See Letter to Jefferson, October 17, 1788 in 1 Letters and Other Writings of James Madison: 1769-1793 425-26 (Lippincott, 1867).
“that according to their primitive signification,” bills of rights “have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants,” for here “the people surrender nothing; and as they retain everything, they have no need of particular reservations.” In a letter to Jefferson, Madison reiterated this point that a bill of rights, as traditionally conceived, did not seem to have application in a popular government. In a monarchy, while the king enjoyed certain prerogative powers, “the latent force of the nation” remained nonetheless “superior to that of the Sovereign” and thus could be mobilized to oppose abuses of power. In such a system, Madison noted, a “solemn charter of popular rights” served as a “standard for trying the validity of public acts, and a signal for rousing and uniting the superior force of the community.” In contrast, however, Madison wrote, in a “popular Government, the political and physical power may be considered as vested in the same hands, that is, in a majority of the people, and consequently, the tyrannical will of the Sovereign is not to be controled by the dread of an appeal to any other force within the community.” In such a system, then, what purpose could a bill of rights serve?

Madison himself offered an answer to this question; or rather two answers. First, while it is generally true, he argued, that “the danger of oppression lies in the interested majorities of the people rather than in the usurped acts of the Government, yet,” Madison suggested, “there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.” When Madison speaks here of “an appeal to the sense of the community,” he does not seem to be thinking about “rousing and uniting the superior force of the community” in “physical” resistance; rather, he seems to be suggesting that a bill of rights might serve as a standard by which governmental actions would be evaluated and representatives judged within the normal processes of politics: elections, citizens’ movements and the like.

Madison’s second answer concerned the danger that the threat to liberty might come from the majority itself, and here he suggested that a bill of rights might help to reinforce certain principles within the majority: “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion.”

Madison was hardly sanguine about the efficacy of bills of rights in serving these purposes; in his own Virginia, the declaration of rights had been, he

229. Id at 439.
231. Id at 426.
232. This clearly seems to be Madison’s thought in this passage, for he adds as an additional reason that “Perhaps too there may be a certain degree of danger, that a succession of artful and ambitious rulers, may by gradual and well-timed advances, finally erect an independent Government on the subversion of liberty.” Id.
233. Id.
believed, too often violated by the “popular current.” Nonetheless, his arguments in favor of a bill of rights offered an important response to the claim that a bill of rights had no place in a popular government. That claim had rested on a rather simplistic view of the relationship between “the people” and its representatives, and a rather elementary conception of “the people” itself. In contrast, Madison’s arguments, to which Jefferson responded with wholehearted concurrence—the ideas were, as he put it, “acknowledged just in the moment they were presented to my mind”—suggested a far more complex view of popular sovereignty. If in a monarchy, the purpose of declaring rights was to help promote the power of a popular institution against the power of the prerogative, the purpose of a bill of rights in a popular government was, Madison was suggesting, to secure certain important aspects of the people against other aspects of the people. And this was necessary both because particular government institutions may fail to represent certain fundamental aspects of the people, and also because the majority itself, moved by “impulses of interest and passion,” may forget certain important principles.

Indeed, in considering the early idea of a bill of rights, it is significant to note just how little the arguments for even the federal bill of rights seemed to depend on the existence of a system of judicial review. To be sure, the idea that under the new constitutional system, the federal judiciary would have some power to enforce the provisions of the constitutional charter was argued by both advocates and opponents of the new Constitution. But the role of courts in

234. Id at 424.
236. Two of the more definite descriptions of the power of judicial review were offered by Hamilton, in Federalist 78 and the antifederalist “Brutus.” Hamilton argued that a “constitution is, in fact, and must be, regarded by the judges as a fundamental law” and “must therefore belong to them to ascertain its meaning.” Beloff, ed, The Federalist at 398 (cited in note 7). And Brutus contended that under the new Constitution, the Supreme Court would have the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. . . . [I]f the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. . . . And the courts are vested with the supreme and uncontroulable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. Storing, ed, 2 Complete Anti-Federalist at 423 (cited in note 222). The arguments of Brutus, however, must be read within the context of the general antifederalist view that national institutions would essentially destroy the states as political entities; the above argument was followed, for example, by the assertion that courts would claim as well the power to decide all private disputes, even between citizens of the same state. Id at 424-27. In any case, both Hamilton and Brutus are concerned here with questions concerning the general domain of national power and particularly of the general domain of Congressional power. Despite Hamilton’s characterization of the courts as “an intermediate body between the people and the legislature,” he evidently did not think of judicial review as playing
reviewing acts under the Constitution was conceived primarily as protecting against the incursions of one governmental body or political entity into the domain of another. And in the few state cases in which arguments of unconstitutionality had been asserted, the claim had generally been that one governmental body had attempted to exercise a power that was not properly its own (as, for example, when one house of the legislature granted a pardon which, it was claimed, it did not have the power to grant) or had attempted to violate judicial procedures that were guaranteed by the constitution (by, for example, prohibiting courts from hearing private disputes or changing the size of the jury.) It may well have been assumed by some, then, that at least those provisions of a federal bill of rights dealing with judicial procedures might be enforced by a court against legislative encroachments; and since a bill of rights was partly conceived as a protection of state power, a bill of rights may also have been thought to offer grounds on which a court might invalidate unconstitutional federal encroachments on state power (and vice-versa). But much of the debate over a bill of rights proceeded quite independently of any definite conception of judicial review; in the context of these debates, there was little discussion of whether there would be judicial review or in what such a practice would consist. When, in the letter to Jefferson I quoted earlier, Madison expressed his pessimism about the efficacy of a bill of rights—“[r]epeated violations of these parchment barriers have been committed by overbearing majorities in every State”—and assumed that whatever force a bill of rights would have, it would have on “the National sentiment,” he was clearly not thinking of a modern practice of judicial review. In his response from France, Jefferson himself had to add that, in addition, a bill of rights might also put a “legal check . . . into the hands of the judiciary.” The thought, however, was not much developed by Jefferson, and he did not seem to offer it as a response to Madison's central point about the problem of limiting majority tyranny; instead,

such a role with respect to a bill of rights.


239. In Holmes v Walton (1779), the New Jersey legislature authorized a criminal jury of six persons, on the request of either the defendant or the state. The New Jersey Supreme Court held the act violated the New Jersey Constitution, reading the guarantee of trial by jury to refer to a twelve-man jury. Reprinted in Schwartz, ed, 1 The Bill of Rights 405-409 (cited in note 237).


241. In 1798, Congress passed the Alien and Sedition Acts. In response to that act, Kentucky and Virginia passed their famous resolutions, both of which were written by James Madison, then a member of the Virginia House of Delegates. The resolutions argued that the Act violated principles embodied in the First Amendment, but did not suggest that the question of the constitutionality of the Act should be decided by the courts.

Jefferson responded directly to Madison’s point that a bill of rights might be ignored by offering a somewhat more optimistic view of its effect: “[T]ho it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less.”243

Even, then, as the idea of judicial review—in some form—was gaining in currency, the idea of a bill of rights continued to be talked about, not as an enactment of a definite law, but as a means to declare “clearly & without the aid of sophisms”244 certain fundamental aspects of the polity’s collective political character, a “text” of fundamental principles by which to “try all the acts of the federal government.”245 In the light of modern constitutional practices, we may be tempted to read these frequent allusions to the necessity of protecting against the power of government as a reference to judicial review. But there is little mention of courts here, and the imagined audience for the anticipated appeal to a bill of rights seems, in general, to be the government itself and the people. And the idea is that without such a declaration of rights, there will be nothing to counteract the government’s own representation of “the people” and nothing to counter the natural tendency of both government and the people themselves to neglect important principles. “Miserable indeed would be the situation of those individual states who have not prefixed to their Constitutions a Bill of Rights,” argued the anti-federalist John DeWitt of Massachusetts; for without such written declarations, it is difficult to counter “that doctrine of tacit implication which has been the favorite theme of every tyrant from the origin of all government to the present day.”246 Or as “Agrippa” put it, “In many other countries, we find the people resisting their governours for exercising their power in an unaccustomed mode. But for want of a bill of rights, the resistance is always by the principles of their government.”247 Declaring rights, then, is once again understood here as a means of presenting and emphasizing certain fundamental aspects of the people against the way in which the people might otherwise tend to be represented by governmental bodies. In the words of the “Impartial Examiner,” without a bill of rights, “there will be no standard to resort to,” no “criterion” to counter the decisions of government; and with no alternative grounds, there will be “no apparent object injured.”248 And as the “(Maryland) Farmer argued, the “greater the portion of political freedom in a form of govern-

243. Id at 660.
245. Id at 659.
ment, the greater necessity of a bill of rights," for "often the natural rights of an individual are opposed to the presumed interests or heated passions of a large majority [] of democratic government" and "if these rights are not clearly and expressly ascertained, the individual must be lost."249 And in a passage that I earlier quoted in a different context, the New Hampshire Farmer noted the importance of a bill of rights in offering a set of principles on the basis of which unofficial groups representing "the people," might challenge decisions made by governmental bodies which themselves claim to represent the people: "We have found by experience, the great advantage of a Bill of Right in our State Constitutions; when the legislature passed sundry laws infringing on the Bill of Rights, we had it in black and white to show them they were wrong; and to their honour be it spoken, they have repealed one; and so far as the necessities of the people would admit the other."250 As Madison had said, in a state in which political power is "vested in . . . a majority of the people," there is no other force in the community to which appeal can be made. But the idea in each of these passages is that a bill of rights might nonetheless function to represent fundamental aspects of the people to themselves. A bill of rights would thus stand as a declaration by "the people," addressed to the people, and to their representatives, and about the people, particularly about certain aspects of their own constitutional identity that might otherwise be neglected in the course of governing.

This conception of a bill of rights was described well in a pamphlet written by one of the most articulate and widely read of the antifederalists,251 who published under the name "The Federal Farmer." I shall take the liberty of quoting it at some length.

We do not by declarations change the nature of things, or create new truths, but we give existence, or at least establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. If a nation means its systems, religious or political, shall have duration, it ought to recognize the leading principles of them in the front page of every family book. What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people, and has their assent—we discern certain rights, as the freedom of the press, and the trial by jury, &c. which the people of England and of America of course believe to be sacred, and essential to their political happiness . . . while the people of some other countries hear these rights mentioned with utmost indifference; . . . The reason of the difference is obvious—it is the effect of education, a series of notions impressed upon the minds of the people by examples, precepts and declarations. When the people of England got together, at the time they formed Magna Carta, they did not consider

it sufficient, that they were indisputably entitled to certain natural and
unalienable rights, not depending on silent titles, they, by a declaratory act,
expressly recognized them, and explicitly declared to all the world, that
they were entitled to enjoy those rights; they made an instrument in
writing, and enumerated those they then thought essential, or in danger,
and this wise men saw was not sufficient; and therefore, that the people
might not forget these rights, and gradually become prepared for arbitrary
government, their discerning and honest leaders caused this instrument to
be confirmed near forty times, and to be read twice a year in public places,
not that it would lose its validity without such confirmations, but to fix the
contents of it in the minds of the people, as they successively come upon
the stage. . . . What we have long and early understood ourselves in the
common concerns of the community, we are apt to suppose is understood
by others, and need not be expressed.\textsuperscript{252}

As an historical account of the Magna Carta, this leaves something to be desired,
but it is a splendid articulation of the idea of a constitutional declaration of
rights as understood in the early constitutional period. We see here the fear that
even in a popular government, certain aspects of the people, certain rights and
liberties, may "be soon forgot" by "representative" institutions and by the
people themselves. And we see here, once again, the hope that a declaration of
rights might act as a counterforce to the tendency to "forget these rights" and
might provide thus for that "frequent recurrence to" those "truths and prin-
ciples" which is necessary for a "free government."

IV

Earlier, I discussed the conception of a written constitution that received its
most famous expression in John Marshall's opinion in \textit{Marbury} and that has
come to dominate American thought about constitutional rights as well. In that
conception, a written constitution is an enacted law which represents the
"original and supreme will" of the people. Constitutional debate and adjudica-
tion is thus understood as a matter of discovering that will; and it is because—or
at least in part because—courts are institutionally and professionally most suited
to that task that courts have a special role to play in reviewing the constitution-
ality of acts of government.\textsuperscript{253} In noting the obvious difficulty of such a con-
ception of a written constitution—especially as applied to constitutional
rights—in a state grounded on the principle of popular sovereignty, I suggested

\textsuperscript{252}. \textit{An Additional Number of Letters From the Federal Farmer} in Storing, ed., \textit{2 Complete Anti-Federalist} 324-25 (cited in note 222).

\textsuperscript{253}. The opinion in \textit{Marbury} relied heavily as well on the claim that courts must have
the authority to interpret the Constitution because it is they who would otherwise be
applying the law that is under challenge, and if that law is unconstitutional, it cannot
"bind the courts, and oblige them to give it effect." \textit{Marbury}, 5 US at 177. But in most
contemporary accounts of judicial review, the courts are said to have the power to
interpret authoritatively the meaning of a constitution even in the context of disputes in
which they would otherwise not be involved.
that a certain amount of its appeal may come from accepting the claim that such a “theory is essentially attached to a written constitution,” and that rejecting that view of a written constitution would “reduce[] to nothing what we have deemed the greatest improvement on political institutions.” I have tried to show, however, that, at least with respect to the idea of constitutional rights, the Marshallian view is not in fact essentially attached to a written constitution; and, in examining the revolutionary American charters as a response to the problem of what it means to found a state on the authority of the people, I have focussed on an alternative—and, I believe, richer—conception of a written constitution of rights and a set of constitutionalist ideas that, while never entirely lost, have also never been sufficiently developed within our constitutional thought. In closing, let me summarize these general ideas before saying just a few words about how taking those ideas more seriously might matter to our constitutional discourse generally and—to focus on that issue that has been the subject of most constitutional theorizing—to the practice of judicial review in particular.

The first of these constitutionalist ideas is, as I put it earlier, that the relationship between “the people” as a sovereign entity and any particular institutional representation of the people is always at issue, and is never fully or definitively settled. Early constitutionalist thinkers did not develop this idea very far theoretically, but as I have tried to suggest, a form of the idea was implicit within the special procedures adopted for establishing new constitutional charters, and as well in the systems of government established by the states and by the federal Constitution of 1787, each of which divided representation of the people into multiple institutions (in the case of the states, increasingly so in the successive waves of constitution-making). And the idea was explicitly expressed in the constitutional charters of a number of states, which proclaimed that “all power is vested in ... the people” and that the “the people,” therefore, possess the right to reform the constitution in whatever “manner ... shall be judged most conducive to the public weal.” These constitutional charters thus quite clearly distinguished between “the people” and the representation of the people by particular governmental bodies, and denied that “the people” itself could ever be fully captured within any particular political institution.

The idea that the relationship between “the people” and those governmental bodies that are meant to represent it is an imperfect one was certainly not entirely of American origin and, among its other intellectual creditors, it owed a good deal to English Whig thought. But in Great Britain, Parliament came to be regarded as the full embodiment of the political nation. Not even as staunch an advocate of Parliamentary sovereignty as was Blackstone denied the general right of revolution against tyrannical governments, or denied that Parliament might fail properly to represent the nation; but this right of revolution was for Blackstone an extra-constitutional one and involved a break between one consti-

254. These particular expressions of the idea are taken from the Va Const of 1777, Bill of Rights §§ 2, 3 (superseded 1830).
In early American constitutional thought, however, we can see the unfolding of the remarkable idea—or perhaps we should call it only an early movement of thought, for it was certainly not well-developed—that the dynamic tension between “the people” and the institutions that claim to represent it might be capable of existing as a force within the constitutional order. While incipient to be sure, there is nonetheless quite early on the presence of this notion that “the people” is not ever fully embodied within any institutional form, and that proper representation of “the people” requires the existence of counterpoints to the particular representation of the people that any single institution offers.

The second idea is a particular extension of the first and concerns the notion of declaring fundamental rights. Once again, this idea was not quite fully developed as a theory; it was, as much as anything else, a collective impulse, an almost instinctive reaction to a particular history. But the idea of declaring rights, as I have tried to show, came out of the recognition that political institutions concerned with the everyday objects of government will tend to neglect certain aspects of “the people,” including certain important rights. A declaration of rights, it was thus hoped, (and it was really, at bottom, a hope) would serve as a marker such that “the people. . . might not forget these rights,” and a mooring to which those whose rights were unjustly harmed might secure their objections. Against the notion that the performative function of declaring rights is to enact a law, we have here, then, a very different idea: that the function of declaring rights is to articulate part of the fundamental character of the people that might otherwise be poorly represented—and by so doing, to give additional presence to that aspect of the people within the politics of the state. Declaring certain fundamental aspects of the people that are likely to be neglected in the ordinary course of governing was one response to the recognition that even elected bodies constitute only imperfect and partial forms of representation; by articulating certain fundamental principles, these declarations would—so went the hope—help to recall and to promote at least part of what governmental institutions were most likely and dangerously to forget.

For a number of reasons, it is not surprising that the early state constitutions did not, on the whole, provide for systems of judicial review to protect fundamental rights. Given the historical association of the colonists with their assemblies and given the experience of colonists with certain royal courts, early constitutional thinkers did not naturally think of the judiciary as an institution for representing “the people” against legislatures. In the debates over the federal constitutional charter of 1787, some federalists (most famously Hamilton) did describe courts in the new constitutional order as, in part, serving as “an

255. William M. Blackstone, 1 Commentaries *157.
256. Although, as we have noted, early state courts did sometimes invalidate legislation that violated judicial procedures specified in the state constitutions, and did sometimes invalidate, on separation-of-powers grounds, governmental actions that harmed individual rights. See text accompanying notes 237-39.
intermediate body between the people and the legislature.”257 However, this view (later echoed by the opinion in Marbury) relied on the notion that the constitution, as the “will” of the people, was a “fundamental law” and that the “[i]nterpretation of the laws is the proper and peculiar province of the courts.”258 The arguments for judicial review thus generally did not extend to include judicial protection for a bill of rights; for a bill of rights was still not conceived as a law in this sense. It was for just that reason, as we have seen, that Hamilton himself claimed that, while bills of rights might have “application” in a “treatise of ethics,” they had none in a “constitution of government professedly founded upon the power of the people, and executed by their immediate representatives and servants.”259 One may wonder about the ingenuousness of Hamilton’s argument; but whether or not sincerely held, the argument was one that was obviously meant to persuade, and as such it evidences both the continuing legacy of the idea that bills of rights were general declarations of fundamental principle rather than enacted laws, and the idea that, at least with respect to such principles, the best official representative of the people was the legislature. If the earliest constitutionalists tended to leave their faith in the legislature as the institution that would best protect rights and liberties, we may have more reason to question that faith, at least with respect to certain kinds of rights and liberties. And there may be good reason to believe that, with respect to certain issues, courts can play an important role in articulating and representing certain aspects of the people. However, taking seriously the constitutionalist ideas that we have discussed here suggests a very different starting point for thinking about judicial review. The dominant contemporary approach to thinking about judicial review, after all, begins with the assumption that legislative and executive power is prima facie legitimate and that it is only judicial review that requires special justification; it then finds that justification in the idea of courts as interpreters of a written constitutional charter that embodies the fundamental will of “the people.” In equating “the people” with a constitutional document, this approach itself recognizes a distinction between “the people” and its representatives; but it does so only at the cost of reducing the people to the form of an enacted law. In taking this approach, we have, as it were, traded the conception that came to dominate elsewhere of the people as embodied within a particular governing assembly for the idea that “the people” is essentially embodied in a text. But from the radical and fundamental insight that the “the people” can never be fully represented by a particular institution, the theoretical project of constitutionalism must be, not to show how the people can be embodied instead in a document, but to consider how various institutions may alternatively represent the people, and to ask what sorts of important considerations or principles are likely to be poorly attended to within various institutions. And on such an understanding, the project of a theory of judicial review in particular would be, not to show

258. Id.
how we should go about excavating the meaning buried within this thing called a constitution, but to ask what kinds of principles are likely to be neglected within other institutions and to ask whether—and if so, how—those principles might be better represented by courts.

To put the matter in this way, of course, is to describe the project, not to complete it. Giving a proper answer to these questions would obviously require consideration of a number of questions which I have not sought to address here: questions concerning the virtues and the dangers of judicial involvement with respect to various kinds of principles, and questions concerning the kinds of techniques that courts have available to them in representing important principles that other institutions may tend to neglect. This is not the space in which to develop these ideas; my principal concern here has been with the conception of a written constitution of rights itself, not specifically with the question of judicial review

But the answer to the question of what role courts should play in articulating constitutional principles obviously depends on our understanding of what a written constitution of rights is. As against the notion of a written constitution of rights as the will of "the people" enacted as law, I have tried to suggest here a different conception, one that is based in the problem of the relationship between "the people" and the political institutions that claim to represent it. I have tried to show the presence of this conception, although not fully-developed, in revolutionary American constitutional thought and I have tried to show how such a conception emerged out of a traditional concern with the relationship between interests in "government" and the rights and liberties of individuals, and out of the particular conflicts between England and the colonies over the nature of political authority and over the relationship between sovereignty and political freedom. I have tried to suggest as well that this approach to thinking about a written constitution of rights represents a considerably more robust understanding of "the people" and a more profound contribution to the constitutional question of the relationship between popular sovereignty and government than that represented by the dominant model. And while I have not meant to offer a theory of judicial review, what I have said suggests the basis from which such a theory ought to proceed.

260. I have discussed such issues in The Perspective of Political Justice, Chapter 4 (Ph.D. dissertation, University of California, Berkeley, 1995) (on file with the author).