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FUNDAMENTAL LAW
AND
THE AMERICAN REVOLUTION
1760-1776

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PREFACE

THE historians of the American Revolution have taught us that the concept of a spontaneous political uprising of an oppressed people revolting against British tyranny is incorrect; they have taught us that the Revolution was a movement in which a variety of social and economic factors mingled with the political to bring on first verbal and then armed resistance to British policy; they have taught us also that for a fuller understanding of the Revolution we must set it against both the background of colonial institutional development and British imperial policy; and finally they have taught us to consider a number of other factors, international politics, religion, and political and constitutional theory. It is this last aspect that will be developed in the following pages.

Too often, perhaps, the Revolution has been viewed from the standpoint of action and as unworthy of consideration from that of theory. Without intending to detract from the social and economic interpretations, with which the writer essentially concurs, it may be suggested that the imperial and legal ideas of the Revolution are of no less interest than the political action. What men do and why they do it is undoubtedly of much importance, but it is not the whole story. Of great importance, also, is their explanation and justification of what they are doing, which accounts for their political theory. In the process of explaining and justifying their conduct the colonists formulated a great deal of imperial theory, but it should not be thought that they manufactured this entirely out of their own experience. The ideas that

were used to sustain theories of empire advanced by the American revolutionists were not original; the political classics of twenty centuries and more were called upon to justify them. Particularly was this true in the matter of a "higher law", the ultimate appeal of revolutionists.

Periods of political distress and crisis have at all times produced appeals to a fundamental law that is above and beyond all human positive law. This law has been hailed under various names, natural law or law of God being most common, although in England, from which the colonists of course drew most of their authorities, men frequently spoke of the law of reason and in some cases endowed the common law and the constitution with the qualities of natural law. The colonists, in protesting against what they believed to be an unwarranted disregard of their rights by the British government, followed then in a well beaten path when they called upon fundamental law in their own defense. Their claims were made as claims of right, not of expediency. Since these were erected on such a foundation, law played a leading role in establishing them, and the safest kind of law to use was fundamental law in some one of its manifestations.

In searching for prophets of this law the Americans ranged far and wide, and the result was indeed a strange collection of oracles, who furnished the intellectual ammunition whereby the colonists hoped to withstand British efforts to reduce their practical autonomy. Yet while this variety tended to produce a curious confusion of phraseology and even contradictions in the colonial protests, no colonist needed to apologize for the names which dotted his pages. Greek philosophers, Roman historians, medieval theologians, French *philosophes*, common lawyers, English revolutionists, all contributed to the justification of the American cause, and if but a few of the colonial pamphleteers had gone to the more esoteric authors, those authors may still be legitimately re-

garded as among the intellectual fathers of the American Revolution, along with such popular writers as Coke, Locke, and Blackstone.

This study had its genesis in a seminar on British imperial theories given by Professor Robert L. Schuyler in 1924-25. It is evident that it owes a great deal to Professor R. G. Adams's *Political Ideas of the American Revolution* and Professor C. H. McIlwain's *American Revolution*. It was largely completed before the publication of the recent works of Professor C. G. Haines and Professor B. F. Wright, Jr. on natural law, but has undergone considerable modification in the light of those books.

The primary purpose of this study is to analyze the idea of fundamental law as it was used by the American revolutionists. The first two chapters sketch the concepts of fundamental law held by those authors whom the leaders of colonial opinion quoted or referred to in their writings. No attempt had been made to write a history of fundamental law *per se* from its earliest appearance in Europe down to the eve of the American Revolution, although some revolutionary pamphleteers were acquainted with practically all of the exponents of the idea from Sophocles to Blackstone. It is not suggested that all or even very many colonial writers knew all the authors whose ideas are summarized in these first two chapters; there was only one John Adams, one John Dickinson, and one James Wilson. But no writer has been cited in these chapters who was not known to at least one colonial pamphleteer. Men like Bland, Drayton, and Jefferson read widely, and no part of their reading in law and politics could not be applied, when they wished to strengthen their arguments. Their writings dealt with some aspect of British policy: their reading supplied them with an ideology which elevated an *ad hoc* dispute to a struggle concerning the fundamental and abiding principles of politics.

In this connection it is of interest to note the preponderance of lawyers among the colonial pamphleteers, a factor which Burke in his speech on American taxation remarked as explaining the character of the opposition to British policy. "In no country perhaps in the world", he said, "is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the Deputies sent to the Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent Bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the Plantations. . . . This study renders men acute, inquisitive, dextrous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle."

The last three chapters contain an examination of the ideas current in the colonies with respect to fundamental law. It is hoped that no writer or writing that might have had influence has been overlooked, even though the point of view was not original. In general, fundamental law was used to justify fairly specific claims which can be readily classified. If this study of what the revolutionary pamphleteers read and the use they made of their reading gives some impulse to the consideration of the intellectual history of the great imperial controversy, the writer will be content.

Special thanks are due to Professor E. B. Greene for his critical reading of the manuscript, and to Professor R. L. Schuyler, who has guided the study from its inception. I would also acknowledge the courtesy of the editors of the *Canadian Historical Review*, *Economica*, the *Political Science*

PREFACE

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Quarterly, the *Southwestern Social Science Quarterly* and the *University of Missouri Studies*, in permitting me to include parts of material which I published in those journals.

CHARLES F. MULLETT

FEBRUARY 9, 1933.

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CHAPTER I

CONTINENTAL SOURCES OF FUNDAMENTAL LAW

I

IN tracing the sources of American revolutionary ideas of fundamental law we may well begin with the Greeks, since the colonists in their search for eternal principles applicable to their situation went no further back.¹ Among the Greeks

¹ There is no adequate history of the idea of fundamental law. The most thorough treatments for limited periods are E. Burle, *Essai historique sur le développement de la notion de droit naturel dans l'antiquité grecque*; Moritz Voigt, *Das jus naturale aequum et bonum und jus gentium der Römer*, 4 vols.; and R. W. and A. J. Carlyle, *A History of Medieval Political Theory in the West*, 5 vols. Its influence throughout the history of Europe generally can be found in Paul Janet, *Histoire de la Science Politique dans ses Rapports avec la Morale*, 2 vols. The best sketches in English are to be found in Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law", *Harvard Law Review*, vol. xlii, pp. 149 *et seq.*, 365 *et seq.*; James Bryce, *Studies in History and Jurisprudence*, vol. ii, no. xi; and Sir Frederick Pollock, *Essays in the Law*, chap. ii. Masterly sketches may be found in Otto Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien*, and in the same author's *Die Staats- und Korporationslehre der Neuzeit*, pp. 276-541 (vol. iv of *Das deutsche Genossenschaftsrecht*) covering later middle ages and early modern centuries. See also C. G. Haines, *The Revival of Natural Law Concepts*, chaps. i-iii; Sir H. S. Maine, *Ancient Law*, chaps. iii, iv; Pollock, *The Expansion of the Common Law*, p. 107 *et seq.*; Roscoe Pound, *The Spirit of the Common Law*, *passim*; David Ritchie, *Natural Rights*, chaps. i, ii; John Salmond, "The Law of Nature", *Law Quarterly Review*, vol. xi, p. 121 *et seq.*; Max A. Shepard, "William of Occam and the Higher Law", *American Political Science Review*, Dec., 1932 and February, 1933, and Paul Vinogradoff, *Common Sense in Law*, chap. ix. That appeal to fundamental law has not been merely an occidental practice can be seen by glancing at Chinese and Hindu political theory. Janet, *op. cit.*, vol. i, pp. 1-51;

the idea of a power which orders the universe was pondered philosophically. What, they asked, is behind positive law? From Heraclitus to the Stoics the answer returned was "God" or "Nature", and natural law was the permanent and universal law.² Such a conclusion led Greek thinkers to the view that man acting naturally acts rationally, and to the identification of nature and reason.³ Plato, although providing grist for John Adams's mill, failed of an extensive hearing for his concept of justice.⁴ Aristotle, on the other hand, writing soberly of natural justice and universal law, attracted a great many serious thinkers in the eighteenth century. For him nature was divine, the ideal of rational design, not constant, not always realized, but existing nevertheless; and law was the supreme, the true, ruler, the controller of the sovereign; and he who bade the law rule might be deemed

H. A. Giles, *Chang Tzu, Mystic, Moralist and Social Reformer*, p. 107; W. H. Ratican, "The Ancient Jus Gentium of the Aryans", *Law Quarterly Review*, vol. xv, p. 303 *et seq.*, and E. D. Thomas, *Chinese Political Thought*, chap. xiv.

² Voight, *op. cit.*, vol. i, p. 76; Haines, pp. 4-7. For a dramatic epitome see Sophocles, *Antigone* (Storr trans.) lines 453-57:

"Nor did I dream that thou, a mortal man,
 Could'st by a breath annul and override
 The immutable unwritten laws of Heaven.
 They were not born today or yesterday:
 They die not; and none knoweth whence they sprang."

Incidentally, a translation of these lines was used by Dickinson in his *Essay on the Constitutional Power of Great Britain over the Colonies in America*.

³ E. Zeller, *The Stoics, Epicureans and Sceptics*, pp. 551-552. See also J. L. Myres, *The Political Ideas of the Greeks*, p. 241 *et seq.*

⁴ See especially the *Laws*, and the *Republic* to a lesser extent. In the disputed dialogue *Minos* (Loeb ser.), pp. 405-7, Plato distinguished between positive laws and fundamental law, holding only those decrees consonant with good to be law. Cf. C. H. McIlwain, *The Growth of Political Thought in the West*, p. 18, and generally chap. ii; E. Barker, *The Political Thought of Plato and Aristotle*, chap. iii; W. A. Dunning, *A History of Political Theories, Ancient and Medieval*, chap. ii.

to bid God and reason rule.⁵ The Stoics further amplified the nature-reason concept, and through Cicero their doctrines passed into Roman law. To them man was a rational being living by a set of principles in harmony with nature. The sum total of these principles was the law of nature.⁶

The juristic tendency was much more pronounced among the Romans, who transmuted the abstract nature concepts of the Greeks into natural law. Whereas the Greeks sought to connect positive laws with the immutable background of natural justice, the Romans tended to regard the law of nature as a source of law in the practical sense. The contributions of the Roman lawyers to the whole theory of natural law can best be gauged by contrasting the mild stoicism of Cicero with the elaborations of medieval scholastics. According to the former, "universal consent is the voice of nature" and "true law is right reason conformable to nature, universal, unchangeable, eternal". "This law cannot be contradicted by any other law . . . God himself is its author, its promulgator, its enforcer."⁷ From this he went on to make supremely high claims. "Law is the highest reason, instituted in nature, which orders what should be done and prohibits the contrary."⁸ Obviously the ethical note was in

⁵ *Politics* (Davis ed.), bk. i, sec. 2; bk. iii, sec. 16. Barker, *op. cit.*, chap. iii; McIlwain, *op. cit.*, chap. iii. In his *Rhetoric*, Aristotle spoke of "the sure and unwritten institutions of the Gods" which could not be contravened by human enactment, and in the *Nicomachean Ethics* he distinguished between natural and legal right: "Natural justice is law because it is right, conventional justice is right because it is law." E. M. Cope, *An Introduction to Aristotle's Rhetoric*, p. 240 *et seq.*

⁶ Bryce, *op. cit.*, p. 568; W. W. Buckland, *A Manual of Roman Private Law*, p. 28 *et seq.*

⁷ *De Re Publica*, bk. iii, sec. 22. Thorough accounts of Cicero's theories are to be found in Voight, *op. cit.*, vol. i, pp. 176-226, Carlyle, *op. cit.*, vol. i, chap. i, McIlwain, *op. cit.*, pp. 106-119, and Corwin, *loc. cit.*, pp. 157-163.

⁸ *De Legibus*, bk. i, sec. 6. See also bk. i, sec. 21. "Sed certe ita res se habet, ut natura vivere summum bonum sit".

the ascendant here, and the connotation was idealistic. Such positive law as might exist could be, for Cicero, no more than declaratory of a natural order governed by reason, all of which helps to make clear why such pamphleteers as Otis and Dickinson found Cicero a worthy prophet.

Other Romans of this early period also talked of the judgments written in the heavens which could reverse those of mundane origin, and a few of these had some vogue in America. Polybius, the Romanophile Greek, followed Plato and Aristotle in his notions of justice, but on the whole was more concerned with things as they were than as they ought to be.⁹ Three other historians, Livy, Sallust, and more especially, Tacitus, who personified the republican ideal, had a greater influence. Among the philosophers, Seneca and Marcus Aurelius were the chief torch-bearers; yet neither had the importance of Cicero so far as natural law was concerned.

The situation is much the same with regard to the jurists and Justinian. Whether the colonial lawyer acquired his education in the offices of Gridley or Wythe or at the Inns of Court, the emphasis was all against Roman law. Such attention as it did receive came more frequently through later channels than from the sources. As has already been said, Cicero provided the link between Greek philosophy and Roman law, with the consequence that the greatest of the jurists had Stoic tendencies. On the other hand, however, they were rather less concerned with the purely ethical connotation of natural law. The jurists took no common measuring-stick for the characteristics of the various kinds of law. Gaius recognized no difference between *jus naturale* and *jus gentium*; Ulpian, although he frequently accepted the interpretations of Gaius, at times distinguished between the

⁹ See *The Histories of Polybius*, vol. i, book vi, especially sec. 47.

two.¹⁰ According to Gaius, *jus gentium* was universal, rational and equitable: "Whereas what its natural reasonableness (*naturalis ratio*) has caused to be received by mankind generally is observed by all peoples alike, and is called the law of peoples (*jus gentium*)."¹¹ To Ulpian, however—and his interpretation was accepted by later civilians and canonists—certain institutions, such as slavery, existed by *jus gentium* but were in themselves contrary to *jus naturale*.¹² Yet the major tendency was towards identifying the two, and directly, or indirectly through Grotius, Pufendorf, and Vattel, that identification came to have an influence in America. The distinction, on the other hand, between natural and civil law was more clear-cut: the latter was always positive law. Yet even here the inoculation of *jus civile* with *aequitas* endowed *jus* with a supernatural character.

Nevertheless, if the juriconsults did not succeed in reaching any strict or unanimous definition of *jus naturale*, it is evident that they attributed certain universal characteristics thereto. The law of nature, ever fixed and immutable, was a norm of judgment for the civil law, which of itself might undergo considerable change. It applied to all men, among all peoples, at all times; and corresponded with the innate conviction of right.¹³ Its propositions were based on right reason inherent in nature and man, and had a binding force as law. By natural law, air, water, and the sea were common, while slavery, and in some instances private property, were under its ban.¹⁴

¹⁰ Carlyle, *op. cit.*, vol. i, p. 36; McIlwain, *op. cit.*, pp. 122-133; H. Gouley, "Roman Law", *Encyclopaedia Britannica* (11 ed.).

¹¹ J. Muirhead, *The Institutes of Gaius and the Rules of Ulpian*, p. 1.

¹² Carlyle, *op. cit.*, vol. i, pp. 39-44.

¹³ *The Institutes of Justinian* (J. B. Moyle, trans.), pp. 3, 6.

¹⁴ *Institutes of Justinian* (Sandars ed.), book i, tit. ii, book ii, tit. i;

It must be obvious then that to the Roman jurist natural law was no bed of Procrustes, and its elasticity of meaning continued into the middle age. The lawyers of the latter period, however, increased the troubles of later students by drawing upon another source of equally remarkable exegetical possibilities, the Bible—a well-spring that assumes a first-rate importance for the purposes of this study in the light of New England education. With its constant emphasis upon the law of God over and above all human law, the Bible provided a highly welcome element for any concept of fundamental law.¹⁵

The process by which the identification of the law of God with the principles of secular law took place during the first centuries of the Christian era is most important. It stands as the distinguishing feature of the medieval philosophy of law, and was the more significant since civilians, no less than the Fathers and the canonists, were prone to yield to the authority of this *jus dei jus naturale*. Accordingly everyone was under the law and responsible to God. Temporal institutions were sacred only so long and in so far as they conformed to eternal standards. Although by such teachings the Church was enabled to maintain its supremacy, there is no evidence to suppose that the course of legal evolution was radically changed. Gregory the Great taught that all men were originally free and equal, as Ulpian had done several centuries before; St. Ambrose criticized the notion of private property as contrary to natural law.¹⁶ Finally, Augustine

Pound, *Philosophy of Law*, p. 34; L. T. Hobhouse, "The Historical Evolution of Property, in Fact and in Idea," *Property, Its Duties and Rights*, p. 24.

¹⁵ Note especially *Romans*, chap. ii, vv. 12-14.

¹⁶ Carlyle, *op. cit.*, vol. i, p. 114; Carlyle, "The Theory of Property in Medieval Theology," in *Property, Its Duties and Rights*, p. 121. See also Otto Gierke, *Political Theories of the Middle Age* (trans. F. W. Maitland), pp. 38, 40.

completely accepted the Ciceronian dictum that "what the law does, justice does, and what is done unjustly, is done unlawfully."¹⁷

Of the canonists, Isidore of Seville and Gratian were the most important media for the transmission of legal concepts. The former was in essential agreement with Ulpian and Justinian, repeating the tripartite division of law, a division not acceptable to Gratian, who, however, embodied most of Isidore's definitions in his *Decretum*.¹⁸ Gratian, summing up the essence of canonist natural law, reclassified law into natural, or divine, and custom (*mores*). The second and inferior included both *jus gentium* and *jus civile*, between which by the eleventh century no great distinction existed. Natural law, on the other hand, was the reasonable basis of all law, fixed, immutable, and supreme. Custom itself could not be good if contrary to natural law. Since, unlike Ulpian, Gratian limited the law of nature to mankind, the *Decalogue* and the *Gospels* were but its synonyms.¹⁹

The attitude of the civilian was scarcely different. Azo, for example, thought natural law an instinct of nature or *jus commune*, sometimes equivalent to *jus gentium*, sometimes to *jus civile*, and sometimes to Mosaic law, but of itself immutable and always superior to positive law.²⁰ Civilians, however, frequently did accept as legitimate some rules of civil law which were often held contrary to natural law. To

¹⁷ *The City of God*, book xix, chap. xxi; McIlwain, *op. cit.*, pp. 157-161.

¹⁸ Carlyle, *Political Theory*, vol. i, pp. 106-110; vol. ii, p. 102; Voight, *op. cit.*, vol. i, pp. 290-91.

¹⁹ Carlyle, *Political Theory*, vol. ii, pp. 102-106; H. Rashdall, "The Philosophical Theory of Property", in *Property, Its Duties and Rights*, p. 39. Maurice De Wulf, *History of Medieval Philosophy*, vol. i, pp. 215-16.

²⁰ F. W. Maitland, *Bracton and Azo*, pp. 32-33—"Unde dicitur, *jus naturale est quod natura, id est, ipse deus, docuit omnia animalia*." This concept was accepted by Bracton.

this fact there was one important exception which had great propagandist value in the revolutionary era. When a civilian declared that a rescript of the emperor contrary to natural law was void, he was very close in thought if not in time to the American patriot who argued that an act of parliament contrary to natural law was void.

This concept, that supremacy of law meant the reign of justice, and its corollary principle, that political organization was essentially ethical, nowhere received a more comprehensive statement than in the writings of Thomas Aquinas. Dividing law generally into two grand categories, eternal and natural, he maintained that the latter was "nothing else than the rational creature's participation in eternal law."²¹ Natural law was instilled into man's mind by God, and was expressed by reason; human law was but the fulfilling, the defining, the qualifying, and the explaining of natural law. Nevertheless, "every law framed by man bears the character of a law exactly to that extent to which it is derived from the law of nature. But if on any point it is in conflict with the law of nature, it at once ceases to be a law; it is a mere perversion of the law."²² Thomas, however, did allow for innovations, as in the case of private property, which although not an institution of natural law was not contrary to it, being added by human reason.

Somewhat similar in point of view was Dante, who furnished Richard Henry Lee with some of his ideas concerning law. Dante taught that justice should be paramount and that laws must be good laws or else they are not laws at all. What nature has ordained is right, and what is contrary to

²¹ *Summa Theologica*, pt. ii, q. xci, art. 2. See generally Edward F. Murphy, *St. Thomas' Political Doctrine and Democracy*, chaps. ii, vii; McIlwain, *op. cit.*, pp. 324-335.

²² *Summa*, qq. xc, arts. 1, 4; xci, art. 3; xcvi, art. 2.

nature has no validity. Finally, that which comes from God comes either by divine or by natural law.²³

II

In turning from ancient and medieval to more modern theorists, we have to deal with men who in general had a much greater vogue in colonial times. Stretching over the period from the fifteenth to the eighteenth centuries, were several continental writers whose repute as apologists for revolution was scarcely less than that of English authors of the same period. While few of them, it is true, had the same currency value as Locke or Sidney, there can be little doubt that many Europeans were read in all sections of the American colonies, and what was of greater importance, contributed considerably to revolutionary propaganda.

The appearance of Machiavelli among the ranks of those who helped to shape American revolutionary thinking might well occasion surprise to any one whose reading of that versatile author had been limited to the *Prince*, the quality of which has served for generations to prevent any well rounded appreciation of Machiavelli. If, however, any reader will turn from the *Prince* to the *Discourses*, he will discover why idealistic Americans found the historian and diplomat of Florence a pleasant guide. That commentary on Livy contains much that might have come from the pen of a Harrington or a Hoadly.²⁴ Throughout, there is emphasis upon law, a belief in an "empire of laws." Although he was too much of a realist to teach that fundamental law *per se* was an end unto itself, Machiavelli was shrewd enough to realize that where the spirit of law was supreme, content and prosperity were more likely to follow. When the Prince keeps

²³ *De Monarchia*, especially book ii.

²⁴ *Discourses upon the First Decade of T. Livius* (Edward Dacres, trans.).

the law, safety and security are guaranteed, but when he rules without the law he stands to lose his kingdom.²⁵ It is no wonder that John Adams and Dickinson found a place for Machiavelli among their authorities.

The writings of John Calvin, whose politics were as slippery as his theology was rigid, were actually less fruitful than those of Machiavelli. Although he had expressed the belief that the "law of God . . . is nothing else than the testimony of natural law" and in one place advised that rulers need not be obeyed when they commanded anything contrary to the law of God, Calvin generally took care not to encourage revolution.²⁶ "We cannot resist the magistrate", he wrote, "without resisting God", and thus he laid the foundations of a divine right theory.²⁷ So, beyond identifying the law of God with the law of nature, a common enough identification, Calvin had little to offer American seekers for revolutionary propaganda.

Much, however, could be obtained from two contrasting groups of sixteenth-century reformers, the Huguenots and the Jesuits. The first, indeed, were in a position similar to that of the Americans, except that the *casus belli* was political power rather than taxation, and they sought to obtain a tolerable *modus vivendi* by appealing to history for proof of the

²⁵ *Ibid.*, pp. 69, 350-1.

²⁶ *Institutes of the Christian Religion* (trans. by Henry Beveridge), vol. iii, pp. 538, 553. Cf. Herbert D. Foster, "International Calvinism through Locke and the Revolution of 1688", *American Historical Review*, vol. xxxii, pp. 475-99. Foster believes that Locke was the medium through which the five points of political Calvinism,—fundamental law, natural rights, contract and consent of the people, popular sovereignty, and resistance to tyranny through responsible representatives, filtered to the American revolutionaries. See especially p. 487 *et seq.*

²⁷ *Institutes*, vol. iii, p. 545. See also p. 575. "We are enjoined to obey not only good magistrates, but all who possess authority, though they may exercise tyranny; for it was not without the authority of God that they were appointed to be princes."

natural rights of subjects against kings. Beza, Hotman, and the author of the *Vindiciae contra Tyrannos*, "Junius Brutus," appealed with considerable force to the Americans because they recognized revolution as a means of regaining natural rights. The *Du Droit* of Beza emphasized natural law as the basis of individual rights.²⁸ Hotman, one of Arthur Lee's sources, declared it to be a fundamental law that people were bound only by the laws to which they had consented.²⁹ The author of the *Vindiciae*, which John Adams considered one of the most influential books in America on the eve of the revolution, was more elaborate. The chief characteristic of the tract was the constant insistence on the supremacy of law, especially in answering the first three of the four main questions which the author propounded. The first, "whether subjects are bound and ought to obey princes, if they command that which is against the law of God", brought the reply that kings should not order "that which is repugnant to the law of God"; but if they do, in violating that law they forfeit their kingdom.³⁰ The definition of a

²⁸ Allen, *A History of Political Thought in the Sixteenth Century*, p. 320 et seq. The full title of Beza's work is *Du Droit des Magistrats sur les sujets*. Michel de L'Hopital, another famous libertarian of the period, conceived of the king as under the law but he did not favor rebellion, neither did another contemporary, the author of the *Dialogue d'Archon et de Politie*.

²⁹ *Franco-Gallia* (London, 1711), pp. 71, 84. On Hotman generally consult Beatrice Reynolds, *Proponents of Limited Monarchy in Sixteenth Century France: Francis Hotman and Jean Bodin*, chaps. ii-iii.

³⁰ *Vindiciae Contra Tyrannos (A Defense of Liberty against Tyrants)*, pp. 65, 74. I have used a recent reprint of the 1689 English edition, with an introduction by Harold Laski who, in reviewing the whole mooted question of authorship, believes that Duplessis-Mornay was the author. On the other hand, Professor Ernest Barker, "The Authorship of the *Vindiciae Contra Tyrannos*", *Cambridge Historical Journal*, vol. iii, pp. 164-181, likewise has recently reviewed the problem and without any particular reference to Laski's arguments gives his support to Hubert Languet. Allen (*op. cit.*, p. 319), is sceptical of either claim.

rebel given by the author, carried his meaning farther. The true rebel, he taught, is he who omits to obey God rather than he who refuses obedience to the king. In considering "whether it is lawful to resist a prince who doth infringe the law of God" and how far it is lawful, he justified war if necessary to defend that law; for "there is nothing which exempts the king from obedience which he owes to the law." The *law* to which this author required such allegiance was a "divine gift", coming from above; it was "reason and wisdom itself."⁸¹

It may seem strange that Huguenot opinions concerning law should also have been current among the Jesuits, yet both sought to defend themselves against arbitrary rulers by much the same reasoning. The reliance of the Jesuits on natural law goes a long way toward explaining their presence in American colonial libraries. In addition, the fulfilment of the ideal expressed in regard to the Harvard Library, that no considerable writer on government from the time of Moses should be denied representation, demanded their inclusion. The most considerable were Mariana, Bellarmine, and Suarez, although it may be doubted whether the first two were much more than names in the colonies. Mariana taught that the king was *non legibus solutus* but must obey the law.⁸² Bellarmine, more insistent on the importance of natural law, emphasized that popular sovereignty existed by divine law.⁸³

⁸¹ *Op. cit.*, pp. 80, 88, 144-45. By the law of God Brutus meant simply the Decalogue. For similar views see also the Scotch George Buchanan (*De Jure Regni Apud Scotas*, pp. 8, 11).

⁸² *Del Rey y De La Institucion Real*, in *Obras del Padre Juan de Mariana*, Tome Segundo, pp. 485, 489. In discussing the difference between the king and the tyrant (*op. cit.*, lib. i, cap. v), Mariana taught that the tyrant is one who governs "sin respeto a las leyes".

⁸³ *Tractatus de Potestate Summi Pontificis in Rebus Temporalibus*, vol. i, cap 6, especially p. 257. See also Gaillard Hunt, "The Virginia Declaration of Rights and Cardinal Bellarmine", *Catholic Historical*

With Suarez, however, the situation was different. His enormous work was political theory in the grand manner, and that meant more than a reference to fundamental law. Although like his fellow Jesuits he accepted monarchy as a tried and true institution of government, he was more prone to limit the prince by a hierarchy of law. Among these laws none stood higher than natural law, which was both a judgment of reason and an actual command of God.⁸⁴ No one could modify it, neither pope nor prince; a civil statute contravening it was void. In fine, it was *the law*—*Lex naturalis est propria lex*—identical with that of God.⁸⁵

The major continental political theorist in this immediate post-Reformation period was also a source of comfort to the Americans. Bodin, essentially practical in his discussion of fundamental law, accepted without question the idea of a law of nature conditioning human activity, and he made that law largely ethical in character,—a touchstone by which right could be distinguished from wrong. Like Suarez, a little later, Bodin did not identify *jus naturale* with *jus gentium*, nor did he concede to the prince the right to violate the former although he might break the latter with impunity. With *Brutus*, Bodin agreed that when the sovereign's commands contravened the law of nature or of God his inferior was not bound to obey. Among those rights which natural law safeguarded were liberty, equality and property rights.⁸⁶ If the sovereign, however, violated those natural rights, there

Review, vol. iii, p. 276 *et seq.* This article should be viewed somewhat sceptically. There was, however, a copy of Bellarmine at Princeton before the Revolution.

⁸⁴ *Tractatus de Legibus ac Deo Legislatore*, vol. ii, bk. vi, sec. 4. See also *ibid.*, vol. i, bk. ii, sec. 5, where he distinguished between *jus* and *lex*.

⁸⁵ *Ibid.*, vol. ii, bk. v, sec. 3; vol. ii, bk. vi, sec. 5; vol. ii, bk. ix, sec. 2. See also *ibid.*, vol. iii, bk. xii, sec. 4. A civil statute contravening natural justice, he held to be void.

⁸⁶ *Les Six Livres de la Republique* (ed. 1577), pp. 95, 132, 162.

was actually no power capable of calling the violator to account.⁸⁷ Such a statement need not be taken as proof that Bodin did not believe in a law given by God which was superior to any positive law.

This notion was even more clearly held in the next century by one who derived not a little of his theory from Bodin, namely Hugo Grotius. For him, *jus naturale* was grounded in right reason; it was immutable, so immutable in fact that God himself could not change it or command anything against it.⁸⁸ History proved its existence. Among the rights protected by natural law was first of all that of revolution which could be justified on two different counts, the right of self-preservation and the right of the people to resist their ruler if he transgressed the law.⁸⁹ Coupled with this right was the inviolability of private property under natural law.⁴⁰ Finally, human liberty, although it might be circumscribed by civil law, was guaranteed by natural law, which would override any prohibitions directed against personal freedom.⁴¹ Considering the inclusive and definite privileges to which Grotius gave validity under natural law, it need scarcely be wondered that he had a great vogue in the American colonies.

Grotius, however, was only one representative of a continental influence which from his time steadily grew stronger.

⁸⁷ Bodin, however, did believe in a sort of constitutional law (*leges imperii*) which was above the prince and thus not to be abrogated or modified. This law would seem to have had coercive force. *Ibid.*, p. 139. Miss Reynolds, *op. cit.*, p. 198, points out very clearly that Bodin's ideas did not remain constant, that in 1566 he had a plan of definite limitations for the monarchy through constitutional safeguards, but that in 1576 he was in favor of a much less qualified absolutism.

⁸⁸ *De Jure Belli ac Pacis* (Whewell ed.), vol. i, pp. 12, 26.

⁸⁹ *Ibid.*, pp. 29 *et seq.*, 188.

⁴⁰ *Ibid.*, p. 12. See also *ibid.*, vol. ii, p. 119.

⁴¹ *Ibid.*, vol. i, p. 237. See also *ibid.*, p. 199. "By natural law every-one is the vindicator of his own right."

Germany contributed Baron Pufendorf to this stream, and Otis and James Wilson, among others, attested the influence of this philosopher and diplomatist. His book revealed the strong influence of Grotius by its emphasis upon the reasonable and immutable quality of natural law. For him the law of nature could contain nothing repugnant to justice, and it were impiety to assert the contrary.⁴² Much less than Grotius, Pufendorf concerned himself with what the law of nature ordained, although he did connect it intimately with self-preservation. He was content to reiterate that the law of nature was "most true and infallible", a "most general and universal rule of human actions", and that only a reasonable being could deduce what the law of nature was.⁴³ Yet by such methods he could convince willing readers that the law fundamental was an ever present reality to be invoked whenever desirable, and conformed in meaning very largely to the desires of the person appealing to it.

More specific was one of Bland's guides, the famous Janzenist lawyer, Jean Domat, a vigorous critic of arbitrary government. For him the law of nature possessed three major characteristics which he emphasized over and over again. It was just, it was reasonable, and, finally, it was immutable.⁴⁴ The source of this law was God, and among the rights protected by it were liberty, equality, and property.⁴⁵ No subtleties could take away its virtue, and even where the law seemed to be abolished it was only in appear-

⁴² *Of the Law of Nature and Nations* (1710 ed., Kennett trans.), pp. 60, 98, 107-109. "The Dictates of Right Reason are true Principles, which agree with the Nature of things well observ'd and examin'd."

⁴³ *Op. cit.*, pp. 98, 111. Furthermore (p. 113) he argued that if a nation oppresses its weaker neighbor, it is guilty of a breach of the law of nature.

⁴⁴ *The Civil Law in its Natural Order* (trans. William Strahan, ed. Luther Cushing), pp. 7, 49, 58.

⁴⁵ *Ibid.*, pp. 52, 132-3.

ance, not in reality. Yet Domat was willing to admit that the spirit of natural laws allowed some variations. This did not mean, however, that these laws ceased to be immutable; expediency and custom might justify some elasticity, but such variation must stop short of genuine change, since no authority whatever could change the immutable laws.⁴⁶

Following Domat came a number of French critics of absolutism, many of whom expressed belief in a fundamental law.⁴⁷ Fenelon, the mild monarchist, accepted the idea that the king must obey the law. Jurieu freely stressed the power of the laws of God and nature as giving the people the right to disobey the king if he became a tyrant, and thus protect their liberty.⁴⁸ More influential was that authority of many colonial pamphleteers, Montesquieu, who, while believing in an empire of laws, was less an advocate of natural than of constitutional law. Yet one cannot agree with some commentators who, misled by his criticism of the whole contractual school, have taught that the great Frenchman had no belief in fundamental law. There were laws behind the positive law, no less for Montesquieu than for Grotius. These laws were founded on reason; they taught peace, and at the same time, self-preservation.⁴⁹ When the civil laws, which came subsequent to "those of nature", conflicted with natural law, they should be "holden for none."⁵⁰ Coupled with this rather scanty dependence on the law of nature, Montesquieu also assumed the law of the constitution to be fundamental law, although he had little to say of its character.

Mention of Montesquieu calls to mind Voltaire and

⁴⁶ *Ibid.*, pp. 59-60.

⁴⁷ Consult Henri Sée, *L'Évolution de la Pensée politique en France au XVIII^e siècle*, *passim*.

⁴⁸ *Ibid.*, pp. 25, 28-29.

⁴⁹ *The Spirit of the Laws* (trans. Thomas Nugent), vol. i, pp. 2, 4, 6.

⁵⁰ *Ibid.*, vol. ii, pp. 151-53.

Rousseau, both of whom appealed to American revolutionists. The first found time among his manifold self-appointed tasks to define very clearly that natural law of safeguarded liberty, property rights, and trial by jury.⁵¹ Such a clear-cut notion of what natural law guaranteed has led Sée to affirm that Voltaire might be considered largely responsible for the ideas expressed in the "Declaration of the Rights of Man and the Citizen."⁵² Whether that be so or not, it is evident that the libertarian ideals of Voltaire were those most commonly expressed by the American pamphleteers when they waxed eloquent over their rights as Englishmen and as men not subject to the control of the British parliament.

Although Rousseau has been considered the very antithesis of Voltaire, the two had many features in common, not the least of which was their profound belief in natural law as a practical guiding force. But where Voltaire accepted the imperative concept, Rousseau was interested in natural law only in so far as it was expressive of reason and justice. In that sense he followed Montesquieu rather than Locke, the chief guide of Voltaire. What Rousseau actually meant when he used "natural law" is by no means easy to say, for he himself wrote that "il serait bien difficile de convenir d'une bonne definition de la loi naturelle." Complaining that the notion had always been defined too metaphysically, he concluded that natural law was nothing but the accepted code of morality in a given civilization at a given time.⁵³ In spite of his impatience with prevailing usage of natural law, however, Rousseau had no desire to live in a state where anyone

⁵¹ Voltaire's ideas on natural law can be found in *Lettres sur les anglais*, 8e lettre, and in the *Phil. Dict.*, sub "Gouvernement."

⁵² *Les Idées politiques en France au XVIIIe siècle*, p. 83. See also the same writer's *L'Évolution de la Pensée politique*, p. 115 et seq.

⁵³ *The Political Writings of Jean Jacques Rousseau* (Vaughan ed.), vol. i, pp. 137, 452-3.

was able to say that he was above the law. Such an attitude led logically to the view that the ruler who broke the law was a tyrant.⁵⁴

Two men outside of France remain to be considered, and it is fitting that they should be citizens of a state that for centuries had made its name synonymous with liberty. Although other countries gave greater numbers, Switzerland, in offering Burlamaqui and Vattel as authorities to Otis, Wilson, Bland and others, stood high as a source of inspiration. Burlamaqui accepted without question the imperative quality of natural law, as a rule which nature or God prescribed to man.⁵⁵ Simultaneously he saw that same law as indicative of the light of reason and human understanding.⁵⁶ In defining the qualities of natural law, Burlamaqui remained consistently vague. Principles deduced from this norm should be true, simple, immutable and universal. The great abstractions which natural law justified, not to say created, were rights of self-preservation, happiness, equality, and independence.⁵⁷ It was the rule and measure of liberty. The law, coming originally from God, had an ethical content, and whoever violated it testified thereby that he trampled "on the maxims of reason and equity which God has prescribed for the common safety", and was thus an "enemy of mankind."⁵⁸ It need not be wondered that this Swiss philosopher was a welcome spiritual guide for American patriots.

Equally important was his fellow-countryman, Vattel, the

⁵⁴ *Ibid.*, vol. i, p. 126, vol. ii, p. 90. See also vol. ii, p. 27, where he held that no man had a natural authority over his fellow man. In addition to natural law, Rousseau also believed in a fundamental constitutional law, a belief which marks the influence of Montesquieu. *Ibid.*, vol. ii, p. 63.

⁵⁵ *The Principles of Natural and Politic Law*, pp. 1, 55, 87.

⁵⁶ *Ibid.*, pp. 4, 64, 77, 78.

⁵⁷ *Ibid.*, pp. 27, 108, 113, 216.

⁵⁸ *Ibid.*, pp. 224, 273.

inspirer of James Otis's, "an act against the constitution is void." Although he differed little in his ideas from the majority of those already discussed, one or two suggestions may be noted. In the first place, Vattel believed that the law of nature was no less binding on states than on individuals.⁵⁹ Secondly, more than any other continental writer, with the possible exception of Montesquieu, Vattel emphasized a fundamental law which existed apart from natural law, and this concept has had no little effect on American political thinking from Otis to present-day commentators on the constitution.⁶⁰ This other norm was the law of the constitution which limited and regulated the sovereign power and was "inviolable and sacred." Otherwise, he asked, since the legislators derive their power from the constitution, how "can they change it without destroying the foundation of their own authority." In conclusion, it need only be said that in natural law Vattel found the basis of liberty, independence, and the right of self-preservation, which led him very easily to the most popular phrase of the American revolutionaries, a phrase sanctified either by use or implication in the writings of nearly all the continental prophets, *salus populi suprema lex*.⁶¹

III

Before leaving these continental writers it may be well to estimate briefly their relative contributions to the colonial constitutional struggle. While all were known, it is clear that only a few had much influence. Aristotle was frequently cited in the footnotes of pamphlets but there is no

⁵⁹ *The Law of Nations or Principles of the Law of Nature applied to The Conduct and Affairs of Nations and Sovereigns* (6th American ed. from Chitty), p. vii.

⁶⁰ *Ibid.*, p. 11. See also R. G. Adams, *Political Ideas of the American Revolution*, p. 124.

⁶¹ *Op. cit.*, pp. lvi, 21, 24.

evidence to indicate that all those who cited him had actually read his works. Plato was appealed to scarcely at all. Of the Romans, Cicero and Tacitus had an extensive usage; in fact, only two or three continental writers equaled them in popularity. The other Romans appeared but infrequently. Scarcity of reference is even more apparent with regard to the medieval and early modern authors, although it should be remembered that in addition to direct citation, the ideas of all of these early writers filtered into colonial America through more popular channels.

From the sixteenth century on, the situation undergoes considerable change. The political philosophers of modern Europe rivaled their English contemporaries in their influence upon the formation of colonial political principles. Grotius, Pufendorf, Burlamaqui, Montesquieu and Vattel were regarded as scarcely, if at all, less authoritative than the most popular English writers. And *Junius Brutus*, Domat, Rousseau and a few others not infrequently found their way into the pamphlets. Indeed, many learned colonial pamphleteers, especially those educated in America, were as likely to quarry a statement from Pufendorf or Burlamaqui as from Locke, when they desired to preface an attack on British policy with a fundamental political principle.

CHAPTER II
ENGLISH AND COLONIAL SOURCES OF
FUNDAMENTAL LAW

I

WHILE there can be no doubt concerning the importance of the continental contributions to American ideas of fundamental law, the fact remains that the colonists were Englishmen. As such the great majority were better acquainted with both the spirit and the letter of English than of continental law and political philosophy. Whether the colonial lawyer was educated at the Inns of Court or by his own fire-side, the classics of English law were the chief source of his *legal* knowledge. Again, it may be recalled that long before the catastrophe of 1914-18 self-righteous advocates of a given cause appreciated the worth of "out of their own mouths" propaganda. No matter whether the quoted Englishman had tossed off his dictum *ex cathedra* or imbedded it in a mass of constitutional argument or political theorizing, he had for the majority more value than the greatest jurists or philosophers of foreign civilizations.

Probably the earliest English legists studied by colonial lawyers were Glanvill and Bracton. The first does not, however, seem to have been widely used for propaganda purposes, for he had little to offer in the way of fundamental law.¹ The law of nature had no place in his treatise and even

¹ *De Legibus et Consuetudinibus Regni Angliae* (Woodbine ed.). See also Pollock and Maitland, *History of English Law* (2 ed.), vol. i, p. 162 *et seq.*, Holdsworth, *History of English Law* (2 ed.), vol. ii, p. 146 *et seq.*, both of these books being indispensable for much that follows.

customary law went down before the rules made in the king's courts.² Bracton provided a study in contrasts, for where Glanvill was simple and brief, the "patriarch of the common law" was philosophic and extensive. Scattered throughout his whole treatise were evidences of a belief in a higher law, the most famous being that wherein Coke found support in his tilt with James I.³ But other equally explicit statements are not wanting.⁴ Bracton's ethical definition of law, his recognition of justice, and finally his devotion to natural rights, all point to an arsenal in which men as diverse as William Henry Drayton and Arthur Lee could discover revolutionary ammunition. Notwithstanding Bracton's ready acceptance of the supremacy of natural law it may be reasonably doubted that he held the common law in the same reverence. Although he did admit that "custom, also, is sometimes observed for law . . . and fills the place of law," he did not philosophize upon its majesty or sovereignty.

The immediate successors of Bracton presented a varied offering on the subject in question. Britton, whom Selden supposed to be Bracton *in parvo*, made no reference to

² Pound, "Common Law and Legislation", 21 *Harv. Law Review*, pp. 388-89, thinks that Glanvill believed customary law only a makeshift and that enacted law was true law. Cf. Pollock and Maitland, *op. cit.*, vol. i, p. 165, and Holdsworth, *op. cit.*, vol. ii, pp. 160-63.

³ *De Legibus et Consuetudinibus Angliae* (Twiss ed.), bk. i, chap. 8. "But the king himself ought not to be subject to man, but subject to God and the law, for the law makes the king. Let the king therefore attribute to the law what the law attributes to him, namely, dominion and power, for there is no king where the will and not the law has dominion. . ." See also bk. ii, chap. 16; The king has a superior in the law "through which he has been made king"; and *Bracton's Note Book* (Maitland ed.), vol. i, pp. 29-33.

⁴ *De Leg.*, bk. i, chap. 3: Law enjoins "what is honest, forbidding the contrary." See also bk. i, chap. 4: Justice emanates from God, and right derives from justice; and bk. i, chaps. 4, 5, 12; vol. ii, p. 1: Natural rights, of which liberty and property are the most sacred, are immutable.

fundamental law whatever.⁵ The author of the *Mirror of Justices*, on the contrary, had a great deal to say about a binding law. The flavor of Roman Law, obtained possibly from Bracton and the *Institutes* of Justinian, penetrated the scheme of the whole work. Law, according to the author, was nothing more than the rules laid down in Holy Writ. It came from God, and since "it is given to all in common it is called common law."⁶ If a more specific definition of the law be required, such could be found in the author's pronouncement that the ordinances of Alfred were the law, and furthermore that the *forty* articles of *Magna Carta* formed the basis of the law of the realm.⁷ All statutes contrary to this law were said to be null.⁸

With Fleta we return to the more conventional stream of English legal treatises. Like Britton, Fleta was largely content to abridge Bracton, but unlike Britton, Fleta had moments philosophical. And it was those moments which justified colonial attention and study. In words similar to Bracton's, Fleta wrote that the king "ought to have no superior in the kingdom except God and the law. And because the king was made by law it is right that power and dominion be attributed to the law." Therefore, he continued, "let the rulers temper their power through the law."⁹ This fundamental law which Fleta revered was probably natural law. If anything may be concluded from his description of the business of parliament, he had no definite belief in the supremacy of the common law or of

⁵ Britton, *Pleas of the Crown* (Nichols ed.), 2 vols.

⁶ *The Mirror of Justices* (Selden Soc. ed.), pp. 2, 5, 121. The author is generally supposed to have been Andrew Horn, a London merchant of the time of Edward II.

⁷ *Ibid.*, pp. 8 et seq., 175.

⁸ *Ibid.*, pp. 188, 199-200.

⁹ *Fleta seu Commentarius Juris Anglicani* (1647 ed.), bk. i, chaps. 5, 17.

any body of constitutional law, since he conceded to the king's council in parliament the power to dispense law as it saw fit.¹⁰

Between these early treatises, in which constitutional law played no fundamental rôle, and the very fount of constitutional law, Magna Carta, there is a broad chasm. For Americans the latter was the highest source of appeal, coeval with natural right. The exact date when the Great Charter came to be regarded as fundamental law is not easily decided. The successive confirmations point to one conclusion; the Year Books lead to another. While the confirmation of 1265 might still leave the student undecided, there can be little doubt concerning that of 1297, wherein the first article enjoined the observance of the Great Charter as the common law, and the second held that any judgment contrary to the charters "shall be undone and holden for naught."¹¹ In 1368 a statute declared that any future statute against Magna Carta should be deemed void.¹² On the other hand, a thorough reading of the Year Books during the same period leads quite as easily to the opposite conclusion. Magna Carta is therein regarded, when referred to at all, as a statute, and in comparison with such statutes as Marlborough and Westminster II it has no great importance. In the light of that condition Maitland's acute

¹⁰ *Ibid.*, bk. ii, chap. 2. "The king has his court in his council in his parliaments . . . where judicial doubts are determined, and new remedies are established for new wrongs, and justice is done to everyone according to his deserts."

¹¹ Stubbs, *Select Charters* (9 ed.), pp. 404 *et seq.*, 490 *et seq.* For a statement of Magna Carta and its relation to fundamental law see Faith Thompson, *The First Century of Magna Carta*.

¹² Yet, the question may be asked, if parliament could make a statute *perpetuelment a durer*, did it not possess the power to undo its own act? If so, how fundamental was a law which parliament had declared to be fundamental?

observation that Coke invented Magna Carta does not seem nearly so fanciful.

It is not likely that the colonists got very much ammunition from the Year Books with which to defend their citadels, and in fact an examination of the contents compels some overhauling of generalizations about fundamental law. Here and there, to be sure, is a dictum which resembles the lofty claims made by Cicero; but for the most part it is clear that the majority of justices of the common law courts from the thirteenth century on regarded no law under God as immutable. Yet the colonial lawyers could and did find scattered evidence of a belief in fundamental law. Herle spoke, somewhat indefinitely, of the king being bound by law.¹³ Denom was more explicit, stating that Westminster II did "not abrogate the common law."¹⁴ Finally during the trial of the Despensers it was held that the common law adjudged an act of parliament void because it was against "common right and reason."¹⁵

The fifteenth century produced at least one legist, Chief Justice Fortescue, who occupied no inconsiderable place in the political education of colonial lawyers. In his treatise on the government of England Fortescue spent little time with natural law, although he did manage to inform his readers that there were laws which the king must not contravene.¹⁶ These laws were those of God and Nature, of which the latter was nothing more or less than the Golden Rule. In the *De Laudibus Legum Angliae* and the *De*

¹³ *Year Books* (R. S.) 33-35 Ed. I, p. 18.

¹⁴ *Ibid.*, 3 and 4 Ed. II, p. 112. Cf. *ibid.*, p. 162: "the statute annuls divers things which were at the common law."

¹⁵ *State Trials* (Howell ed.), vol. i, p. 33.

¹⁶ *The Difference between an Absolute and Limited Monarchy*, p. 13. I have used the 1714 edition of Lord Fortescue-Aland. The most recent edition of C. Plummer's *The Governance of England* (Oxford, 1885).

Natura Legis Naturae one may find a similar attitude. Human laws were here regarded as no better than rules whereby justice could be determined but justice itself was "a virtue absolute and perfect."¹⁷ The law of nature was an earnest of this perfect justice, having the same qualities and the same force the world over.¹⁸

In the sixteenth century, during the revolutionary ecclesiastical and constitutional upheaval, several Englishmen were writing books which the colonists read and quoted in later years, namely, Thomas More, Fitzherbert, Rastell, St. Germain, and John Ponet. Of these only one or two may be said to have devoted much attention to fundamental law. More's *Utopia*, although of no great value for controversial purposes, did sanction a belief in fundamental law and had the advantage of seeming to refer to America. The Utopians, it was said, did not have many laws, but such as they had conformed to equity and the law of God.¹⁹ Since equity and the law of nature were frequently held to be identical, it was obvious that inequitable laws contravened natural justice and therefore had no validity.

Fitzherbert and Rastell represented the practical lawyer, and few legal guides were better known to colonial lawyers than theirs. The first in his *Abridgement* and *Natura Brevium* was engaged in ordering medieval law for his own day. In that capacity he had the interest and point of view of the medieval lawyer and immutable law had no place in his treatises. He saw the common law being constantly changed by statutes, and natural law only rarely occupied

¹⁷ *De Laudibus*, p. 12. Pollock (*Essays*, p. 54) thinks that the law of nature in the *De Laudibus* was ornamental and included for continental readers. In the *De Natura*, which Americans did not know, Fortescue was even more metaphysical, declaring the law of God to be but the scriptural manifestation of natural law.

¹⁸ *De Laudibus*, p. 49 *et seq.*

¹⁹ *The Utopia* (reprint of the 1556 ed.), pp. 34, 45.

his rather antiquarian interests.²⁰ Similarly Rastell's *Termes de la Ley*, although a highly regarded compendium of legal knowledge, tended in its definitions to favor the statutes, and therefore played a slight rôle in propaganda. The nature of law received little attention, and natural law none whatever. A Ciceronian tinge, it is true, appeared in the sententious phrase: "Maxims are the Foundations of the Law, and the Conclusion of Reason."²¹ Yet in the main the book dealt with matter-of-fact problems which could offer but little comfort to the American colonial critics of parliamentary supremacy and the proponents of a fundamental law.

In turning to the *Doctor and Student* of Christopher St. Germain an entirely different point of view is discovered. The scantiest examination would suffice to show why this book was recommended by John Rutledge to his brother and why Jefferson felt the urge to annotate it thoroughly. A familiar chord at the very outset carries the reader to the philosophical approach to law:²²

Wherefore thou shalt understand, that Doctors treat of four laws. . . . The first is the *Law Eternal*. The second is the *Law of Nature* of Reasonable Creatures, the which, as I have heard say, is called by them learned in the law of England, the *Law of*

²⁰ Anthony Fitzherbert, *New Natura Brevium* (9 ed., 1793), pp. 30, 478 *et seq.* His *Abridgement* in general expresses the same view, although in one place (p. 42) Fitzherbert relates that the common law adjudged an act of parliament void since it contravened common right and reason.

²¹ *Termes de la Ley* (1742 ed.), pp. 11, 34-35, 148, 438. See C. B. Warren, *The History of the American Bar*, pp. 172, 191, for evidence of its interest to colonial lawyers.

²² *Doctor and Student or Dialogue between a Doctor of Divinity and a Student in the Law* (1751 ed.), p. 2. For an excellent summary of St. Germain's general position, see Paul Vinogradoff, "Reason and Conscience in 16th Century Jurisprudence", 24 *Law Quarterly Review*, pp. 373-84.

Reason. The third is the *Law of God*. The fourth is the *Law of Man*.

Here then were several types of fundamental law, the meaning of which was further amplified by St. Germain. The "Law Eternal" stood before all other laws, and all other laws derived from it. It might be known in three different ways: "by the Light of Natural Reason," "by Heavenly Revelation," "by the Order of a Prince. . . ." The first manifestation was called the law of reason, the second, the law of God, and the third, the law of man. The author treated the law of nature, which was always righteous and good, quite as elaborately. As far as the deeds of man were concerned, it was preferred to the law of God since it might not be put away and was not changeable by diversity of time or place. "Against this Law, Prescription, Statute, nor Custom may not prevail"; if contrary to it they were "Things void and against Justice." "And all other Laws, as well the Laws of God as to the Acts of Men, as other, be grounded thereupon."²³

Scarcely less fundamental, however, was the law of God which, closely allied with reason, taught love, peace, and justice, and also that it was lawful for every man to defend himself and his goods against an unlawful power.²⁴ The corollary of this doctrine could be found in the discussion on the laws of man, namely, that since they derive from reason and from God they should always be consonant to both. Failing that, they need not be observed.²⁵

Having treated law *per se*, St. Germain turned his attention to the law of England. The first ground of that law

²³ *Doctor and Student*, pp. 3-4, 5-6, 79. He was rather unique in subordinating the law of God to that of nature.

²⁴ *Doctor and Student*, p. 7 et seq. St. Germain made property right a part of the law eternal.

²⁵ *Ibid.*, pp. 11-12.

was the law of nature, or, as it was known in England, the law of reason. The law of reason provided that man was lawfully entitled to "defend himself against an unjust Power" so long as he kept "due Circumstance" and protected property rights and contracts. The second ground of the law of England was the law of God. The third was formed of those general customs which were against neither the law of God nor reason. Many of these customs were held to have been confirmed in Magna Carta and other statutes,²⁶ but none of them could have any validity if they were against God and reason. The common law was in a somewhat different position, for by it was sometimes meant the law of reason and the law of God, which gave the common law therefore a higher place in the hierarchy of law than it was frequently accorded.²⁷

In the meanwhile the Reformation had been driven home to one mild Englishman with distressful force. John Ponet, variously Bishop of Rochester and Winchester, was impelled to express his opposition to the arbitrary power of a ruler who could send men into exile because of their religious beliefs. The result was a book markedly in anticipation of the *Vindiciae Contra Tyrannos*. At last two questions were propounded and answered in both books, less clearly, however, by Ponet, namely, "In what things and how far subjects are bound to obey their Princes and Gouverneurs," and "Whether it be lawful to depose an evil Gouverneur and kill a Tyrant." Obviously here was a book in the continental tradition. Natural law abounded. Man's actions, said the Bishop, should be directed by the law of God which is the law of nature.²⁸ When the Prince, whose actions ought to

²⁶ *Ibid.*, pp. 14-17, 20, 21, *et seq.* It is interesting to note that Magna Carta and other statutes were not regarded as fundamental law.

²⁷ *Ibid.*, pp. 116-117.

²⁸ *A Short Treatise of Political Power*, chap. i.

be bound by the law of God, imposes unjust taxes and confiscates the property of his subjects he has broken the law. The law of nature, he further argued, allows the overthrow of the evil ruler and even permits tyrannicide.²⁹ With such justification of revolution it is no wonder that John Adams believed Ponet to be quite as advanced as Locke or Sidney.

The philosophical successor of St. Germain in the realm of jurisprudence was Richard Hooker. This subtle writer had an influence in America both directly through his own writings and indirectly through John Locke. The first book of his famous treatise, *Of the Laws of Ecclesiastical Polity*, concerned itself with "laws and their several kinds in general," and therein he made reference to fundamental law. The "law eternal," by which God worked, was of two parts: the law of nature which ordered all life, and the law of reason which bound reasonable creatures and controlled their relations one with the other.³⁰ If anything were done amiss, then the law of nature and reason had thereby been transgressed. What was contrary to justice was contrary also to these fundamental laws. Beyond this, however, the "judicious" Hooker was not prone to go. As a good child of the Elizabethan settlement he could not urge too far the power of immutable laws over those of England. He could state the division of laws but he did not find it essential to follow his premises to any revolutionary conclusions.³¹ So that in saying of Hooker that he believed in fundamental law and its essential identity with justice, without defining that weasel word, his contribution to the American cause has been assessed.

²⁹ *Ibid.*, chaps. iv, v, vi.

³⁰ *The Works of that learned and judicious divine, Mr. Richard Hooker* (Oxford, 1890, 2 vols.), book i, ch. iii, sec. 1; ch. viii, secs. 6, 8, 9.

³¹ In *ibid.*, book i, ch. x, sec. 4, he admits the necessity, human nature being what it is, of supporting the law of nature with positive laws.

In the meantime the politicians and lawyers of the late sixteenth century did not all follow the same line of approach. Sir Thomas Smith and James Dyer found no place for fundamental law.²² On the other hand, Edmund Plowden, "Great Lawyer and Sage of the Law," as some colonial writers called him, in compiling his reports in 1578, found space to erect some facade of legal philosophy. "There are," he said, "three kinds of Laws in the Realm of England, by which the King's People are governed, *viz.* the Law general, Customs, and Statute Law," or, as he elsewhere put it, "Common Law, Customs, and Statutes."²³ From this he went on to give evidence that he was of the century of St. Germain and the generation of Hooker by discussing natural law. The founders of English law were not ignorant of the law of nature, nor remiss in searching after it, for their laws showed them to be as well acquainted with that law as with the law of reason and also the law of God. There was, Plowden further taught, nothing ordained in our law contrary to reason, God, or nature.²⁴ In fact for him the common law was the chief vehicle of the law of nature and what was not countenanced by the latter could not find any justification in the former.

II

With the unfolding of the seventeenth century there evolved in England a state of affairs and withal a state of mind which were later to afford the American revolutionists valuable precedents. There were, it is generally held, three schools of political thought in England in the early years of the seventeenth century,—advocates, respectively, of the

²² *De Republica Anglorum* (Alston ed.); James Dyer, *Reports* (1688 ed.).

²³ *Commentaries or Reports* (1816 ed.), part i, pp. 9, 243.

²⁴ *Ibid.*, pp. 304-306. Cf. *Doctor and Student*, pp. 116-17.

sovereignty of the king, the sovereignty of the king in parliament, and the sovereignty of the law. Most zealous and most able of the latter group was Coke, the highest legal authority to many of the colonists.⁸⁵ "There be", he said, "divers lawes within the realme of England",—*lex coronae*, *lex et consuetudo parliamenti*, and *lex naturale*. The law of England itself was divisible into common law and statutes. For the first there were "20 several fountaines" among which none was more prominent than nature.⁸⁶ Law, viewed abstractly, was the highest reason, which ordered what was necessary and useful and prohibited the contrary, and the reason of the law was the life of the law.

There were three kinds of law which Coke at times seems to have placed above statutes. The first was common law, in which he included Magna Carta, "the fountaine of all the fundamental lawes of the realme" and for "the most part declaratory of the principall grounds of the fundamentall Lawes of England, and for the residue it is additionall to supply some defects of the Common Law." Furthermore "if any Statute be made contrary to the Great Charter, or the Charter of the Forest, that shall be holden for none."⁸⁷ This view he elaborated in the famous *Dr.*

⁸⁵ See generally the present writer's "Coke and the American Revolution", *Economica*, no. 38 (Nov. 1932), pp. 457-71.

⁸⁶ *The First Part of the Institutes of the Laws of England* (Hargrave and Butler ed.), fols. 11a, 11b. Farther on (fol. 344a) he divided temporal law into the common law, statutes, and "custom grounded on reason."

⁸⁷ *Ibid.*, fol. 81a; *The Second Part of the Institutes of the Laws of England* (1642 ed.), Proeme; *The Third Part of the Institutes of the Laws of England* (1648 ed.), p. 111; *The Fourth Part of the Institutes of the Laws of England* (1648 ed.), pp. 52, 300. See also *Parl. Hist.*, vol. ii, p. 357: "Magna Charta is such a fellow that he will have no sovereign." Coke also endowed other statutes, notably Westminster I and *Articuli Cleri*, with fundamental qualities, and regarded them as "declaratory of the common law." 2 *Inst.*, pp. 16 *et seq.*, 632; 8 *Reports*, p. xxiii.

Bonham's Case where he pronounced the oft-quoted dictum that in many cases the common law would control acts of parliament "and sometimes adjudge them utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void. . . ." ³⁸

A second type of fundamental law which for Coke had valid authority was the law of God. In the *Third Institute*, he made not a little of that law, enumerating many practices as being contrary to the law of God and at times identifying the common law with it.³⁹ This tendency was further marked in his *Reports*. In the *Ipswich Tailor's Case* Coke delivered a discourse on the moral aspects of the common law, supplementing the doctrine that the law was "reason and equity" and that any act of parliament against equity was void.⁴⁰

Mention of natural equity brings us to the third branch of fundamental law to be found in Coke, namely, natural law. Here the American revolutionaries were on the least equivocal ground when they appealed to the great common lawyer for arguments against parliamentary taxation. If there was something contradictory about his attitude toward common law and statutes, if his use of divine law was confined mostly to problems of private law, Coke's employment of natural law was not open to question, and in the case in which he depended most upon it, namely, *Calvin's Case*, he

³⁸ 8 *Reports*, fol. 118a. T. F. T. Plucknett has presented an excellent discussion of the precedents for Coke's judgment in "*Bonham's Case* and Judicial Review", 40 *Harv. Law Rev.*, pp. 30-70, concluding that they were none too good. See also E. S. Corwin, "The 'Higher Law' Background of American Constitutional Law", 42 *Harv. Law Rev.*, 366 *et seq.*, and McIlwain, *The High Court of Parliament*, chap. ii.

³⁹ 3 *Inst.*, pp. 50-51, 57-58, 205.

⁴⁰ 11 *Reports*, fols. 53b, 72b.

was faced with a problem that later had a special interest for Americans. The fact that the matter argued concerned allegiance was of no less value to colonial pamphleteers than the reliance on natural law.

Among Coke's most interesting generalizations in this case were those defining the character of the law of nature and its relation to the law of England. He held that the law of nature was part of the laws of England and above any positive law, being absolutely immutable. It was the law which "God at the time of creation" had infused into the heart of man for his direction; it was the *lex aeterna*.⁴¹ As to the power of the law, Coke was equally explicit. First, it commanded the obedience and "ligeance" of the subject to the sovereign; yet this allegiance, he stated, was due the king primarily in his natural capacity.⁴² Since this was the case, whosoever was born outside the realm of England, but within the king's ligeance, owed obedience to the king but not to England.⁴³ From this premise it was not difficult for the colonists to conclude that by the law of nature non-English subjects of the king were beyond the power of parliament.

To write of Coke is to recall to mind his great rival, Bacon, who occasionally found his way into colonial tracts. The point of view, the prolixity, and the loyalties of the first bring out the quite diverse, even antagonistic, characteristics of the second. Bacon was eminently a believer in

⁴¹ 7 Reports, fols. 4b, 12b.

⁴² *Ibid.*, fols. 2b, 10a.

⁴³ It was here that Coke incorporated the statement, widely quoted in America, with reference to Ireland: *Hibernia habet Parliamentum, et faciunt leges, et nostra statuta non ligant eos, quia non mittunt milites ad Parliamentum sed personae eorum sunt subjecti Regis*. This concession, however, was rendered pointless by Coke's further statement that Ireland as well as other outlying dominions could be bound by English parliamentary statutes if they were especially named.

the subordination of parliament; two powers ranked above it, king and law. By a fundamental law the king was supreme over parliament; and the very nature of law made for its own supremacy. Bacon's fundamental law was not, however, the common law of England, for in general he believed that statutes could change common law.⁴⁴ Rather it was the law of nature which he held more worthy than either the common or statute law. Upon the law of nature that of England was grounded and from it three things naturally derived: "preservation of life, natural; liberty, which every beast or bird seeketh and affecteth, natural; the society of man and wife, whereof dower is the reward, natural." *Natura omnes homines erant liberi.*⁴⁵ Students of constitutional history and political theory may find in those phrases of Bacon more than a fanciful resemblance to Jefferson's "life, liberty, and the pursuit of happiness."

A more single-minded opponent of parliamentary claims to supremacy at the dawn of the seventeenth century was John Cowell. Yet in most cases the power which he would set over against parliament was not the law but the king, who was for Cowell above the laws of the land. The only place in his *Interpreter* where he seemed to be in agreement with Coke and other leading lawyers of the day was in his observation that all the laws of England were thought to depend on Magna Carta.⁴⁶ Otherwise he evidenced a belief

⁴⁴ *Law Tracts*, pp. 88, 123, 178, 231, 276, 335. Cf. his statement in *Calvin's Case*, "the common law is more worthy than the statute." *The Works of Francis Bacon* (Speeding ed.), vol. xv, p. 202.

⁴⁵ *Works*, vol. xv, pp. 202, 225. Cf. *ibid.*, p. 11 et seq: "The maxims and rules by which the King is directed are the ancient Maxims, Customs, and Statutes of this land." These are "the foundations of the Law, and the full and perfect conclusions of reason." Bacon also identified the law of God with that of England.

⁴⁶ John Cowell, *The Interpreter*, "Magna Charta". For comment on Cowell see F. C. Hicks, *Men and Books Famous in the Law*, p. 28 et seq.

that the statutes were above the common law, thus bringing upon himself the charge that he spoke irreverently of the common law.

Other contemporary writers not engaged in the controversies of the seventeenth century, yet mirroring in one way or another current thought, had some authority in America as exponents of law. Although the majority of these were reporters, a notable exception was Henry Finch (d. 1625), who found his way into the reading of John Adams and probably that of others. His book, a rather popular textbook, first appeared in 1613 and was re-edited at various times in the seventeenth and eighteenth centuries. The tone was rather Ciceronian with its emphasis upon reason and the importance of ethical considerations.⁴⁷ For Finch there were various kinds of fundamental law all of which were intimately bound one with the other. The laws of nature and reason were held to give light to all the positive laws of the world. The common law which derived from the law of nature and reason was itself but the golden and sacred rule of reason. Since this was true any positive law which was contrary to the common law had no force and was in fact no law at all. The law of nature as well as that of reason was, said Finch, immutable and permitted no alteration.

Of the reporters of the first half of the seventeenth century, the majority appear to have accepted the idea that the statutes were supreme over the common law, and none of them were given to *obiter dicta* of a philosophical or constitutional sort. Sir Henry Hobart, however, inclined more to the view of Coke and thus obtained a friendly hearing

⁴⁷ Sir Henry Finch, *Law, or a Discourse thereof* (1759 ed.), pp. 3-4, 74-76. He quoted Cicero's, "The Law of Nature is that sovereign reason fired in man's nature which ministreth common principles of good and evil."

from the colonists. Although Hobart did not specifically assert that a statute contrary to common law was null and void, he frequently implied that such was his belief; but at the same time he often stated that statutes were designed to amend and even change the common law. There was one law, at any rate, which clearly ranked above the statutes. An "Act of Parliament, made against natural equity", said Hobart, "is void in itself, for *Jura naturae sunt immutabilia*, and they are *leges legum*." Elsewhere he spoke of "the law of nature, by which all men are free and cannot be brought under the dominion of any."⁴⁸

Toward the middle of the seventeenth century, Edward Bulstrode, Chief Justice of North Wales, seemed to accept much the same attitude toward law. For him a custom directly against justice was void, and the king's prerogative was confirmed by law.⁴⁹ While he believed in parliament's power to make laws and thought England fortunate because "the greatest Bulk of our Laws are Acts of Parliament", he recognized a fundamental standard to which statutes ought to conform. Human laws, he observed, depend on the law of God and the law of nature which is derived from it. And those laws that are known maxims for the common good ought not to be changed any more than the law of nature.⁵⁰ Thus while Bulstrode was giving allegiance to the law of parliament, he was a satisfactory source for the idea that statutes could be over-ridden by a higher law

⁴⁸ *Reports* (1678 ed.), pp. 87, 99. See also John Davys, *Reports* (1628). In the preface Davys defined the common law as "nothing else but the Common custome of the realme," and better than written laws. Davys also held that the law of nature, "which the schoolmen call *ius commune*, . . . is better than all the written laws in the world." Customary law is the closest in England to the law of nature. Pp. 72a, 75b.

⁴⁹ *Reports* (1657), pp. 14, 28.

⁵⁰ *Second Part of the Reports* (1658), Preface; *Third Part of the Reports* (1659), Preface.

and in that capacity occasionally crept into the footnotes of a lawyer-pamphleteer.

In the meantime the English political scene was one of great turmoil and at no time in history was the idea of fundamental law more eloquently presented. Whether it be in the debates of parliament, in the arguments of the courts, in the pamphlets, or in the considered treatises of philosophers, one may find abundant evidence that political crisis impels men to appeal to eternal principles of right and wrong. The parliamentary party found the chief sources of its strength in certain fundamental statutes and in natural law; judges continued to appeal to the common law and, where that did not suffice, to the law of nature, and, finally, the pamphleteers and philosophers invoked higher law of any or all kinds, connecting that law directly with the rights of the articulate class. We cannot, of course, be certain how much the colonists knew of seventeenth-century history, but it is not too much to say that they surmised where they did not know and read the whole period in terms of their own troubles. Moreover, they were not ignorant of the major crises of the time, since those crises were the common stock in trade of contemporary and later pamphleteers.

The speaker's remarks at the close of the parliamentary session in 1604 indicate clearly that a spirit which had lain dormant under Elizabeth had now been released. "The Laws whereby the ark of this government hath been ever steered, are of three kinds", he said, "the 1st, the Common Law, grounded or drawn from the Law of God, the Law of Reason, and the Law of Nature, not mutable"; the others were the positive laws and customs.⁵¹ Since the common law was made up of such irreproachable ingredients, the Commons steadily based their arguments on this "unwritten, fundamental law of the land." The Petition

⁵¹ *Commons Journals*, vol. i, p. 254a.

of Right itself was scarcely anything more than an attempt to declare certain rights a part of the fundamental law. As Coke said, "This Petition is a branch of *Magna Carta* and fitt to follow that Presedent."⁵²

During the decade in which the king attempted to get along without parliament the discussion of his legal powers continued. Sir John Eliot in the *Monarchy of Man*, called upon a "great squadron of ancient writers" to prove the supremacy of law, "the ground of all authority."⁵³ A series of state trials, especially those involving William Prynne and John Hampden, helped to crystallize the legal discussion.⁵⁴ In the case of John Hampden and ship-money the American colonists later found a very pertinent parallel to their own predicament; and the arguments of St. John, Hampden's chief counsel, were freely repeated in colonial pamphlets. Those arguments, prosaic though they were as stated by St. John, were erected by the colonists into classic statements of the principle that it was a fundamental law that no man should be taxed save by his own consent given by himself or his constitutionally elected representatives.

With the advent of the Long parliament the controversy increased both in extent and heat. In the main, however, the chief interests of that Parliament were purely temporary. The problems of the moment from day to day occupied its time, and little attention was devoted to abstract theorizing on questions of law. In the courts the situation differed somewhat. Many men were tried for high treason and a common accusation ornamented all charges: the accused had

⁵² Frances Relf, *The Petition of Right*, pp. 22, 56. Arbitrary imprisonment was stated to be contrary to common law and God's law.

⁵³ John Forster, *Sir John Eliot*, 2 vols. The *Monarchy of Man* is in an appendix in vol. i.

⁵⁴ *State Trials* (Howell ed.), vol. iii, pp. 561 *et seq.*, 711 *et seq.*, 825 *et seq.*

subverted the fundamental law. Whether it was the king, Lord Keeper Finch, Strafford, Laud, or merely an underling, the charge was the same.⁵⁶ At the trial of Charles I, which Jonathan Mayhew was to review a century later, when it was questioned by what law the king was condemned, the response came back most rhetorically:⁵⁶

By the Fundamental Law of this Kingdom. . . . If a King destroy a people, it is absurd and ridiculous to ask by what law he is to die. And this Law of Nature is the Law of God. . . . And by the law of England any act or agreement against the laws of God or nature is a mere nullity.

And as it was further explained: "When our Law-Books are silent we must repair to the Laws of Nature and Reason", a precept which the colonists followed most assiduously.

With all of this debating and stating of principles in parliament and the courts, it was to be expected that many, participants and observers alike, would turn their hand to explaining and defining the "truth" about the issue. Of those who did so, none was more learned or historically important than William Prynne, legal antiquary, parliamentarian, and born controversialist. Whether he wrote as an opponent of royal pretensions or as critic of the army, the burden of Prynne's song was the same: England ought to be governed according to the fundamental law. In the *Sovereign Power of Parliaments*, although consistently defending the thesis implicit in the title, he granted to the subjects the right to defend themselves and their rights by the common law and the law of nature.⁵⁷ Some years later,

⁵⁶ *Ibid.*, vols. iii and iv; *The Journal of Sir Simonds D'Ewes* (W. Notestein ed.), pp. 395, 410.

⁵⁶ *State Trials*, vol. iv, pp. 1032, 1033.

⁵⁷ *The Sovereign Power of Parliaments and Kingdoms* (1643), part iii, pp. 13, 19.

when his sovereign parliament had begun to exercise the unqualified power which he conceded to it, Prynne charged that it was breaking the same fundamental laws that the king had broken. Specifically he maintained that parliament had gone contrary to the principle, *quod tangit omnes, ab omnibus debet approbari*. Its acts therefore in such instances were contrary to Magna Carta, the Petition of Right, and the law of the land. Under these circumstances Prynne shifted from a plea for a sovereign parliament to one for a sovereign law.⁵⁸ But not only was the parliament guilty; so also were such subversive groups as the Army and the Levellers. In fact it would seem that whosoever was in power at a given time was guilty of contravening the fundamental law.

Equally famous, although more useful as a lawyer than as a politician, was John Selden, whose recognition of the existence of a law of nature was attested by his contributions to the debates in the Long Parliament and by his *Table Talk*.⁵⁹ As an author Selden was more inclined to devote his energy and great learning to clearing up obscure and technical points of law, such as "titles of honour", which were of no value to pamphleteers dealing in eternal principles of political right and wrong.

On the other hand, the author who is chiefly remembered today for his attempt to justify God's ways to man played an equally distinguished rôle for the American colonists by his efforts to define for men the dictates of the law of God and nature. Milton's political tracts are neither varied nor profound in their arguments but rather are eloquent and express a burning interest in all aspects of liberty, principles

⁵⁸ *A Legall Vindication of the Liberties of England against Illegal Taxes* (1649), pp. 18 et seq., 23, 26.

⁵⁹ *Table Talk of John Selden* (ed. Sir F. Pollock), pp. 61, 69-70. See also his *De Jure Naturali et Gentium* (1665 ed.).

which Jonathan Mayhew gratefully acknowledged as still alive in New England. *The Tenure of Kings and Magistrates* was written to prove that a tyrant could lawfully be put to death.⁶⁰ Using almost entirely Biblical and theological precedents as a basis, Milton argued that subjects have the right by the law of God and nature to defend themselves against unjust rule. What that law was he defined elsewhere as that "which God and nature have enacted, viz. that whatever things are for the universal good of the whole state, are for that reason lawful and just."⁶¹ Such being the case, he was prepared to admit that parliament itself, although bound by no other laws, had to observe the law of nature, "the only law of laws truly and properly to all mankind fundamental."⁶²

Two of Milton's contemporaries, John Lilburne and James Harrington, appeared quite frequently in the footnotes of various colonial pamphlets. The first pleaded steadily for observance of Magna Carta, which he seemed to feel was in that condition so graphically described by a contemporary, lying "prostrated, besmeared and groveling in her own gore."⁶³ More prosaic and yet of an influence in America equal to if not greater than Milton, was James Harrington. While, however, he drew colonial plaudits because of his belief in an empire of laws rather than of men, he was much less concerned with defining what he seemed to in-

⁶⁰ *The Prose Works of John Milton*, 7 vols. (Symmons ed., 1806), vol. ii, pp. 271-314. See also *Eikonoclastes: in answer to a Book, entitled, Eikon Basilike, Works*, vol. ii, pp. 383-472; vol. iii, pp. 1-102.

⁶¹ *A Defence of the People of England, in answer to Salmasius; Defence of the King* (Works, vol. iii, pp. 114).

⁶² *The Ready and Easy Way to establish a Free Commonwealth* (Works, vol. iii, p. 403). Milton's interest in the whole problem of freedom is further attested by his *Treatise of Civil Power in Ecclesiastical Causes* (Works, vol. iii, pp. 317-347).

⁶³ Lilburne, *Fundamental Liberties of England* (1649).

clude in his governing law than with outlining a practical form of government.⁶⁴ Consequently, while having a great deal of influence on American writers on constitutional issues, state and national, he was of no particular value to the authors of inflammatory tracts. Nevertheless, he was interested in liberty, a liberty hedged in by law so that it might not become license.

With Harrington there came a brief intermission in political writing. Relief from stress and the loyalty to the restored monarch produced a temporary era of stagnation from the point of view of appeals to fundamental law in behalf of liberty. The doctrines of Hobbes seemed to reign unquestioned, and he continued to expound his concepts of monarchical absolutism. It is not without interest that this man, the keenest political theorist of his century, should have made no appeal to American revolutionaries. While many of them had read Hobbes, they mentioned him in their tracts only with opprobrium. Yet Hobbes did admit the existence of fundamental laws of nature, such as the endeavor to keep the peace, the right of self-preservation, keeping of contracts, and equitable relations between men. The maintenance of these laws, accordingly, were essential for the continued existence of civil society.⁶⁵ Since, however, these laws were primarily ethical rather than political and since they stood at once for a "brute instinct" and "a moral ideal", they were not susceptible of easy application to revolutionary arguments.

⁶⁴ *The Oceana or Commonwealth*. For Harrington's influence in America see H. F. Russell Smith, *Harrington and his Oceana*, p. 185 *et seq.*, and Gooch, *English Democratic Ideas* (2 ed. by H. J. Laski).

⁶⁵ *The Leviathan*, chaps. xiv, xv. Hobbes in his other works added nothing to his ideas of natural law as expressed in the *Leviathan*. See *English Works* (Molesworth ed.).

III

After two decades of restored absolutism, political theory reopened again the question of the limits of political power, and the years around the Revolution of 1688 were filled with heated discussion. The tracts of this period, more consciously revolutionary than those earlier in the century, became the classic arguments for Americans. Where the earlier arguments tended to turn on immediate injuries and were couched in terms of English law, those of the last part of the century were grounded on questions of principle, as if their authors were writing for eternity; and English law had become metaphysically endowed with the attributes of natural law with which it was freely identified. Lawyers became philosophers, philosophers, lawyers; and the combined handiwork was the beginnings of that philosophic jurisprudence which has been found so characteristic of the eighteenth century.

Among the writers who ornamented the later years of the seventeenth century none had more claim to consideration by the colonists than Algernon Sidney. As a revolutionary, a republican, and as a martyr he qualified for membership in the inner circle of prophets. The chief characteristic of his *Discourses* was the insistence upon keeping government in conformity with God and nature. If constitutions were contrary to the laws of God and nature, they are not rightly made, for that "which is not just is not law; and that which is not law ought not to be obeyed."⁶⁶ Kings, he said, could have no power but what the law gave, since they were under the law; if they broke the laws the people, who in the last analysis were sovereign, had the right of revolution.⁶⁷ Among the rights preserved to the people by

⁶⁶ *Works of Algernon Sydney* (1772 ed.), pp. 39, 328.

⁶⁷ *Ibid.*, pp. 248 et seq., 271, 288 et seq.

the law of nature were life, liberty, and property.⁶⁸ These principles Sidney reiterated again and again, and it is therefore no cause for wonder that the government decided that it would be far safer with him out of the way. This proved not a little unfortunate a century later, for as a martyr, his ghost walked on Boston Common and his intellectual remains became a monument to courageous patriotism.

Less noted and more matter of fact was a contemporary pamphleteer, Henry Neville, whom John Adams described as having considerable influence. Written in the form of a dialogue between an Englishman and a Venetian, Neville's *Plato Redivivus*, published about 1680, considered the common law as the main check upon tyranny. The statutes, including even Magna Carta itself, were held to be but declaratory of the common law, which was "Reason itself, written as well in the hearts of rational men, as in the Lawyers' Books."⁶⁹ By it the lives, liberties, and properties of men were protected. In addition the prince and his servants were both ruled by the law of God and nature, thus guaranteeing that government should be for the good of the governed.⁷⁰

More nearly aligned with Sidney than with Neville was the most famous source of American political ideas, John Locke. His first Treatise attempted to answer the labored historical arguments of Filmer's *Patriarcha* with others equally labored, and as a result Locke set up standards of criticism as absurd as those he demolished and scarcely made a dent upon Filmer's essential thesis. When he turned to stating what he believed about rights and government he

⁶⁸ *Ibid.*, pp. 351, 508.

⁶⁹ *Plato Redivivus: or, a Dialogue concerning Government*, pp. 119-20, 128.

⁷⁰ *Ibid.*, pp. 133, 135. Somewhat similar in approach was George Petyt's *Lex Parliamentaria: or, a Treatise of the Law and Custom of the Parliaments of England* (1690).

expressed himself in arguments that Americans could and did use with great avidity.

In his second Treatise Locke was concerned with the true end of government. In order the better to discover that, he felt it necessary to begin with man in a state of nature controlled by natural law. For him the state of nature was one of equality and liberty, where no man could invade the rights of his neighbor or exercise absolute power over another except by violating the law of nature.⁷¹ Nevertheless, violations did occur and in order to prevent them civil government was instituted, yet this government itself had to conform to the law of nature if it was to receive the obedience of subjects. Among the rights guaranteed by natural law were life, liberty, property, and equality, and the true end of political society and government was to see that these rights were not infringed.⁷² While the legislative power was the supreme authority in the government it should not be arbitrary to the extent of detracting from man's liberty, taking his property without his consent, or giving power over him to some one else.⁷³ These limits were placed upon government by the law of God and nature, and when transgressed, government ceased to be instituted of God and nature and became a tyranny and usurpation. Then by the same law which controls all government the people could exercise the right of revolution.⁷⁴

It may not be without value at this point to call to mind one of Locke's correspondents, who also had an appeal in America, an appeal heightened by the fact that he formulated arguments applicable to a particular case as well as of

⁷¹ *Of Civil Government*, book ii, "An Essay concerning the true Original, Extent and End of Civil Government", chap. ii.

⁷² *Ibid.*, chaps. iv, v, ix.

⁷³ *Ibid.*, chap. xi.

⁷⁴ *Ibid.*, chap. xix.

general propagandist value. When William Molyneux composed *The Case of Ireland being bound by Acts of Parliament made in England stated* at the end of the seventeenth century, he little suspected that, whatever his influence in Ireland, he was contributing fuel to a revolution by another part of the Empire against Great Britain. As has recently been suggested, Irish emigrants to the American colonies may well have preached the doctrines of Molyneux and others "at town-meetings, in debating clubs, at corners of the village street."⁷⁵ In brief, Molyneux argued that the rights of Englishmen were founded on "that universal *law of nature* that ought to prevail throughout the whole world, *of being governed only by such laws to which they give their own consent* by their representatives in parliament." Parliamentary acts binding Ireland, therefore, were "against reason and the common rights of all mankind." Not only, however, did he find sanction for his theory in the law of nature, but he also appealed to the principles of the common law and the constitution as a further defense against parliamentary encroachment. That Molyneux's case in so far as it was concrete was thoroughly exposed as "a tissue of error, contradiction and fallacy" was of no great moment to people who ardently desired to believe that his interpretation was sound.

In the meantime the establishment of a constitutionally and legally limited monarchy had not put an end to political theorizing and the turn of the century witnessed a considerable output of political tracts all of which appeared in the footnotes of American pamphlets. Among the more important were the writings of John Trenchard, Thomas Gor-

⁷⁵ R. Coupland, *The American Revolution and the British Empire*, p. 102. For full treatments of the Irish background of the American Revolution see *ibid.*, pp. 56-59, 90, 94 *et seq.*; R. L. Schuyler, *Parliament and the British Empire*, chap. ii; C. H. McIlwain, *American Revolution*, pp. 29-56.

don, Benjamin Hoadly, and Thomas Burnet. The first of these, Trenchard, had written in 1697 a short piece to prove that the maintenance of a standing army was an attack upon "the old English constitution" because it overthrew the laws and liberties of the people.⁷⁶ Two decades later he and "the excellent Gordon" engaged in a public correspondence, the fruits of which were gathered into several volumes under the impeccable title of *Cato's Letters*, an important source of Joseph Hawley's ideas. While both authors were mainly concerned with the discontents of their own times they found it easy to digress into the realm of fundamental principles of government. Maintaining both the necessity for, and sanctity of, law, Gordon described *salus populi suprema lex esto* as the primary law of nature and nations. Trenchard varied the formula slightly by holding self-preservation to be the first and fundamental law.⁷⁷ Both men admitted England to be a government of laws and not of men, but they went beyond that to agree that positive laws are effective as far as they go but ultimately the people must have recourse to the law of nature from which positive laws derived their force.⁷⁸ Among the rights which these men found to be safeguarded by the fundamental law, whether constitutional or natural, were liberty, property, and a popular share in legislation and taxation. Where the positive law was bad, that is where it transgressed the fundamental law, it was no crime to disobey it.⁷⁹

⁷⁶ *An Argument shewing that a standing army is inconsistent with a free government*, pp. 13, 27. Trenchard also described the English government as one which "may truly be called an Empire of Laws, and not of Men."

⁷⁷ *Cato's Letters or Essays on Liberty* (1733 ed.), vol. i, pp. 66, 75.

⁷⁸ *Ibid.*, vol. ii, pp. 64-65.

⁷⁹ *Ibid.*, vol. ii, pp. 214, 228; vol. iii, p. 12.

Hoadly and Burnet also developed certain features of Locke's argument, although more conservatively. The first conceded that when the legislative power made a law contrary to humanity the appeal was to the law of nature and of God, which was the last resort, and which defended the right of self-defense and self-preservation. Elsewhere Hoadly argued that the law of nature was necessary to the well-being of mankind.⁸⁰ Burnet's point of view differed but little. He believed that regardless of all vicissitudes of political theory there was an absolute norm by which the happiness of society could be secured. This norm was the law of nature, which lay back of the English constitution. By that law people had certain rights and privileges of which they could not be deprived. For Burnet these rights were mainly those of religion and property, but he also admitted the right of resistance to the unlawful acts of the ruler, whether prince or government.⁸¹

Meanwhile the law books of the day reflected a similar interest in the basis and nature of law. It is of course true that the majority of the judges had no reason to discuss the philosophy of law and thus were of little value to the propagandist. Of those who were more than mere lawyers, Sir Matthew Hale has taken first place. While not conceding supremacy to common law over statutes, he did admit the jurisprudential existence of the law of nature which would take priority over all other law.⁸² Thomas Wood in

⁸⁰ Benjamin Hoadly, *The Original and Institution of Civil Government, Discuss'd* (1710 ed.), p. 30.

⁸¹ Thomas Burnet, *An Essay upon Government: or, the Natural Notions of Government demonstrated. In a Method altogether New* (1726), pp. ii, 40, 45, 67.

⁸² *History of the Common Law of England* (1739 ed.), p. 26; *History of the Pleas of the Crown*, 2 vols. (1736 ed.), vol. i, pp. 51, 432. Lord Justice Bridgman also recognized the efficacy of the law of nature even to quoting *jura naturae sunt immutabilia*. S. Carter, *Reports of several Special Cases* (1687), p. 130 *et seq.*

summarizing Coke described the law of England as having six principal foundations among which he named the law of nature or reason, the revealed law of God, and general customs "properly called the Common Law." The common law was "the absolute Perfection of Reason", and nothing contrary to reason was consonant to law, for "The Reason of the Law is the Life of the Law." Finally he argued that all law was founded on that of nature and God which he thought might properly be placed within the category of the common law.⁸³ Similarly Sir George Mackenzie in his summary of the laws of Scotland divided law into the three classes, "Law of Nature, Law of Nations, and the Civil and Municipal Law of each particular Country." He defined the first as comprehending "those Dictates, which Nature hath taught all living Creatures . . . and generally, all those common Principles, which are common to Man and Beast."⁸⁴

Scarcely less philosophic was Lord Fortescue, a descendant of Henry the Sixth's chief justice. In an edition of his famous ancestor's *Governance of England*, he prefaced that classic with reflections which would have received the hearty concurrence of the author of *De Laudibus Legum Angliae*. First he divided all law into that of God and of nature and expressed the opinion that of all the systems of law on earth none came so near to the law of nature as the law of England, because English laws were founded on the law of nature. Not only, however, did Fortescue recognize the law of God and nature as fundamental, he also revered the

⁸³ Thomas Wood, *The Institutes of the Laws of England* (1754 ed.), pp. 4, 7-8, 10. See also William Salkeld, *Reports of Cases adjudged in the Court of King's Bench* (6 ed.), vol. iii, p. 221. "Laws are divided into arbitrary or natural laws: the last of which are essentially just and good, and bind everywhere and in all places where they are observed. . . . Those which are natural laws are from God."

⁸⁴ *The Institutions of the Law of Scotland* (1730 ed.), pp. 1, 2.

common law of which Magna Carta was a confirmation. Nevertheless he warned his readers that when Coke said that an Act of Parliament against Magna Carta was void, he did not include every part of it, but referred only to the moral part, which was as immutable as nature itself: "for no Act of Parliament can alter the Nature of Things, make Vertue Vice or Vice Vertue."⁸⁵

Of the judges of the day who accepted the concept of a fundamental law, the most noted by far was Lord Chief Justice Holt, quoted as a final authority by no less a student than James Wilson. Yet even he could be decidedly equivocal in his attitude toward common law and parliamentary enactment. He variously agreed with Coke's famous dictum in *Bonham's Case*, believed that an act of parliament against Magna Carta was not necessarily void but ought to be construed very strictly, and implied that a statute would supersede the common law.⁸⁶ In the main, however, Holt can be said to have accepted the notion of common law supremacy. In that respect he differed from most of his fellow justices in so far as they spoke their mind on a question which to all intents and purposes scarcely interested them.

During the middle years of the eighteenth century there were two philosophic commentators whose works formed part of the reading of the young revolutionists. Neither said much that was particularly new or eloquent but they at least had the merit of being contemporaneous and showed that the ideas of St. Germain and Sidney still had currency.

⁸⁵ *The Difference between an Absolute and Limited Monarchy; as it more particularly regards the English Constitution (1714)*. See also his *Reports of Select Cases*, pp. i, ii.

⁸⁶ *A Report of Cases Determined by Sir John Holt (1738)*, p. 513; 12 *Modern Reports*, p. 687. See also Carl Wittke, *The History of Parliamentary Privilege*, p. 62 *et seq.*, and Herbert Broom, *Constitutional Law viewed in relation to Common Law (2 ed.)*, p. 846 *et seq.*

The first was the chaplain of the Dowager Princess of Wales, Thomas Rutherforth, who helps us to understand why Hogarth could engrave his "Sleeping Congregation." In some lectures on Grotius he repeated the old pronouncements about natural law without illuminating them.⁸⁷ "A law", he said, "is a rule to which men are obliged to make their moral actions conformable." Laws themselves were divisible into natural and voluntary, with the former prescribing piety, justice, benevolence, chastity, and temperance. Such fundamental human institutions as liberty and property were ordained by the law of God and nature; and if transgressed the people might lawfully exercise the natural right of revolution, since the fundamental law limits civil government.

Fresher in his approach, if no more original, was Lord Bolingbroke, whom so erudite a critic as John Adams estimated an acute thinker. In his *Idea of a Patriot King*, Bolingbroke sought to weaken parliamentary power by going beyond it. Therefore he argued that the people were subject to two laws, the law of reason and the constitution.⁸⁸ The first, which he identified with the law of nature, was the law of all God's people. By it the ultimate end of government was to secure the good of the people. As for the constitution, Bolingbroke thought that a good king would reverence it as the law of God and man. Both the constitution and the law of reason, rather than new (parliamentary?) laws, ought to be the bulwarks of liberty.

⁸⁷ *Institutes of Natural Law* (2 Am. ed.), pp. 1, 5, 187, 457. Rutherforth's law of nature was nothing if not elastic. It restrained liberty, entailed obligations to God, demanded respect for revelation, permitted the sale of children, and forbade divorce. See pp. 74 *et seq.*; 172. These lectures were read in St. John's College, Cambridge, in 1750.

⁸⁸ *Letters on the Spirit of Patriotism; on the Idea of a Patriot King; and on the State of Parties, at the Accession of King George the First* (1749), pp. 84 *et seq.*, 119 *et seq.*

The last of the great lawyers to be considered here was one who, like many of his predecessors, made a great many equivocal statements, but the colonists were bothered by contradictions in Blackstone no more than they had been by those in Coke or Prynne. The American reception of Blackstone is almost incredible, for, according to Burke, more copies of the Commentaries were sold in America than in England on the eve of the Revolution. Allowing for some exaggeration, there can be no doubt of Blackstone's popularity in spite of Jefferson's warning against his "honeyed Mansfieldism." He summed up eighteenth-century jurisprudence to perfection, and although later writers have felt that his philosophic ornaments were mere window-dressing, it is quite obvious that his American readers did not think so. This window-dressing, if such it was, included a discussion of law in general and contradicted the doctrine of parliamentary supremacy running through the body of the book.

At the outset Blackstone defined the will of God to be the law of nature, saying that when God created man "he laid down certain immutable laws" and endowed man "with the faculty of reason to discover the purpose of those laws." The law of nature comprehended these immutable laws and was coeval with mankind; being dictated by God, it was "of course superior in obligation to any other." Human laws contrary to natural law had no validity, and such positive laws as were valid derived "all their force and all their authority, mediately or immediately, from this original."⁸⁹ Mankind was endowed with certain rights guaranteed to it by the law of nature. These included personal security, liberty, and property, and were inherent in every

⁸⁹ *Commentaries on the Laws of England* (Lewis ed.), vol. i, pp. 29, 31. Sir Frederick Pollock (*Essays in the Law*, p. 151) is foremost among those who oppose giving undue weight to these "exotic phrases" about natural law.

Englishman, being safeguarded by Magna Carta, the Petition of Right, Habeas Corpus, and other famous statutes. From personal rights certain secondary rights might be derived; for example the right of a person to exercise a voice in the levying of taxes either directly or through his representative was a projection of personal property rights.⁹⁰

The final contributor to the political ideas of the colonists to be considered here was the Scottish historian, Dr. William Robertson, who, without rivaling Blackstone, had no small place in colonial tracts. The particular work of Robertson's which attracted attention was his *History of the Reign of Charles V*, especially the opening section, "A View of the Progress of Society in Europe from the Subversion of the Roman Empire to the Beginning of the Sixteenth Century." His readers could discover the particular facts that in the free cities it was a fundamental principle "that no freeman could be subjected to new laws or taxes unless by his own consent," and that early in the fourteenth century two French kings had issued ordinances to the effect that "all men were by nature freeborn."⁹¹ They could also see in the period covered by the libertarian author's survey, the steady rise of liberty, justice, and law, with reason controlling evermore the activity of men and the policy of states. His history only confirmed what their philosophic reading had suggested so many times.

IV

Although not nearly so important for revolutionary purposes as English sources, earlier colonial use of the authority of fundamental law had some little influence in later critical days. From 1646 when Massachusetts claimed the

⁹⁰ *Commentaries*, pp. 116-117, 122 *et seq.* For similar statements see pp. 111, 117, 219, 226; vol. ii, p. 472; vol. iv, p. 1474 *et seq.*

⁹¹ *The Works of William Robertson, D.D.* (London, 1835), pp. 319 *et seq.*, 327.

“absolute power . . . to correct, punish, pardon, govern and rule the people” and recognized neither the laws of the English parliament nor the king’s writs, down to the period after 1763, when the dialectics of self-taxation and self-government occupied all attention, men were not wanting to talk of fundamental law and the rights which it prescribed and justified. In philosophic treatises, tracts for the times, colony records, and private papers they uttered generalizations in which the revolutionists saw a genuine merit. While few of these expressions had any great currency during the revolutionary period they were useful in bolstering the colonial case.⁹²

The diary of John Winthrop contains many references to all the types of fundamental law which the revolutionists were later to invoke. In particular the “law of God” appeared frequently in Winthrop’s pages, having as might be expected a most comprehensive meaning.⁹³ Scarcely less important, moreover, was the charter, “the foundation of our government.” According to Winthrop some of his contemporaries thought Massachusetts subordinate to parliament, but he believed that the charter gave the colony absolute power to make the laws for its inhabitants.⁹⁴ By the charter Massachusetts was not bound by the laws of England, although he felt it highly desirable that the fundamental laws of the colony should be framed according to English law, for, as he said:⁹⁵

We have no laws diametrically opposite to those of England,

⁹² See on this topic generally, B. F. Wright, *American Interpretations of Natural Law*, chapters ii, iii.

⁹³ *Winthrop’s Journal* (Hosmer ed.), vol. i, pp. 303, 316; vol. ii, pp. 86-87, 148, 173, 211. *Johnson’s Wonder Working Providence* was another book in which the law of God bulked large. See especially pp. 30 *et seq.*, 139 *et seq.*

⁹⁴ *Journal*, vol. ii, p. 290.

⁹⁵ *Ibid.*, p. 301.

for then they must be contrary to the law of God and of right reason which the learned in those laws have anciently and still do hold forth as the fundamental basis of their laws, and that if anything hath been otherwise established, it was an error, and not a law, being against the intent of the law-makers.

Nevertheless, he expressed the sentiments voiced by colonial patriots in 1775 that the statutes of England, no matter how ideally grounded, reach no farther than the boundaries of England.

Several of Winthrop's contemporaries also uttered generalizations that would have received a hospitable welcome in popular gatherings at a later date.⁹⁸ John Cotton taught that civil government should be administered by the light of nature, and that the law of God must supersede even the common law and the sovereignty of God supersede that of the state. The apostle to the Indians, John Eliot, published similar doctrines in his *Christian Commonwealth*, as did John Davenport, the principal author of the Fundamental Articles of New Haven (1639), in his *Discourses about Civil Government in a New Plantation*. In Connecticut, Thomas Hooker drew up "Fundamental Orders of Connecticut" and by so doing recognized the existence of an absolute norm by which governments should be guided. Finally, Roger Williams, a pamphleteer in New and old England, referred constantly to natural rights and fundamental law.

The early colonial assemblies sometimes spoke in the same vein. The Plymouth general court maintained on more than one occasion that it was the fundamental right of the colonists as Englishmen to be bound only by the laws passed

⁹⁸ In addition to Wright, *op. cit.*, pp. 16-26, consult *Cambridge History of American Literature*, vol. i, chap. iii; Gooch, *English Democratic Ideas*, pp. 73-93; and James E. Ernst, *Roger Williams, New England Firebrand*.

by their legal representatives.⁹⁷ The general court of Massachusetts Bay went even farther. In 1643 Nathaniel Ward, the "Simple Cobbler of Aggawam", drew up the Massachusetts Body of Liberties which made particular references to higher law and as a whole assumed the rôle of a constitution to which all laws effective in the colony must conform. This was especially true in the matter of personal rights.⁹⁸ Moreover, the general court not only claimed the right to govern the people but also agreed with Winthrop that "the lawes of England are bounded within the fower seas, and doe not reach America", since the colonists were not represented in parliament.⁹⁹ The Carolina charter of 1663 provided that the assembly should have the power "to enact and make all such Lawes, Acts and Constitutions as shalbe necessary" so long as those acts did not contravene either the laws and customs of England or the interest of the proprietors. Some decades later the Carolinians resolved on the basis of their charter that they were subject only to those laws which were "Consonant to Reason."¹⁰⁰ A few years later an Admiralty Judge was charged in the colony council with having denied to some Carolinians the benefit of the common law, "every Englishman's birthright."¹⁰¹ In the Jerseys as in the Caro-

⁹⁷ *Records of the Colony of New Plymouth*, vol. ii, pp. 6, 11, 78-81, 154. See also Julius Goebel, "King's Law and Local Custom in Seventeenth Century New England", 31 *Columbia Law Review*, pp. 423-24, 431.

⁹⁸ William MacDonald, *Select Charters and Other Documents illustrative of American History, 1606-1775*, p. 72 et seq. See also Richard Morris, "Massachusetts and the Common Law: The Declaration of 1646," *American Historical Review*, vol. 31, pp. 443-53.

⁹⁹ *Records of the Governor and Company of the Massachusetts Bay*, vol. v, p. 200. This claim was made in 1678.

¹⁰⁰ *Colonial Records of North Carolina*, vol. i, pp. 82-83, 636, 638. The Lords admitted the contention.

¹⁰¹ *Ibid.*, vol. iii, p. 224.

linas there were elaborate paper constitutions, and in Pennsylvania there was a succession of frames of government, all designed to put the government of the respective colonies beyond the immediate reach of arbitrary power and all leaving an impress on subsequent constitutional ideas.

During the latter part of the seventeenth century the British government anticipated its efforts of 1765-1775 by trying to institute a more unified system of administration in the form of the Dominion of New England. As was the case later, British policy failed largely because of the bitter colonial opposition.¹⁰² For years New Englanders, arguing on the basis of the charter, had expressed their unwillingness to obey any laws but their own.¹⁰⁸ A few years later, after Governor Andros had arrived and the Dominion was beginning to function, John Wise and others protested against his raising a revenue in Massachusetts without the consent of the colonial assembly, which had been suspended, on the score that such a practice was contrary to Magna Carta.¹⁰⁴ They claimed that Englishmen could be taxed only with their own consent. Similarly the colonists objected to the administration of justice through the admiralty courts, without trial by jury, as a violation of their charter rights.

During the first half of the eighteenth century the colonial assemblies constantly claimed for themselves the rights summarized in the English Bill of Rights, pronouncing these rights to be due them under the English constitution.¹⁰⁵

¹⁰² On this consult Viola Barnes, *The Dominion of New England*, and Everett Kimball, *The Public Life of Joseph Dudley*, chaps. ii, iii.

¹⁰⁸ Barnes, *op. cit.*, p. 17; *Hutchinson Papers*, vol. ii, pp. 216, 264 *et seq.*

¹⁰⁴ Barnes, *op. cit.*, pp. 87 *et seq.*, 100 *et seq.*, 117-8; Wright, *op. cit.*, pp. 38-9.

¹⁰⁵ Kimball, *op. cit.*, pp. 82-3; John Burns, *Controversies between Royal Governors and their Assemblies*, Evarts B. Greene, *Provincial America*, and *The Provincial Governor in the English Colonies of North America*, *passim*.

Struggles over personal and political rights crystallized the discussion into fairly definite channels. In 1721 the Massachusetts assembly declared it to be their duty under the charter to defend the rights of the people, and refused to accept the decision of the home government that the governor had the right to veto the assembly's choice of a speaker.¹⁰⁶ In 1728 the assembly, in a dispute over the governor's salary, argued that it not only controlled the purse but also the making of laws for the colony and drew up a statement, parts of which might easily have been composed in 1765. The second article declared that it was "the undoubted right of all Englishmen by *Magna Carta* to raise and dispose of moneys for the public service of their own free accord."¹⁰⁷

Although such opinions were more frequently expressed in Massachusetts, the people of other colonies did not hesitate to define their rights. In Pennsylvania there was considerable questioning of parliamentary authority, even to the extent of appealing to the "natural rights of freeborn Englishmen."¹⁰⁸ The assembly of New Jersey remonstrated that the settling of fees except by a local legislative act was repugnant to *Magna Carta*, a stand taken by several other assemblies.¹⁰⁹ The Maryland assembly stated that the colony had always enjoyed the rights and liberties guaranteed by the common law of England.¹¹⁰ The New York

¹⁰⁶ *Journals of the House of Representatives of Mass. Bay*, vol. iii, pp. 107, 120-21, 128, 131.

¹⁰⁷ *Ibid.*, vol. viii, pp. 279-81, 284, 287, 315-18. Such views were uttered rather frequently in Massachusetts during the next few years. See *Journals*, vol. ix, p. 16; vol. x, pp. 250 *et seq.*, 376; vol. xi, pp. 64 *et seq.*, 104 *et seq.*

¹⁰⁸ C. H. Lincoln, *The Revolutionary Movement in Pennsylvania*, pp. 17-18.

¹⁰⁹ E. B. Greene, *Provincial Governor*, pp. 119-20.

¹¹⁰ See especially *Proceedings and Acts of the General Assembly of*

assembly made frequent references to colonial rights and liberties under the English constitution, insisting especially on the constitutional right to state its grievances to the governor and regulate its own courts.¹¹¹ Of scarcely less significance for the people of New York was the trial of John Peter Zenger for libel in 1734-35, at which Zenger's lawyer, Andrew Hamilton, took the opportunity to expound the fundamental right of Englishmen to freedom of speech.¹¹²

Of the individuals who wrote during this period, the most influential for later revolutionists was John Wise, who played a rôle quite in keeping with the activities of the revolutionary patriots. As one who thought monarchy was opposed to God and who was imprisoned in 1686 for adhering to the doctrine of no taxation without representation, he obviously had something to offer to the agitators of 1765. His most pertinent excursion into political theory, the *Vindication of the Government of the New England Churches* (1717), was grounded upon Pufendorf's *De Jure Naturae et Gentium*. Here he argued that man was "most properly the subject of the law of nature", which was no more than the "dictate of right reason."¹¹³ The purpose of this law, which God has established as the general rule of government, was to work for the public good. For Wise the public good included thorough-going adherence to liberty and equality.¹¹⁴ These rights, he continued, could best be

Maryland, vol. xxii, p. 236. There are scattered expressions of the same idea during the whole of the first half of the eighteenth century but these do not go beyond reference to the existence of colonial rights.

¹¹¹ *Journal of the Votes and Proceedings of the General Assembly of New York*, vol. i, pp. 664, 706-709; vol. ii, pp. 173, 193, 269.

¹¹² Wright, *op. cit.*, pp. 40-1.

¹¹³ *Vindication*, p. 35. See also Wright, *op. cit.*, pp. 49-57; Vernon Parrington, *Main Currents of American Thought*, vol. i, p. 118 *et seq.*; J. M. Jacobson, *The Development of American Political Thought*, chap. i.

¹¹⁴ *Vindication*, pp. 37-38.

safeguarded when sovereignty inhered in the community. Under such circumstances only could the colonists exercise the rights of Englishmen, that is, the right of self-taxation and trial by jury.

The fact that Wise was a minister may serve to suggest that his sentiments were probably but little different from those of many other clergymen. New England election sermons were full of references to the law of God, which in the minds of many became identical with the law of nature. While the ministers of the early eighteenth century concerned themselves mainly with the laws of ecclesiastical polity, many of their generalizations about liberty, equality, and property could extend to the realm of civil government which for them had a divine origin. John Bulkeley of Connecticut in 1713 argued that under the laws of God there existed many rights and liberties which no civil law could contravene. Twenty years later John Bernard identified the law of God with the law of nature and stated that no one had any right to violate these fundamental laws. To these teachings Elisha Williams gave his support in a pamphlet in 1744. In addition, he argued that reason taught that men were naturally free and equal, limited only by fundamental laws. Therefore only those civil governments whose constitutions were identical with the laws of God and nature had any right to be called governments.¹¹⁵ In defence of these expressions of political philosophy their authors drew upon the same authorities that were employed in the revolutionary era, and if certain direct references to specific legislation were eliminated the dating of a pamphlet or a sermon would not be easy, on the basis of internal evidence alone.

¹¹⁵ The material in this paragraph has been gained largely, with some reference to sermons, from Alice M. Baldwin's *New England Clergy and the American Revolution*, chaps. ii-vii. See also A. L. Cross, *The Anglican Episcopate and the American Colonies*.

It is probable, however, that few colonists of this early period were so outspoken as the ministers; a greater number resembled the milder Jeremiah Dummer. This famous defender of the charters was much less concerned with metaphysical rights than with the rights of Englishmen. Consequently in his pages the common law got more attention than the law of nature. Notwithstanding his preponderant dependence upon the "ablest common lawyers that England could ever boast of", Dummer did however, appeal to abstract natural justice. Even when he admitted parliament to be absolute and unaccountable, he qualified such a concession by declaring that what parliament cannot do justly, it cannot do at all. Furthermore he held it to be "a most sacred and unalterable rule of justice . . . that no person can be deprived of life, liberty or estate till he has had time and opportunity to make his defence."¹¹⁶ Dummer also gave evidence of belief in a law above parliament when he argued, following Coke, that the common law courts were superior to the admiralty courts, created by parliament, which would deprive the colonists of their rights as Englishmen.¹¹⁷

Standing midway between the New England clergy and Dummer was Daniel Dulany the elder. Like Dummer, he argued in behalf of a rather concrete claim, albeit more extensive in its application than that which aroused Dummer; and after the manner of the clergy he appealed to natural law as well as to the British constitution. The claim which Dulany sought to establish in his tract of 1728 was that the inhabitants of Maryland were not a conquered people but either freemen who migrated voluntarily from England or the descendants of those freemen, and therefore were en-

¹¹⁶ Jeremiah Dummer, *A Defence of the New England Charters*, pp. 85, 84.

¹¹⁷ *Ibid.*, pp. 64-5.

titled to the laws and the rights of Englishmen. In maintaining this position Dulany did not hesitate to employ philosophical disquisition. For him the law of England consisted of common and statute law, the former including the law of nature, which was also the law of reason and of God, as well as usages and customs.¹¹⁸ Common law was the foundation of the rights of Englishmen, and as Maryland was part of the British dominions its inhabitants possessed those rights stated in Magna Carta, the Petition of Right, and other important statutes, which were no more than declaratory of the common law.¹¹⁹ These statutes, Dulany felt, were necessary because, while the common law was founded upon the law of nature which made all men equal and enjoined them "to treat one another with humanity, justice, and integrity", such principles ought to be declared and defined as a greater measure of protection.

Some years later Jonathan Mayhew began to do homage to the goddess liberty in various election sermons. On the centennial anniversary of the death of Charles I he summarized the crimes of that ruler, charging him with having overturned the constitution which was essentially free.¹²⁰ Parliament on this occasion, he believed, was only defending its natural and legal rights. A few years later Mayhew turned his attention to his own day. After reminding his listeners that the origin of civil power was ultimately derived from God, he charged them to choose men with a good

¹¹⁸ *The Right of the Inhabitants of Maryland to the Benefit of the English Laws* (reprinted in an appendix to St. George L. Sioussat's *The English Statutes in Maryland*, pp. 81-104), p. 82. For background consult Professor Sioussat's monograph, p. 31 *et seq.*

¹¹⁹ *Ibid.*, pp. 84-92.

¹²⁰ John W. Thornton, *The Pulpit of the American Revolution*, p. 39 *et seq.* At about the same time Samuel Quincy was delivering some sermons in Charleston, S. C., elaborating the philosophy of nature. *Twenty Sermons.*

knowledge of charter rights and to maintain colonial rights especially in the matter of taxation.¹²¹ In making this plea he introduced references to natural, inalienable rights.

By this time the French and Indian War was arousing animosities which led to the formulation of arguments that came to play an increasingly important part after its conclusion. Many of the same questions that later inspired opposition to parliamentary authority were stimulating rebellious feelings during the period 1754-63. The most important was, as ever, taxation. Both officially and unofficially protests were directed against any levying of taxes that appeared unconstitutional. The assemblies of Connecticut and Rhode Island considered the proposed method of raising money under the Albany Plan of Union a violation both of the charter rights and the rights of Englishmen, on the ground that the general taxing power given to the President-General and Council was a "very extraordinary thing", an "innovation", and a "breach on charter privileges" which would dishearten the colonists. In Massachusetts a group of Bostonians protested against the plan as a violation of "the liberties and privileges of every British subject."¹²² During the war, however, these colonies accepted the tax burden imposed by their own assemblies largely because they were in a dangerous position. Protests, meanwhile, were plentiful in the majority of the remaining colonies.

¹²¹ Election Sermon, 1754. For facts relative to Mayhew's point of view consult Alden Bradford, *Memoir of the Life and Writings of Rev. Jonathan Mayhew, D.D.* In contrast to the clergy the lawyers of this period seem to have had little to say that might be construed as grist for the revolutionary mill. See *Maryland Reports, 1658-1775; Virginia Reports, 1730-40; Reports of Cases ruled and adjudged in Pennsylvania*, vol. i.

¹²² E. I. McCormac, *Colonial Opposition to Imperial Authority during the French and Indian War* (*Univ. of California Publications in History*, vol. i), pp. 12-13, 94-95. See also G. L. Beer, *British Colonial Policy, 1754-65*, and Burns, *op. cit.*, *passim*.

In New York controversies over all aspects of the financial question, taxation, disbursement and credit, led to the assertion of rights and to a search for their constitutional basis.¹²³ The same was true to a lesser extent in New Hampshire and New Jersey. It was in Pennsylvania, however, that the most extreme claims were made, for not only did people refer to the charter and the English constitution but also to the rights guaranteed by nature. "The crown is limited . . . by the fundamentals of the constitution", so it was specifically stated, and could not contravene the great charter. In exercising the right to control their own revenues the Pennsylvania assembly claimed that such was not only conceded by their charter but was a natural right of Englishmen.¹²⁴ Maryland and North Carolina were hardly less jealous of their rights. Virginia, while going no farther in its defence of colonial rights, offered a more reasonable argument in behalf both of the subject's right to dispose of his property by his own consent, and of other personal rights.¹²⁵

From these scattered examples it can easily be seen that the "rights of Englishmen" and even the "rights of man" had considerable currency in the colonies before the Stamp Act. The controversies of the war period, involving as they did the right of exclusive self-taxation, led definitely to statements of rights only slightly dissimilar from those appearing during the later troubles. Still further, some of these statements went so far as to include the claim of exclusive internal legislation, a claim that was not to be made very extensively until the eve of Lexington and Concord.

¹²³ McCormac, *op. cit.*, pp. 30-31.

¹²⁴ *Ibid.*, pp. 37 *et seq.*, 42, 48, 58.

¹²⁵ Greene, *Provincial Governor*, pp. 75, 84, 109.

V

In evaluating the comparative influence of English writers on the colonists, the same conditions hold true as in the case of the continental writers. While a large number were known, only a few contributed to the formulation of the colonial case. Knowledge of the pre-seventeenth century writers was limited to such erudite colonists as John Adams, Dickinson, and Wilson. Only Fortescue, St. Germain, and Hooker can be said to have had currency even among the best educated of pamphleteers. The seventeenth-century authors, however, contributed a great deal to strengthening the sinews of resistance. Coke was almost universally cited, even by people whose acquaintance with him was limited. The authority of Bacon, of certain law reporters, and of Prynne was viewed with great respect. Harrington and Milton surpassed these in influence but did not equal that of Coke.

At the end of the century, Locke, Sidney, and the authors of *Cato's Letters*, stood out, but it may be seriously argued that the influence of the first has been overestimated by recent writers, or perhaps his name had come to symbolize revolutionary philosophy in general. In any case, while Locke was quoted with much frequency, the actual number of references to his name, if one wished to be statistical, did not greatly, if at all, surpass those to certain others, notably Coke and Burlamaqui. As to his ideas and phraseology, they were the common stock of many writers, and astute indeed would be the historian who could say "this or that statement is Locke's peculiar contribution to the American Revolution." Of the eighteenth-century writers, Hoadly, Blackstone, and Robertson had the greatest weight, but some lesser figures such as Bolingbroke had considerable authority in certain quarters.

CHAPTER III

FUNDAMENTAL LAW IN ITS RELATION TO TAXATION AND PERSONAL RIGHTS

I

So far the main concern of this book has been with the concepts of fundamental law that helped to shape the revolutionary mind. It has been seen that the idea was employed to justify many beliefs and institutions that were not always consistent with one another, a tendency which continued in the revolutionary era. In the decade and a half before the Declaration of Independence the colonists invoked fundamental law in resistance to parliamentary authority in the realm of taxation and personal rights, of internal legislation, and finally on any subject. Not infrequently opponents of British policy passed through all the stages of resistance. In their "strategic retreat" as Schlesinger calls it, they successively denied parliament's right to do what had earlier been allowed, and apparently they saw no essential inconsistency in such changes. Others took one stand at the beginning of the controversy and adhered to it during the whole period. But all, whether their ideas changed with the agitation or whether they were "stand-patters," appealed to fundamental law in defence of their position.

In this concept of fundamental law above parliament three elements were distinguishable, namely, the colonial charters, the English constitution, including the common law as well as statutes which had come to be regarded as fundamental, and natural law, the latter appearing in different guises in different pamphlets. Sometimes the type of fundamental law

appealed to correlated with the extent of the colonial claim, the more extreme the claim the more abstract the basis, as a comparison of the resolutions of the Stamp Act Congress of 1765 with the Declaration of 1776 will show. Yet in most cases all types of higher law permeated colonial bills of complaint, whether the demand was for exclusive self-taxation or for legislative independence.

That exclusive self-taxation was for most pamphleteers the main issue cannot be denied, for it was everywhere claimed that the charters or the constitution or nature, or all three or any two, gave the colonists exclusive powers over their own revenues. The earliest dispute in this connection to be considered here, though it did not involve the question of parliamentary authority, occurred in Virginia in 1753, and had the additional significance of introducing a man who played an important role during the subsequent controversy. When Governor Dinwiddie attempted to levy a fee of one pistole in connection with signing land patents he aroused to action in behalf of the burgesses, Virginia's foremost constitutional lawyer, Richard Bland, and Bland's *Fragment* was the opening shot of a steadily augmented barrage. In that brief tract the author put forward objectives and arguments that for many people remained the *ne plus ultra* of colonial ambition. Arguing that the fee was a tax, destructive of the rights of the subjects and contrary to the "Law and Principles of the Constitution", Bland maintained that it was a fundamental principle, safeguarded by the charter, that subjects could not be deprived of their property without their own consent.¹ The right of exclusive self-taxation by the colonial legislature was never more simply or effectively stated, and on appeal to the Privy Council the decision went in favor of the Burgesses.

A few years later Massachusetts became the scene of a

¹ *Bland's Fragment on the Pistole Fee* (ed. W. C. Ford), pp. 37-38, 42.

different kind of dispute; the issue at stake in the Writs of Assistance agitation was the broader question of personal rights. This crisis also had its hero, less balanced but scarcely less learned than Bland, and of great popular influence, and although the records of the case are inadequate, the point of view of James Otis is quite clear. The writs, introduced in 1755, gave customs officials the general right of search and had aroused such bitterness that when they came up for renewal in 1760 Boston merchants petitioned against them. At the hearing in 1761 Oxenbridge Thacher and Otis appeared for the merchants. The former, arguing that the writs were not authorized by English statutes, contented himself with saying that the common law was the birthright and trial by jury the darling privilege of the colonists. Otis, on the other hand, did not bother to argue the case specifically but launched into a fervid defence of the rights of man grounded in the British constitution and natural law. What he said was undoubtedly important, but of equal import was what he was supposed to have said; and rumors piled on rumors made him the author of a clarion call to revolt.²

The following year saw Otis engaged in another dispute, similar to that in which Bland had been involved several years before. This time he wrote, and although his contribution was more restrained than that of the previous year, it was no less influential. *The Vindication of the House of Representatives*, written in greater detail than Bland's *Fragment*

² As is well known, there is no adequate report of Otis's speech on this occasion. The most trustworthy documents are collected in Quincy's *Reports of Cases argued and adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, 1761-1772*, pp. 469-76. For sentiments very like those uttered by Otis in his speech see his letter to the *Boston Gazette*, January 4, 1762 and also another communication in the *Gazette*, February 22, 1762. J. T. Adams, *Revolutionary New England*, p. 269 *et seq.*, M. M. Bigelow in the *Cambridge Modern History*, vol. vii, p. 179 *et seq.*

but with a similar purpose, sought to prove that Governor Bernard's levy of a tax with the consent of the council but without that of the assembly was unlawful.³ Before entering upon the constitutional discussion Otis begged leave to "premise two or three data" extracted from Locke, which established the tone of the whole performance. These data consisted of those familiar propositions concerning natural liberty and the limitations imposed by the law of nature in the matter of taxation. He likewise, as evidence of his essential loyalty, described the British constitution as "the wisest and best in the world" and stated that if the colonies were administered in accordance with it, the "*ne plus ultra* of human glory and felicity" would be achieved.⁴ Otis did not, however, content himself with hyperboles but discussed the colony charter with reference to his claim that no money could be raised except by virtue of an act of the colonial legislature.⁵ He declared also that the colonists were entitled to all the privileges of British subjects "by the common law, by their several charters, by the law of nature and nations, and by the law of God."⁶ With this comprehensive defence, Otis employed all the kinds of fundamental law that were to be used during the next fifteen years. The dispute, however, had no immediate repercussion and not until the passage of the revenue acts in 1764-65 did the principle of exclusive self-taxation begin to be widely asserted.

³ *A Vindication of the Conduct of the House of Representatives of the Province of Massachusetts-Bay more particularly in the Last Session of the General Assembly* (1762). This tract, formerly rare, has now become available in the writer's *Some Political Writings of James Otis, University of Missouri Studies*, vol. iv, no. 3. Subsequent references are to the original pagination as retained in this reprint. For a summary of Otis's tracts see Tyler, *Literary History of the American Revolution*, vol. i, chaps. ii, iii, iv.

⁴ *Vindication of the House of Representatives*, p. 17 *et seq.*

⁵ *Ibid.*, pp. 31, 44.

⁶ *Ibid.*, pp. 51-52.

Then Otis was again in the front rank of controversialists, but on this occasion he had the aid of similarly minded men from New Hampshire to Georgia. His longest piece, *The Rights of the British Colonies*, was a systematic attempt to discover the origin of government, the nature of colonies, the natural, political, and civil rights of the colonists, and to apply these discoveries in defence of colonial rights of self-taxation. Although such was his purpose, he at times seemed to go beyond the question of taxation to the issue of colonial representation in parliament.⁷ Nevertheless, it may safely be said that taxation was his chief concern. The point of view of this pamphlet differed but little from that of his earlier, less ardent contribution. Fundamental law of all kinds was invoked but the number of exponents of that law had become larger, references to Vattel being especially significant. Despite his avowed purpose of safe-guarding colonial rights, Otis expressed some almost insurmountable contradictions. While announcing that there could be no prescription old enough to supersede the law of nature, he quite as definitely admitted the sovereignty of parliament in all matters not directly touching taxation.⁸ On the other hand, his defence of the colonists' exclusive right to tax themselves was unqualified. He claimed that that right was supported by the law of nature, the British constitution, including the common law, and the charters, all of which were to be taken as superior to parliament.⁹

The same arguments appeared again in later pamphlets and speeches.¹⁰ In the *Consideration on Behalf of the Colonists*,

⁷ *The Rights of the British Colonies Asserted and Proved* (1764), p. 65. See more generally R. G. Adams, *Political Ideas of the American Revolution*, pp. 30-31.

⁸ *Rights of the Colonies*, pp. 12, 32-33.

⁹ *Rights of the Colonies*, p. 70 et seq.

¹⁰ See *Considerations on Behalf of the Colonists in a Letter to a*

he insisted that "no taxation without representation" was a fundamental constitutional principle. While eager to admit the legislative supremacy of parliament over the whole empire, he resented bitterly the idea that the colonists were subjects of subjects.¹¹ The colonies, he stated, are "His Majesty's American colonies", and the inhabitants are endowed with all the rights pertaining to British subjects. He dismissed the idea of virtual representation as fallacious; and to those who had argued that the colonists were as much represented as the people of Manchester, he replied that if Manchester was not represented it ought to be. *A Vindication of the British Colonies* contained similar arguments. Here, Otis had a great deal to say concerning the law of nature, making it the basis of the English common law and constitution, and protesting that the levying of internal taxes in the colonies by parliament would contravene it. Thus, he declared, while parliament was supreme, men had constitutional rights and could not be taxed without violating the theory of the constitution. Furthermore, in this tract Otis incorporated Coke's argument from *Calvin's Case* that colonies were bound by parliamentary acts only when they were named. These arguments he propounded again in the less important *Brief Remarks on the Defence of the Halifax Libel*, but here

Noble Lord; A Vindication of the British Colonies; Brief Remarks on the Defence of the Halifax Libel on the British-American Colonies. Reprints of these, all written during 1765, may be found in the *University of Missouri Studies*, vol iv, no. 4. See also Otis's address to Governor Bernard delivered in the Council Chamber late in December, 1765. Opening "with Tears", he protested against the legality of the late act of the British parliament which constituted a breach of the British Constitution and the law of nature. Bracton, Coke, Grotius, Roman law, and Vattel were all cited in defense of the colonists. Quincy, *Reports*, p. 202 *et seq.* Two years later he was more moderate. See R. Frothingham, *Life and Times of Joseph Warren*, p. 38.

¹¹ He was willing to allow parliament a negative on colonial laws. *Considerations*, p. 49 n.

he devoted so much space to personalities that constitutional questions were slighted.

Generally similar in conclusion, though less heated in approach, were the utterances of several other pamphleteers. Oxenbridge Thacher defended the colonial rights of self-taxation and trial by jury on the basis of the common law, the birthright of every British subject, by pamphlet and resolution.¹² In Connecticut, Governor Fitch, although at times appearing to go beyond the claim of self-taxation to that of legislation, showed why the colonists should not be taxed by parliament. He argued that the British were endowed by their constitution with the right of self-government and that the colonists through their charter, which was but declaratory of the principles of the common law, enjoyed the same right. To tax them without their consent, therefore, would violate the constitution.¹³ Andrew Eliot in an election sermon in 1765 also took occasion to remind Governor Bernard that the rights of Englishmen were protected by the charters and the constitution, and that the government of Massachusetts was itself "a little model of the British constitution."¹⁴ Many

¹² *The Sentiments of a British American* (1764), pp. 5, 7; *Massachusetts Historical Society Proceedings*, vol. xx, p. 49 *et seq.* In all probability only Thacher's death prevented his making further contributions to the colonial cause.

¹³ *Reasons why the British Colonies in America should not be charged with Internal Taxes by Authority of Parliament* (1764), *Public Records of the Colony of Connecticut*, vol. xii, pp. 653, 656, 659. Fitch clearly admitted the general supremacy of parliament. *Ibid.*, pp. 660-61.

¹⁴ *A Sermon preached before His Excellency Francis Bernard, Esq.* (1765), pp. 6-7, 39 *et seq.* Earlier in the decade these election sermons were concerned with the origin and nature of government and with natural justice. See, for example, the sermons of Abraham Williams in 1762 and Thomas Bernard and Jonathan Mayhew in 1763. The latter asked whether the laws of England generally or only those adopted by colonial legislatures extended to the colonies. His answer was clearly to the effect that only those statutes and that part of the common law recognized by the colonies was in force. (Bradford, *Life of Mayhew*,

other ministers were equally outspoken and frequently more specific in their charges. The charters, the constitution, and natural law were freely drawn upon in protest against parliamentary taxation. Since many of these ministers had received the greater part of their political education from philosophers, their claims were often more extreme and their arguments more metaphysical than those of lawyers. In tone if not in words they seemed not only to deny parliament's right to tax the colonies but even its legislative authority over them. On the other hand, they confined most of their exhortations to the matter of taxation and made their contribution to the cause of human freedom rather than to a new imperial constitution.

In the south Daniel Dulany the younger and Maurice Moore, associate-justice of North Carolina, delivered telling thrusts in favor of the colonists' exclusive right to tax themselves, the first being especially cogent. Taking his text from generalizations on the limitations of legislative power Dulany argued directly that it was an English constitutional principle that the subject shall not be taxed without his own consent. *Quod omnes tangit ab omnibus approbetur*.¹⁵ Although parliament was the supreme legislature it could not levy taxes on the colonies without violating the British constitution and the charters. Therefore, he concluded, the stamp tax must be given up.¹⁶ Civil rights also were

pp. 299-300). Among the more notable clerical protests against the Stamp Act were those of the Rev. Ebenezer Devotion and the Rev. Stephen Johnson. The first depended largely upon the charter for his defense of colonial rights; the second appealed to all forms of fundamental law and even spoke of independence. For the clerical attitude during this period see Baldwin, *op. cit.*, chap. vii and pp. 177-178, and Cross, *op. cit.*, chap. vi.

¹⁵ *Considerations on the Propriety of Imposing Taxes in the British Colonies* (1765), pp. 7, 9. It was in this tract that Dulany demolished the virtual representation theory.

¹⁶ *Ibid.*, pp. 11, 27-28.

beyond the power of parliament, not only by the constitution but also by natural law.¹⁷ Moore's tract corroborated these same points, and since the author was well acquainted with Coke, Spelman, and Holt, his arguments were similarly constitutional in character. He claimed that the colonial right of self-taxation was secured by both the constitution and the colonial charter.¹⁸ He also argued that the colonists had the right to consent to all laws whatever that might touch the province, but he did not definitely contend for the exclusive right of internal legislation.¹⁹

Meanwhile colonial assemblies were as active as individuals, if less argumentative. The Stamp Act inspired a flood of resolves which, with a few notable exceptions, said much the same thing in the same way. In New Hampshire, New York, Pennsylvania, North and South Carolina, the assemblies were content to go on record in behalf of their constitutional rights as Englishmen, particularly the right of self-taxation. Occasionally references to the natural rights of man appeared, but in 1765 only a few had the insight of Gadsden to see that it was safer to base colonial claims on this broader foundation. At the Stamp Act Congress the tendency was much the same as that in the colonies mentioned above. After admitting the supremacy of parliament the Congress pronounced in favor of the rights of self-taxation, trial by jury, and of petition as constitutionally belonging to the colonists.²⁰ The petitions and memorials coming from

¹⁷ *Ibid.*, p. 42.

¹⁸ *The Justice and Policy of Taxing the Colonies (1765)*, in *Some Eighteenth Century Tracts concerning North Carolina* (ed. W. K. Boyd), pp. 166, 171-2.

¹⁹ *Ibid.*, pp. 171-2.

²⁰ H. Niles, *Principles and Acts of the American Revolution*, pp. 451-61. Gadsden wrote to Charles Garth that he had ever been of the opinion that "we should all endeavor to stand upon the broad and common ground of those natural and inherent rights that we all feel and know,

both the provincial assemblies and the Stamp Act Congress to the king, the lords, and the commons reiterated similar sentiments.²¹

With the repeal of the Stamp Act the colonists felt themselves justified in their course of constitutional opposition, since it seemed to have brought about a reversal in policy.²² Many took advantage of the occasion to express their thanks and at the same time rehearse the well known list of colonial rights. Despite the jealous eyes with which they guarded these rights, however, few of them remarked the dangers inherent in the Declaratory Act which accompanied the repeal of the Stamp Act.²³

Among those who commented on the repeal of the Stamp as men and as descendants of Englishmen.²⁴ He hoped that too much dependence would not be placed on the charters, for he thought such might prove fatal. Along with Thomas Lynch he objected to the Stamp Act petitions as being grounded on too limited a basis. R. W. Gibbes, *Documentary History of the American Revolution*, pp. 8-9.

²¹ *Documents and Records relating to New Hampshire, 1764-76*, p. 92; *Journal of the Votes and Proceedings of the General Assembly of New York, 1743-65*, vol. ii, p. 769 *et seq.*, 795 *et seq.*; *Collections of the New York Historical Society* (1878), vol. xi, p. 11; I. Mulford, *A Civil and Political History of New Jersey*, pp. 369-70; *North Carolina Records*, vol. vii, pp. 129, 168, 182; E. McCrady, *History of South Carolina under the Royal Government, 1719-76*, pp. 561-63; John Almon, *A Collection of Interesting, Authentic Papers relative to the Dispute between Great Britain and America, 1764-1775*, pp. 5-11. The Pennsylvania resolves depended more on natural right than the others. *Votes and Proceedings of the House of Representatives of Pennsylvania*, vol. v, p. 426.

²² S. G. Fisher, *Pennsylvania Colony and Commonwealth*, p. 290, is of the opinion that the Stamp Act resolutions carried no weight. While this may be true, the colonists apparently thought otherwise.

²³ The colonists were not ignorant either of the Declaratory Act or of the debates on it in the commons. See the letter of Charles Garth, agent of the colony, to a Maryland Committee (*Maryland Historical Magazine*, vol. vi, p. 287 *et seq.*), which contains all the arguments in the commons against the phrase, "in all cases whatsoever".

Act were the Boston ministers, Charles Chauncy and Jonathan Mayhew. Possibly the Damoclean sword of the Episcopate prevented their being lulled into the peaceful attitude which characterized the majority. Mayhew boldly reminded his audience that man's natural right to his own was "declared, affirmed and secured by *magna charta*," and therefore under such a high authority it was the exclusive right of the colonial assembly to tax the colony. He also re-affirmed the constitutional right of trial by jury.²⁴ Chauncy, preaching "A Discourse on the 'good News from a far Country'," did not attempt to argue the question of parliamentary sovereignty but contented himself with repeating the usual phrases about the rights of Englishmen and their guarantee by fundamental law.²⁵

The controversy over the Episcopate continued to occupy much attention and supplemented the more widespread agitation over taxation. The New England clergy regarded the proposed Anglican Episcopate as a threat to religious liberty and hence to all liberty. Amos Adams, Chauncy's son-in-law, insisted that religious freedom was the special heritage of Massachusetts and therefore not to be lessened;²⁶ several others mirrored the same attitude. Chauncy, fighting the project by sermon and pamphlet, carried on a literary war with Thomas B. Chandler, who, although a Tory, believed that the colonists possessed constitutional rights which could not be suspended without their own consent.²⁷ In answering Chandler, Chauncy proclaimed the existence of those rights in religious as in civil matters.²⁸ The opposition was

²⁴ Bradford, *Life of Mayhew*, p. 424 *et seq.*; Cross, *op. cit.*, pp. 159-60.

²⁵ Thornton, *The Pulpit of the American Revolution*, p. 119 *et seq.*

²⁶ Baldwin, *op. cit.*, pp. 107-109.

²⁷ *An Appeal to the Public in Behalf of the Church of England*, pp. 38 n., 69. See also his *The Appeal defended or the proposed American Episcopate vindicated*, pp. 245-46, 266.

²⁸ *An Appeal Answered* (1768), pp. 110, 204. Cross, *op. cit.*, chap. vii.

not limited, however, to Massachusetts but extended to New York and Pennsylvania, which became the scene of a riotous controversy in which the connection between episcopacy and tyranny was thoroughly exploited.²⁹ Episcopalian Virginia also witnessed antagonism to the establishment of the Episcopate when two leading clergymen drew up a protest against a plea for such a move. Among other resolutions they stated that such an institution would "materially affect the natural rights and fundamental laws" of the colonies.³⁰

Apart from the Puritan clergy who, because of the Episcopate, were alert to the perpetual menace of British policy, the chief warning with respect to the Declaratory Act came not from patriotic colonists but from the Lord Chancellor of England, Lord Camden. The constitutional justification of the Stamp Act had aroused some discussion in Parliament where Pitt, Barré, Camden and others had protested against taxing people who were not represented, as contrary to the British constitution.³¹ When, on the repeal of the Stamp Act, the Declaratory Act was passed, only Camden seemed alive to its relation to his earlier stand, and his point of view on this occasion was unusual in its emphasis upon the natural law foundation of the British constitution. The Declaratory Act, he said, since it included the right to tax, was illegal, "absolutely illegal, contrary to the fundamental laws of this constitution, a constitution grounded on the eternal and immutable laws of nature." Furthermore, he declared, "taxation and representation are inseparably united; God hath joined them, no British parliament can separate them."³²

²⁹ Cross, *op. cit.*, chap. viii. Prominent among those who engaged in the controversy was William Livingston, a genuine libertarian, who for fifteen years had been writing in defense of colonial rights. See Theodore Sedgwick, Jun., *A Memoir of the Life of William Livingston*, pp. 85, 90.

³⁰ Cross, *op. cit.*, chap. x.

³¹ *Parliamentary History*, vol. xvi, cols. 168-69.

³² *Ibid.*, cols. 177-78.

Outside of parliament, a few Englishmen contributed to the discussion, although in reality English public opinion had not yet become vitally interested in the American question. William Bolla agreed with Locke that the law of nature stood as an eternal rule to all legislators but he did not indicate in what way this "rule" should operate.⁸³ Similarly, the author of a tract, *Thoughts on the Origin and Nature of Government*, while upholding British policy, admitted that acts contrary to God and nature were void.⁸⁴ Others, with the exception of *Amor Patriae*, who will be treated in the next chapter, did not go into a discussion of rights to any real degree but confined their comments to questions of expediency.

II

In 1767, as is well known, came the renewal of the taxing policy of Great Britain, under the inspiration of Charles Townshend. The most prominent contributor to the defence of the colonists at this stage of the controversy was the Pennsylvania *Cincinnatus*, John Dickinson. This "half practical farmer, half classical scholar and lawyer" had first become notable during the Stamp Act agitation when he wrote numerous resolves, tracts, and letters, all calculated to change the heart of the British ministry and to crystallize colonial sentiment. He drafted resolutions for the Pennsylvania assembly, which differed but little from those adopted by the assembly.⁸⁵ Therein he argued that the provin-

⁸³ *A Succinct View of the Origin of our Colonies*.

⁸⁴ *Thoughts on the Origin and Nature of Government, Occasioned by the late disputes between Great Britain and her American Colonies*, p. 21.

⁸⁵ P. L. Ford, *The Writings of John Dickinson*, p. 173 *et seq.* For the career of Dickinson see Charles J. Stillé, *The Life and Times of John Dickinson, 1732-1808*; Isaac Sharpless, *Political Leaders of Provincial Pennsylvania*, p. 224 *et seq.* Dickinson received much of his legal training at the Inner Temple, and beginning with Coke and the Year Books, he was not to be seduced by "the luminous exposition" of Blackstone.

cial constitution, being founded on the natural rights of mankind and the principles of British liberty, was therefore "perfectly free". Since this was true, it was essential that internal taxes should be levied on the people only with their consent and that they should enjoy the right of trial by jury. He also drew up the model draft of resolutions for the Stamp Act Congress, which expressed much the same spirit, and wrote the "Petition to the King", which reiterated the principles of the resolves.⁸⁶ At the same time he addressed the larger public of his fellow countrymen, advocating the same rights.⁸⁷ Not content with appealing to the king, parliament, and the American public, he even composed an address to the Committee of Correspondence in Barbados, maintaining that colonial rights came not from temporal rulers but from "the King of kings, and the Lord of all the earth", and that the colonial resolutions were founded on truth and justice.⁸⁸

His point of view did not change a great deal when he came to oppose the Townshend duties, except that he extended his conception of unconstitutional taxation to include both internal and external taxes. Thenceforth any taxation without representation was "inconsistent with the principles of the British constitution."⁸⁹ In order to prove this he made

⁸⁶ Ford, *op. cit.*, pp. 183 *et seq.*, 193 *et seq.*

⁸⁷ *Ibid.*, pp. 199 *et seq.*, 209 *et seq.* *An Address to 'Friends and Countrymen' on the Stamp Act (1765) and The Late Regulations respecting the British Colonies Considered (1765).*

⁸⁸ *Writings*, pp. 249-276. *An Address to the Committee of Correspondence in Barbadoes Occasioned by a late letter from them to their Agent in London (1766).* Dickinson's *Address* roused a great deal of ire in Barbados, many people seeing in his arguments only war and bloodshed. Agnes M. Whitson, "The Outlook of the Continental Colonies on the British West Indies, 1760-1775," *Political Science Quarterly*, vol. xlv, pp. 80-81.

⁸⁹ *Letters from a Farmer in Pennsylvania (1768 ed.)*, p. 30. He also denounced the act suspending the New York assembly as unconstitutional. See also his letter to James Otis of December 5, 1767 (*Warren-Adams*

an excursion into English constitutional history, supplementing his arguments with conclusions drawn from Coke. Nowhere did he find any precedent by which the taxation of the colonies might be justified. His conclusion, therefore, was convincing to his readers: "Taxation and representation are inseparable—this position is founded on the laws of nature; it is more, it is itself an eternal law of nature; for whatever is a man's own, is absolutely his own."⁴⁰ No wonder that Richard Henry Lee could say that the *Farmer's Letters* abounded in the true principles of constitutional liberty; no wonder, too, that he could thank Dickinson for demonstrating the late measures to be "in violation of those rights which God and nature have given us."⁴¹

During the next half-dozen years Dickinson was continually preaching the accepted doctrine of colonial rights with particular reference to taxation. In 1768 he was very active. He addressed merchants on the question of non-importation, querying, Of what avail is it to preserve the appearance of the constitution when the spirit of it is destroyed? He composed *A Song for American Freedom* containing an exhortation to the colonists to maintain their birthrights. He wrote a letter to Philadelphia merchants concerning non-importation, denouncing the revenue legislation as unconstitutional.⁴² In 1771 he drafted the petition of the Pennsylvania assembly to the king, describing him as the defender of the constitutional rights of the colonies.⁴³ Three years later he went

Letters, vol. i, p. 4): "Our Cause is a cause of the highest Dignity. . . . We have constitutional methods of seeking Redress; and they are the best Methods."

⁴⁰ *Farmer's Letters*, p. 61.

⁴¹ *Writings of John Dickinson*, pp. 289-90; *Letters of Richard H. Lee*, vol. i, p. 29.

⁴² *Writings of Dickinson*, pp. 409-417, 421-445.

⁴³ *Ibid.*, pp. 447-452.

beyond opposition to taxation to become a defender of the colonists' right of internal legislative independence.

Although Dickinson was the most significant publicist during the period between the repeal of the Stamp Act and the first Continental Congress, many others did not hesitate to denounce parliamentary taxation. Such a state of affairs impelled Thomas Hutchinson to believe that the claim to independence of parliament had become universal.⁴⁴ When the colonists are most moderate, he said, they recognize Chatham's distinction between legislation and taxation, but generally they acknowledge no other legislative authority than their own assembly, a statement that was not literally or universally true.

Many of the New England clergy continued to refer to the rights of Englishmen. Daniel Shute, preaching before Governor Francis Bernard in 1768, exhaustively defined the duty of rulers, "the guardians of the natural and constitutional rights of their subjects." Since the British constitution coincided with the moral fitness of things and the natural rights of mankind, he said, there should be no need to differentiate between natural and constitutional rights. Both of these rights were protected by the fundamental law of the British constitution, which was equivalent to natural law.⁴⁵ The following year Jason Haven emphasized the British constitution and the Massachusetts charter, with some reference to natural law, as the bulwarks of colonial liberty, and at the same time frankly conceded to the people the right of revolution if the magistrate broke the law.⁴⁶ Moses Parsons, in 1772, took his cue from "Mr. Agent Dummer"

⁴⁴ Frothingham, *Life of Joseph Warren*, pp. 31, 110.

⁴⁵ Election Sermon, 1768, pp. 23-26, 51-52. Shute, however, saw no essential inconsistency in recognizing parliamentary supremacy.

⁴⁶ Election Sermon, 1769, p. 41 *et seq.* Haven drew directly from Locke.

and defended provincial rights on the basis of charters.⁴⁷ Finally, Charles Turner told Governor Hutchinson that government came from God, who ordained civil rulers, and that the exercise of magistral powers over the colonies was limited by the British constitution.⁴⁸

Meanwhile the lay agitators surpassed the clergy in activity. Governor Pitkin, who in 1765 had been elected governor of Connecticut over Fitch because of his greater firmness in behalf of colonial rights, protested to Lord Hillsborough that the Townshend duties stripped the colonists of their constitutional rights which they valued so highly and which the charter had acknowledged.⁴⁹

Samuel Adams as usual could not refrain from joining battle. Typical of his point of view and method of attack was a series of letters, drawn up by him, from the Massachusetts House of Representatives to various officials in England early in 1768. The fundamental rules of the constitution, which had its foundation in the law of God and nature and was the source of legislative power, secured to the colonists the sole right of disposing of their own property and belonged to them, he wrote, by the common law, the charter, and the law of nature.⁵⁰ Three days later the House addressed Shelburne in a similar vein: the charter, the constitution, nature, all upheld the colonists, who had been impelled to act only because of a just concern for their rights.⁵¹ A few days later a petition to the king stated the same argument. Rockingham was likewise reminded that

⁴⁷ Election Sermon, 1772.

⁴⁸ Election Sermon, 1773, pp. 6, 18-19.

⁴⁹ *Pitkin Papers*, p. 132 *et seq.*

⁵⁰ *Writings of Samuel Adams*, vol. i, p. 134 *et seq.*

⁵¹ *Ibid.*, p. 152 *et seq.* Here Adams depended on Coke's phrase, that the Irish were not bound by English statutes *quia milites ad Parliamentum non mittunt*.

the supreme legislative as well as the supreme executive derived its authority from the constitution, and that neither could break the fundamental law with impunity. Finally, Camden was addressed in phrases flatteringly like his own, concerning the identity of natural and constitutional rights, and the relation between taxation and representation; and Chatham was informed how the British constitution had its foundation in nature and what were its principles with respect to taxation.⁵²

Adams' more influential contribution, however, was of course the notable Circular Letter. Herein the rights of self-taxation and of civil liberty were pronounced the essential rights of men, grafted into the British constitution as a fundamental law which controlled acts of parliament. At the same time parliament was admitted to be the supreme legislature.⁵³ The same reasoning characterized a letter from the House of Representatives to Conway and a communication to the Lords Commissioners of the Treasury; but in the latter parliament was allowed only a superintending power over the whole empire.⁵⁴ During the last half of 1768 and through the years 1769-1773 Adams carried on the same campaign through the press. Letters and articles unsigned or over some meaningful pseudonym helped to inform the people of the true basis of their cause.⁵⁵ Sometimes taxation, sometimes the quartering of troops, and sometimes all of the recent policy of the British ministry provided the text, but whatever it was, the acts were declared unconstitutional and unlawful. In defence he employed a medley of sources,—Locke, Blackstone, and history. He denied that every act of parliament automatically became a

⁵² *Ibid.*, p. 162 *et seq.*

⁵³ *Ibid.*, p. 184 *et seq.*

⁵⁴ *Ibid.*, p. 189 *et seq.*

⁵⁵ *Ibid.*, p. 236 *et seq.*

part of the constitution, and insisted in turn that the rights of nature supplemented the constitution, as in the case of Magna Carta, which derived its fundamental character from its foundation in nature.⁵⁶ On one occasion he attacked the Declaratory Act, arguing that as it was repugnant to reason and equity it was also repugnant to the British constitution.⁵⁷

Not always, however, were these volleys directed against parliament, for at times the activity of Bernard and Hutchinson excited no less opposition. During one threatening crisis between the executive and the legislature the House of Representatives, speaking through Adams, warned Hutchinson that it had the same inherent rights in the province as the commons had in Great Britain, and that the House would use all the powers of the constitution to defend those rights.⁵⁸ Several months later Hutchinson was assured that if the constitutional and natural rights and liberties of the colonists were fully restored and firmly established they would continue in their loyal exertions.⁵⁹

Despite these constant protestations concerning the rights of the colonists and the illegality of parliamentary acts, Adams felt that he was doing too little. Writing to Franklin, to whom he had protested nearly eight months before that the extension of admiralty jurisdiction was contrary to article 46 of Magna Carta, he insisted that colonial rights must be constantly declared lest parliament should think that silence meant approval of their violation.⁶⁰ Consequently he did his share. In one of several articles, he wrote that perhaps there never was a people "more strongly attached to their natural and constitutional rights and liberties, than

⁵⁶ *Ibid.*, pp. 286, 288.

⁵⁷ *Ibid.*, pp. 387, 390.

⁵⁸ *Writings*, vol. ii, pp. 31, 33.

⁵⁹ *Ibid.*, p. 169.

⁶⁰ *Ibid.*, pp. 52-53, 178.

the British Colonists of this American Continent".⁶¹ Frequently he quoted Locke: the supreme power could not be arbitrary, else the subjects' property might be taken without their consent; every man was born free.⁶² Elsewhere he used Blackstone to prove that the right of self-taxation was founded in nature. Vattel supplied some ideological ammunition concerning natural freedom. Hooker became authority for the statement that nobody could make laws over a free people without their consent. Even Grotius was dragged into the discussion, though to no particular purpose.

At times dependence was shifted to the charter, which was supposed to extend to the colonists the rights of Englishmen. Writing as *Cotton Mather*, Adams inquired rhetorically if the earlier colonists, when they accepted the charter, had not assumed that they contracted for a free government.⁶³ The Stamp Act was described in 1771 as a most violent infraction of constitutional and natural rights because it raised a revenue without colonial consent.⁶⁴ In another letter Montesquieu's generalization that the English constitution had liberty for its direct object was held up to the mirror of unconstitutional taxation, and in turn was supplemented by statements from Locke and Hooker on the invalidity of laws not publicly approved.⁶⁵ In conclusion Adams declaimed the revolutionary doctrine that it accorded more with the law of nature and reason, "which the most powerful nation may not violate and *cannot alter*, to suppose that the Colonies are

⁶¹ *Ibid.*, pp. 204-5.

⁶² *Ibid.*, pp. 210-11, 257-59, 260-61. To Arthur Lee he wrote, Sept. 27, 1771, that a civil law was being established in England which Mr. Blackstone said was permitted to "the prejudice of the Common Law, the Consequence of which will prove fatal to the happy Constitution."

⁶³ *Ibid.*, p. 278.

⁶⁴ *Ibid.*, pp. 297-302.

⁶⁵ *Ibid.*, pp. 316-17.

separate independent *and free*, than to suppose that they *must* be one with Great Britain *and slaves*."

After 1771 Adams persisted in a steady trend toward independence, based almost entirely on his loyalty to private rights. In the *Boston Gazette* for January 27, 1772, he launched forth into a defense of colonial rights, leaning heavily upon Coke, who had affirmed Magna Carta "to be declaratory of the principal grounds of the fundamental laws and liberties of England. 'It is called *Charta Libertatum Regni, the Charter of Liberties of the Kingdom*, upon great reason . . . because *liberos facit, it makes and preserves the people free.*'" ⁶⁶ If this be true, Adams continued, then to alter any of its essential parts is to alter the constitution. Vattel had said very plainly that "the supreme legislature cannot change the constitution . . . and that they ought to consider the fundamental laws as sacred", since those laws were excepted from their commission, for "the constitution of the state ought to be fixed." Therefore if Coke and Vattel were right, it followed for Adams "that an act of parliament made against *Magna Carta* in violation of its essential parts, is void."

In "The Rights of the colonists, A List of Violations of Rights and a Letter of correspondence Adopted by the Town of Boston" of November 20, 1772, Adams depended less on the constitution than upon the natural rights of colonists as men.⁶⁷ All positive laws, he stated, should so far as possible conform to the law of reason and equity. Men were entitled to complete liberty "by the eternal and immutable laws of God and nature, as well as by the laws of Nations, and all well grounded municipal laws, which must have their foundation in the former." In addition to rights as men, the colonists had rights as Christians and as English subjects.

⁶⁶ *Ibid.*, pp. 322-26.

⁶⁷ *Ibid.*, pp. 350-74.

They were entitled to these rights by Magna Carta which was, according to Coke and Blackstone, but a declaration of natural rights, by the laws of God and nature, and by the English common law.⁶⁸ Since the first fundamental natural law was the preservation of society, no legislature could have arbitrary power over the lives and fortunes of the people; it was therefore irreconcilable with fundamental law, whether natural or constitutional, that a British House of Commons should control colonial property.

After this formidable charge, Adams returned to the attack again and again, always insisting that the colonists must assert and defend their rights. In December 1772 and January 1773, the project of taking the colonists to England for trial roused his ire; such a practice contravened the first principles of government, the English constitution, and Magna Carta, and was totally incompatible with the charter rights of the colonists.⁶⁹ Later he formulated two addresses from the House of Representatives to Hutchinson, defending all the rights of the colonists, largely on the basis of the charters and the constitution.⁷⁰ By the charters, Adams held, the colonists had the right to make their own laws so long as those laws were not repugnant to the British constitution; since representation in parliament, though consistent with the constitution, was impracticable, why not allow the colonists to make their own laws so long as those laws were not repugnant to the constitution? Likewise he declared that the charter was a compact between the colonists and the king, and by referring to *Calvin's Case* implied a belief in colonial allegiance to the king in his natural, not in his political cap-

⁶⁸ Elsewhere (*ibid.*, p. 438) he admitted that the common law might not prescribe limits to the legislature, though he had no doubt of the power of the law of reason and equity to do so.

⁶⁹ *Ibid.*, pp. 390, 398-99.

⁷⁰ *Ibid.*, pp. 401-26, 431-54.

acity. Elsewhere he declared it impossible to show that parliament could exercise legislative powers over the colonists in all cases whatever consistently with their rights as men, Christians, and subjects, or without destroying that excellent constitution which had its foundations in nature.⁷¹

From April 1773 on, Adams became less concerned with what he had until that time seemed to desire, namely, a return to the conditions existing before 1763, and argued steadily in favor of complete legislative independence.⁷² That is not to say that many of the old pleas and arguments were absent, but that they supported a different point of view. He still opposed the revenue and judicial policy of parliament but where his writings had revolved around the natural rights of the *colonists*, henceforth he threw off positive statements as to the constitutional position of the *colonies*.⁷³ Without lessening his devotion to the cause of man he displayed an interest in the political status of *groups* of men.

A letter from the Massachusetts Committee of Correspondence to Franklin on March 31, 1774, written by Adams, well illustrates this tendency. After his usual introductory statement that the colonists upheld the principles founded in nature and confirmed by the British constitution and the provincial charter he straightway put himself in the group with those who looked to union with England only through the king. Great Britain and the colonies, he declared, "are con-

⁷¹ *Writings*, vol. iii, pp. 10, 15.

⁷² See for example a letter to R. H. Lee on April 10, 1773, and a letter from the Committee of Correspondence to Joseph North on April 13. *Writings*, vol. iii, pp. 25, 35.

⁷³ It seems as though McIlwain (*Amer. Rev.*, p. 144) may have given Samuel Adams too much credit when he implied that Adams might be "regarded as the earliest systematic expounder of the ideas" of what is called today the school of "colonial nationalism". 'Systematic' is a strong word to apply to Samuel Adams; both his legal and imperial ideas were extremely formless.

sidered as distinct Governments under the King," each colony having a constitution in its charter or other institution of government, with the fundamental laws of the British constitution as the basis. Under these circumstances legislation without representation was abhorrent to the constitution and laws of nature and reason.⁷⁴ Four days later in a letter to Arthur Lee, Adams expressed the view that "*the entire separation and independence of the colonies*" might be best.⁷⁵ He continued to insist, however, on the rights of the colonists and how those rights had been violated in a fashion contrary to natural justice and the constitution and "totally inconsistent with the Idea of a free Government."⁷⁶ This he continued to do until April, 1776, when he frankly came out to be urge what he thought might be best two years before, namely, a declaration of independence, since America was already independent.⁷⁷

To attempt a concluding analysis of Samuel Adams and his ideas is as unnecessary as it is difficult. His ideas, when considered as the raw materials of legal thinking, are even more weasel-like than those of the majority of his fellow revolutionaries. He has been treated with those who employed fundamental law in defense of self-taxation and personal rights because his main interest was in abstract rights. But perhaps it were safer to consider him primarily as a revolutionary propagandist who was so ardent a patriot as to believe that a man who was unfaithful to his country generally had lost his moral sense in private matters.

⁷⁴ *Writings*, vol. iii, pp. 89-90.

⁷⁵ *Ibid.*, p. 100.

⁷⁶ *Ibid.*, pp. 109 *et seq.*, 183-84. In March, 1775, he wrote an Address to the Mohawk Indians to issue a warning: "Brothers—They have made a law to establish the religion of the Pope in Canada." Unfortunately he did not attempt to prove to the Indians how such a law was contrary to fundamental law. *Ibid.*, pp. 211-13.

⁷⁷ *Ibid.*, p. 276.

It is now necessary to return to the period of the Townshend Acts, which excited not only John Dickinson and Samuel Adams but also several lesser pamphleteers and various colonial assemblies. The Virginia burgesses protested that these acts were contrary to the colonists' natural right as British subjects to tax themselves.⁷⁸ Peyton Randolph in behalf of the House also wrote to the North Carolina assembly asserting the rights of the colonists with particular regard to the natural and constitutional right of self-taxation.⁷⁹ The Pennsylvania assembly declared that the colonists should enjoy the rights of Englishmen, stating specifically that in confirmation of the right to tax themselves "a legislative Authority, founded on this first and important principle of English Liberty, so essential to the Happiness of the Subject, was early established in this Province."⁸⁰ New Jersey, which had not been as prominent among the opponents of British policy, declared in May, 1768, for the constitutional right of self-taxation.⁸¹ From New Hampshire came a letter to the Virginia burgesses in August, 1768, expressing concurrence with the sentiments propounded by them a few months before and admitting parliamentary supremacy only so long as it was constitutional and did not override colonial rights of self-taxation.⁸² In December of the same year the New York assembly resolved that the

⁷⁸ *Journals of the House of Burgesses, 1766-1769*, pp. 166-171. For additional examples of the dependence on fundamental law during this period consult D. O. Wagner, "Some Antecedents of the Doctrine of Judicial Review", *Political Science Quarterly*, vol. xl, pp. 565-81.

⁷⁹ *North Carolina Records*, vol. vii, p. 746 *et seq.*

⁸⁰ *Votes and Proceedings of the House of Representatives of Pennsylvania*, vol. vi, p. 103 *et seq.*

⁸¹ I. Mulford, *op. cit.*, pp. 378-79 n.

⁸² *Documents and Records relating to New Hampshire, 1764-1776*, pp. 189-190. In 1770 a letter to Peyton Randolph made substantially the same averments. *Ibid.*, pp. 252-53.

rights of the colony included self-taxation.⁸³ In Rhode Island the governor wrote to the king in behalf of the colony to stress the colonial rights under the charter, the English constitution, and nature.⁸⁴

The activity of Massachusetts has already been noticed in connection with Samuel Adams, but mention may be made of a few other protests. In May, 1767, the town of Worcester instructed its representatives in the General Court to maintain the charter rights of the people in a constitutional manner. Ten months later the patriotic party in the town drew up a paper denouncing the Townshend Acts as unconstitutional and an infringement of colonial rights.⁸⁵ At Boston "a friend of the constitution" incorporated the phraseology of Vattel in a letter to the *Gazette* when he stated that there was one thing parliament could not do, it could not annul the constitution.⁸⁶

The year 1769 saw further protests emanating from Massachusetts, Virginia, North and South Carolina, Delaware, Rhode Island, and New York. Several opposed the establishment of a standing army as a violation of fundamental law.⁸⁷ Others reiterated the commoner claims of self-taxation and trial by jury as the constitutional rights of the colonists.⁸⁸ Sometimes these resolutions were addressed to parliament, sometimes to the king, but certainly the failure of the colonists to secure much improvement in their political position did not result from indifference. It is scarcely necessary to do more than catalogue these protests since they did not differ from those of the preceding four or five years.

⁸³ *Journal of Votes and Proceedings of the General Assembly of New York, 1766-1776*, December 21, 1768.

⁸⁴ *Records of the Colony of Rhode Island*, vol. vi, pp. 559-61.

⁸⁵ Lincoln, *History of Worcester*, pp. 67-70.

⁸⁶ Wagner, *loc. cit.*, p. 581.

⁸⁷ William Gordon, *The American Revolution*, p. 187.

⁸⁸ *North Carolina Records*, vol. viii, pp. 122-124.

The Virginia burgesses resolved in May, 1769, that parliamentary taxation and the taking of people overseas for trial violated their constitutional rights.⁸⁹ Rhode Island felt that these Virginia resolves were adequate, and the assembly officially approved them as expressing the views of the colony.⁹⁰ The assembly of South Carolina, after a lull in their agitation, concurred in August, 1769, with the same resolutions.⁹¹ Internal troubles, however, cramped the colony's resistance to British policy. In Maryland, a non-importation agreement was drawn up in June, 1769, which held that the parliamentary taxes were contrary to the rights of Englishmen, and six months later the assembly resolved that self-taxation and judicial rights constitutionally belonged to the colonists.⁹²

During the next four years opposition to British authority was more fitful. Nevertheless, a certain amount of sniping went on, both by individuals and by groups. Charles Thomson privately expressed the opinion to Franklin that British policy had invaded colonial rights.⁹³ In Massachusetts the Boston Massacre inspired a flood of protests. The trend in North and South Carolina was partly indicated by a letter to the Sons of Liberty in North Carolina from Charleston, South Carolina, in April, 1770, which pointed out the need for dependence on the constitution to safeguard colonial rights. Similar ideas came from the Loyal "Regulators" Association somewhat later.⁹⁴ In Maryland a persistent anti-parliament feeling cropped out, as for example at Annapolis in October, 1770, where a number of resolves were

⁸⁹ *Journal of the House of Burgesses, 1766-69*, pp. 214-216.

⁹⁰ *Records of Rhode Island*, vol. vi, pp. 603-604.

⁹¹ McCrady, *op. cit.*, p. 620.

⁹² Scharf, *op. cit.*, vol. ii, pp. 111-114, 116-117.

⁹³ *Coll. New York Hist. Soc.* (1878), vol. xi, pp. 22-25.

⁹⁴ *North Carolina Records*, vol. viii, pp. 197-99; 273-74.

passed, of which the first reiterated the constitutional right of the colonists to tax themselves.⁹⁵ Agitation was further kept alive by a discussion over executive taxation. In the session of 1771 the lower house resolved that "fees charged by the Lord Proprietary are arbitrary, unconstitutional and oppressive" and that it alone had the right to establish fees.⁹⁶ The situation continued in a state of unrest for some years and in July, 1773, a similar resolution was passed.⁹⁷

The dispute, however, was not limited to the assembly but extended in the press, and the first half of 1773 saw the *Maryland Gazette* filled with an acrimonious correspondence between Charles Carroll and Daniel Dulany, two of the best trained lawyers in the country. The first, writing over the title, *First Citizen*, took the view that executive taxation was unconstitutional, the second, as *Antilon*, argued, somewhat strangely in view of his earlier contribution to the colonial cause, that such a levy was constitutional.⁹⁸ Carroll replied at great length, holding that Governor Eden's proclamation of the levy violated a free constitution. He recalled a resolution of the Maryland lower house of several years before, which has declared such executive action to be incompatible with "the constitutional liberty of the subject". He quoted among other authorities that appropriate selection from Coke: "where a statute is against common right and reason the common law shall control it, and adjudge it to be void: a statute contrary to natural equity . . . is void, for *jura naturae sunt immutabilia*." Finally, he concluded that the

⁹⁵ Scharf, *op. cit.*, vol. ii, p. 120.

⁹⁶ Elihu Riley, *Correspondence of "First Citizen"—Charles Carroll of Carrollton, and "Antilon"—Daniel Dulany, Jr., 1773*, p. 13 *et seq.*

⁹⁷ *Ibid.*, p. 242.

⁹⁸ For the documents relating to the dispute see Mr. Riley's *Correspondence of "First Citizen" and "Antilon,"* p. 44 *et seq.* Antilon is Spanish for astringent plaster.

proclamation was an "attempt to set the supreme magistrate above the law", and was therefore totally illegal, unconstitutional, and contrary to Coke, since it placed taxes upon a subject without his own consent. Dulany in turn reiterated his defence of the fees. In his third letter Carroll put forth the not unfamiliar argument that the exercise of unconstitutional powers did not make them rights, else the natural rights of mankind would have no existence. Only when the necessity was "urgent and invincible" would he admit that the violation of that fundamental law, "*The subjects shall not be taxed but by the consent of their representatives in parliament*", could be excused. Such urgency was in no sense present in 1773, according to Carroll, and therefore the fees were illegal and unconstitutional. Dulany rejoined that if the fees were taxes, only the legislature could grant them, but fees themselves could lawfully be proclaimed by the executive. Carroll in answer once more insisted that the fees were taxes, and that by the British constitution taxes must be laid by the whole legislature. This became the official attitude of the assembly when, as has been mentioned, in July, 1773, that body, inspired by the attempted executive taxation rather than by the activity of parliament, resolved against unconstitutional taxes.

Elsewhere revolutionary activity was quite as vigorous as in Maryland. A most effective device for keeping alive the struggle had come into existence in the committees of correspondence, organized for the express purpose of protecting constitutional rights.⁹⁹ Some private societies also were

⁹⁹ The Massachusetts Committee had been organized in November, 1772; Virginia followed suit in March, 1773. Although committees of correspondence had been formed in some of the colonies, notably Massachusetts and Rhode Island, during the Stamp Act agitation, they had fallen into disuse. Those formed during 1772-1774 constituted entirely new committees. Connecticut organized her committee in May, 1773; Georgia in September, 1773; Maryland and Delaware in October, 1773;

formed, such as the "American Political Society" at Worcester in December, 1773, to discuss the colonial grievances and the ways and means of securing colonial rights, the common rights of mankind.¹⁰⁰ Consequently, when the crisis of 1774 arose the colonies were well prepared to state their case to anyone who would listen. Townships, counties, assemblies, and private persons alike, from Georgia to New Hampshire, expounded the colonial case with the same zeal and language that had abounded in the days of the Stamp Act, with the Boston Port Bill as the *bête noire* and non-intercourse as a policy of resistance.¹⁰¹

Before analysing the situation in America on the eve of the First Continental Congress, however, it is necessary to recall that the years 1767-1774 had shown that not all exponents of fundamental law lived in America. After it became obvious that the American problem was more than a flurry numerous Englishmen joined battle. While many, of course, agreed that parliament had exercised only its legal prerogatives in taxing the colonies, others believed with equal conviction that fundamental law of some kind stood as a bulwark between parliament's arbitrariness and colonial rights. Of this latter group, some offered no more than tentative suggestions, but a few uttered sentiments that would have done credit to prominent colonial pamphleteers, even to the extent

North Carolina in December, 1773; and New Jersey and New York in February, 1774. New Hampshire and South Carolina seem not to have had committees. The situation in Rhode Island is rather obscure; the old committee may have been revived. Pennsylvania had no committee but the city of Philadelphia had a "Committee of Observation, Inspection and Correspondence." Several towns in the northern colonies, especially in New Hampshire and Rhode Island, formed committees.

¹⁰⁰ Lincoln, *op. cit.*, p. 72. This society continued until June, 1776, when it broke up on account of discord and the absence of men.

¹⁰¹ For an excellent account of the non-importation movement see A. M. Schlesinger, *Colonial Merchants and the American Revolution*, chaps. viii-xiii.

of going beyond the claim of self-taxation. Among the less enthusiastic friends of America was Thomas Pownall, who believed that the colonists had a right to claim a share in the legislature of Great Britain.¹⁰² Gervase Bushe, on the other hand, argued that on the basis of the charters parliament could not contravene justice and liberty, by which he meant particularly the taxation of the colonies.¹⁰³ In the Commons a new champion of America appeared in the person of Alderman Beckford, who put the colonial case very simply. "Acts of parliament are not like the laws of the Medes and Persians: an act of parliament against common right is a nullity: so says Lord Coke."¹⁰⁴

III

When parliament attempted a coercive policy in 1774 all America became aroused in its own defence. In Georgia, where domestic and international problems had distracted attention from colonial rights, some men found time in July to warn their fellow colonists that the policy of the British ministry with respect to Boston was calculated to deprive Americans of their constitutional rights and liberties, and that it behooved Georgians to take care lest they be treated in the same manner. That this warning received serious consideration is attested by the fact that two weeks afterward non-importation resolves were passed with the proviso that they should continue in force until America was restored to her constitutional rights.¹⁰⁵ This in turn was followed ten days later by several resolutions declaring the rights of the colonists in the realms of taxation and trials and denouncing the treatment of Massachusetts. The "Liberty folks", as

¹⁰² *The Administration of the Colonies* (1768 ed.), pp. 75, 172.

¹⁰³ *The Case of Great Britain and America*, pp. 2, 4-5, 11-12, 39 *et seq.*

¹⁰⁴ Cavendish, *Debates*, pp. 83-4.

¹⁰⁵ *American Archives*, 4 ser., vol. i, pp. 549, 638.

Governor Wright called them, appealed to the constitution, "founded upon reason and justice, and the indelible rights of mankind."¹⁰⁶

The situation did not differ greatly in South Carolina for, although that colony had contributed more leaders than Georgia, as a whole it had not been the scene of such radical action as that which characterized Massachusetts or Virginia.¹⁰⁷ Throughout June, 1774, however, several voices were raised in defense of colonial rights, paving the way for the resolutions of July 8.¹⁰⁸ These resolutions, passed by a convention of the inhabitants elected more or less spontaneously; noted especially the violations of fundamental law through taxation, removal of prisoners to England for trial, and the legislation concerning Massachusetts.¹⁰⁹ Beyond this the colony did not go specifically, although early in 1775 the provincial congress approved the Declaration of American Rights framed by the Continental Congress.¹¹⁰

From North Carolina came several expressions of opinion touching the rights of the colonists. The inhabitants of Wilmington met on July 21, 1774, to resolve that the cause of Boston was that of British America and to approve the plan of a continental congress. Shortly afterward the Wilmington committee sent out a circular letter to the freeholders of various counties bidding them to defend the constitutional liberties of America.¹¹¹ On August 24, the first provincial convention of the colony met, choosing a moderator from its own membership, and resolving in regard to the rights of

¹⁰⁶ *Ibid.*, pp. 700-701. See also *ibid.*, pp. 1135-37.

¹⁰⁷ *Cf.* Caesar Rodney to Thomas Rodney: "... the Bostonians ... are moderate men when compared to ... South Carolina..." Burnett, *Letters of Members of the Continental Congress*, vol. i, p. 27.

¹⁰⁸ *Am. Archives*, 4 ser., vol. i, pp. 382-84, 408, 430-33, 508-12.

¹⁰⁹ *Ibid.*, pp. 525-26, 531-34; McCrady, *op. cit.*, pp. 734-36.

¹¹⁰ *Am. Archives*, 4 ser., vol. i, p. 1110.

¹¹¹ *North Carolina Records*, vol. ix, pp. 1016-18.

Englishmen and the abridgement of those rights by British taxation.¹¹² Likewise during the month the freeholders of several counties orally defended their English and natural rights of self-taxation and trial by jury.¹¹³

Notwithstanding the steady flow of protest in Georgia and North and South Carolina, it was but a trickle compared with the deluge in Virginia, where opposition began early and continued without diminution until the Declaration of Independence. While much of the protest went beyond a concern with "rights", as expressed in terms of taxation and jury trial, the great bulk was limited to concrete forms of "tyranny". Virginia opposition to British policy revived in May, 1774, when an "Association of the Members of the Late House of Burgesses" declared parliamentary taxation of the colonies and the Boston Port Bill unconstitutional.¹¹⁴ Similar resolutions emanated from numerous groups representing counties and towns.¹¹⁵ Some, it is true, depended not only on the constitution in defense of their rights but also on the charter and upon natural rights, but whatever the basis, the claims were largely identical. It is almost an occasion for wonder that certain counties went no farther in the direction of independence when their leaders were men who had conceived a larger end than self-taxation, this being particularly true in the case of Prince George, where Richard Bland was a dominating figure.¹¹⁶

¹¹² *Am. Archives*, 4 ser., vol. i, p. 734 *et seq.*

¹¹³ *North Carolina Records*, vol. ix, p. 1024 *et seq.*

¹¹⁴ *Am. Archives*, 4 ser., vol. i, pp. 350-51.

¹¹⁵ *Ibid.*, pp. 370-73, 388, 437-38, 492-95, 499, 518-19, 522-23, 527-31, 539-41, 550-53, 593, 615-18, 634, 639-41, 643-44, 1021, 1203-4, 1213-14, 1254-56.

¹¹⁶ William Lee wrote rather unfairly that "the resolves of Prince George, Col. Rd. Bland's County, . . . for unmeaning significancy excel anything that has ever appeared in print." *Letters*, p. 96. In fact the resolves were quite typical.

Not only did unconstitutional taxation excite the protests of the counties, but it also aroused certain distinguished individuals. Richard Henry Lee declared in his resolves of June, 1774, that the various concrete encroachments of parliament were unconstitutional.¹¹⁷ George Washington, never much interested in theoretical problems, believed that parliament was acting contrary to natural right and justice, the constitution and the charter. Washington's correspondent, the Tory Bryan Fairfax, likewise stated that he "never was of the opinion that the Parliament had a Right to impose" taxes.¹¹⁸ This also represented the viewpoint of a few anonymous contributors who foresaw dire results from the tyranny of parliament.¹¹⁹

Somewhat more elaborate, but characterized by the same approach, was the pamphlet by Robert Carter Nicholas, who set forth in a straightforward fashion the grievances of Virginia in particular and incidentally of all America, with what Chatham regarded as unanswerable cogency. Nicholas, though by no means anxious for independence, was impelled to defend the colonial cause against the Tory John Randolph, who had argued for the essential identity of the British and Virginia constitutions.¹²⁰ He replied that the essential unity of the British and Virginia constitutions could be admitted only so long as that unity was maintained on just, original principles. The taking of a man to Eng-

¹¹⁷ J. C. Ballagh, *The Letters of Richard Henry Lee*, vol. i, pp. 115-16. See also Lee's letter to Samuel Adams explaining his resolves and their constitutional basis.

¹¹⁸ *The Writings of George Washington* (Ford ed.), vol. ii, p. 421 *et seq.*

¹¹⁹ *Am. Archives*, 4 ser., vol. i, pp. 685-86, 882-85.

¹²⁰ *Considerations on the Present State of Virginia Examined*. William Lee wrote Nicholas on March 6, 1775, thanking him for the pamphlet which "Lord Chatham says . . . is extremely well written and in the argument *unanswerable*," *Letters*, p. 139. Randolph's tract was *Considerations on the Present State of Virginia*.

land for trial, however, was unconstitutional, a violation of the "fundamental Principle of our Laws and Constitution." Likewise he reminded Randolph that it was a "gross Infringement of the vital Principles of the British Constitution" for parliament to legislate beyond its jurisdiction, a consideration which made the Boston Port Bill unconstitutional.¹²¹ The limits which Nicholas placed on parliament's jurisdiction, it may be said, were financial and judicial rather than territorial, and without having contributed a great deal to the discussion of the basic constitutional problem he concluded with a pious hope for a reconciliation on the basis of "constitutional Freedom and Liberty, till Time shall be no more."

Maryland was represented by scarcely fewer resolutions in favor of Boston and in denunciation of parliament than Virginia.¹²² Most of these were directed along the line of taxation and personal rights, either calling upon the colonists to pursue every legal and constitutional means in their own defense or resolving that parliamentary taxation and the legislation touching Massachusetts were an invasion of the colonists' rights as men and as Englishmen. One group of freeholders even claimed that in opposing parliament they were in reality defending the constitution. In general, however, these resolutions were no more than affirmations which serve to indicate the prevalence of protest and the readiness to enter into means of defense.

The middle colonies also burned with indignation against parliament, and the flame of protest rose quite as high as it did farther south. Pennsylvania, not always in the vanguard of the most radical thought, became by the end of 1774 the

¹²¹ *Considerations Examined*, pp. 40, 54, 62-64.

¹²² *Am. Archives*, 4 ser., vol. i, pp. 334, 347-48, 352-55, 366-67, 379, 384-86, 409, 402-3, 425-26, 433-34, 439-40, 704, 992-93; Scharf, *op. cit.*, vol. ii, p. 143 *et seq.*

scene of a steadily mounting resistance to parliamentary action. Various counties resolved in favor of the right of self-taxation and denounced the Boston Port Bill as unconstitutional.¹²³ Capping all of these stood the resolves of the Pennsylvania assembly of July 15, 1774, which made the same generous claims as the generality of resolutions throughout the country.¹²⁴

In addition to resolutions, a large number of letters to the public, long enough to be considered as tracts, appeared. These in a measure are more important for our purpose, for although they were largely affirmations, there was generally some attempt to find and justify the place of the colonies within the constitutional framework of the empire. One of the most persistent writers was "P. P." who addressed several letters in May and June "to the inhabitants of the British Colonies in America." He quoted various accepted authorities but beyond reiterating the colonial rights of self-taxation and trial by jury and denouncing the perfidy of the British government, he said little.¹²⁵ Similarly, the author of a letter "to the freemen of America" could only declare that the action of the British government in usurping supreme jurisdiction leveled American liberty.¹²⁶ Somewhat more cogent, but too brief to do more than state principles, was the author of a letter to "P. P.", who with commendable terseness described the Declaratory Act as against the charters and against law and an effort to break down the barriers of the constitution. Speaking of the Irish Declaratory Act, which

¹²³ *Am. Archives*, 4 ser., vol. i, pp. 341-42, 415-16, 426-28, 435-36; Lincoln, *Revolutionary Movement in Penn.*, chap. x.

¹²⁴ *Am. Archives*, 4 ser., vol. i, pp. 555 *et seq.*, 1170-72.

¹²⁵ *Ibid.*, pp. 347-48, 374-77, 394-95, 410-15.

¹²⁶ *Ibid.*, pp. 335-36. The author took the line that self-preservation was the first law of nature and that anyone who refused to defend his liberties was committing treason against God.

had been passed in 1719, he declared that it was not genuine precedent, for that act, in contrast to the American act, had violated no charter and assumed no new power.¹²⁷ Finally, references may be made to a letter to the people of Pennsylvania to prove that the tea destroyed at Boston ought not to be paid for, largely on the ground that parliament had no right to tax America.¹²⁸

The contributions from Delaware and New Jersey expressed the same opinions. A "freeman" called upon the voters of Newcastle County, Delaware, to organize themselves for the defense of American rights and liberties.¹²⁹ Not only the inhabitants of Newcastle County but of other counties as well as the assembly of the colony met during June, July, and August to resolve in behalf of their rights and to oppose British policy.¹³⁰ Newcastle and Kent Counties limited their resolutions to taxation, to the legislation concerning Massachusetts and to methods of relief, but Sussex County and the assembly went further in their constitutional claims. From New Jersey came similar town and county resolutions, the majority of which denounced parliamentary taxation and the legislation against Boston as violations of the fundamental law.¹³¹ The same was true of the resolves representing the colony as a whole.¹³² Among the individuals who ventured to comment on the crisis not one offered anything remarkable.¹³³

The situation in New York resembled that in Virginia as regards both volume and variety of protest. By the middle

¹²⁷ *Ibid.*, pp. 395-96.

¹²⁸ *Ibid.*, pp. 654-57. See also pp. 753-56.

¹²⁹ *Ibid.*, pp. 419-20.

¹³⁰ *Ibid.*, p. 663 *et seq.*

¹³¹ *Ibid.*, pp. 390, 403-4, 452-53, 524, 553-54, 594.

¹³² *Ibid.*, pp. 624-25. See also p. 1117 *et seq.*

¹³³ *Ibid.*, pp. 642-43, 728-29, 967. One, though he admitted the colonial right of self-taxation, specifically denied any further rights.

of May the committee of correspondence had begun to concern itself seriously with the crisis at Boston.¹⁸⁴ Groups of the citizens, furthermore, were not loath to resolve in behalf of their constitutional rights and in favor of means of redress, Suffolk County, Long Island, being especially full of patriotic citizens.¹⁸⁵ In addition there were several individuals who attempted, not always successfully, to clarify the issues. Among these was John Jay, who wrote the "Address to the People of Great Britain" in which he declared that the colonists claimed "all the benefits secured to the subject by the English constitution." These benefits included self-taxation, trial by jury, freedom of religion, and various other personal rights; their violation was unlawful.¹⁸⁶

Before leaving the middle colonies some mention ought to be made of Charles Lee, who defended America with the aid of Cato, Brutus, Hampden, and Sidney. He began his career as a defender of America during the crisis of the Townshend Acts when in May, 1769, he inquired why it was that Britain, so lately glorious, should "employ her time in trampling on the rights of dependencies and violating her own sacred laws."¹⁸⁷ To a certain Duke he praised the Continental Congress and its defense of American rights; to the public he boasted of his love of liberty.¹⁸⁸ Not only did he write letters; he even attempted a pamphlet. The

¹⁸⁴ *Ibid.*, p. 293 *et seq.*

¹⁸⁵ *Ibid.*, pp. 312-13, 407-8, 420, 453, 506, 702-3, 726-27, 740-41.

¹⁸⁶ *The Correspondence and Public Papers of John Jay* (Johnson ed.), vol. i, p. 17 *et seq.*

¹⁸⁷ *The Lee Papers* (Coll. New York Hist. Soc.), vol. i, p. 71 *et seq.* There is an interesting letter (considering its authorship) from the King of Poland to Lee, dated March 20, 1768, in which the writer wonders why the colonies do not have representatives in parliament, for then representation and taxation would go together; otherwise, either oppression or independence must result. *Ibid.*, p. 65.

¹⁸⁸ *Ibid.*, p. 140 *et seq.*

stimulus for this came from Myles Cooper's *Friendly Address*, which Lee answered in a tract that was widely circulated and often reprinted. Except for its authorship the piece was not remarkable, making no mention of the underlying factors and only advising resistance to encroachments and in defense of colonial rights.¹³⁹

In New England the same forces were at work as in the other colonies, but while the agitation in the three smaller colonies was scarcely different from that of Maryland or New Jersey, Massachusetts as the chief sufferer from parliamentary action was a veritable hornet's nest of resistance. Committees, societies, and individuals in all the colonies, however, buzzed vigorously in protest against the interference from Britain. Connecticut had from an early day in the revolutionary period taken a somewhat broader view of her place in the empire than many of the other colonies, and from 1765 to the day of independence the official definition of colonial rights often included more than self-taxation and certain personal rights. That is not to say, however, that all individuals in the colony took so advanced a stand. The committee of correspondence, for example, in common with most committees consistently dealt with the necessity of defending colonial rights without bothering to justify constitutionally what they were defending.¹⁴⁰ Towns and unofficial groups resolved in much the same fashion.¹⁴¹ Individuals likewise came forward to swell the protest.¹⁴² What

¹³⁹ *Strictures on a Pamphlet entitled a "Friendly Address to all Reasonable Americans, etc."* (Philadelphia, 1774), *ibid.*, pp. 151-166. He also wrote several letters to Lord Percy, "Gentleman Johnny Burgoyne," and others. See *Lee Papers*, vol. i, p. 169 *et seq.*

¹⁴⁰ *American Archives*, 4 ser., vol. i, pp. 304-5.

¹⁴¹ *Ibid.*, pp. 336, 390, 442-445, 788-89; *Deane Correspondence* (1774-1776), pp. 135-37, 161-63, 215-17.

¹⁴² *Am. Archives*, 4 ser., vol. i, pp. 754-55, 854-55; *Deane Correspondence* (1774-76), pp. 142-43; *Deane Papers*, p. 40.

they said had been said before, but for their contemporaries it was the *ne plus ultra* of truth and worthy of infinite repetition.

The character of the revolutionary movement in Rhode Island and in New Hampshire did not differ a great deal from that of Connecticut. The assembly of Rhode Island resolved that the Boston Port Bill violated the constitutional rights and liberties of the subject, and throughout 1774 various towns in the colony followed suit by indulging in similar resolutions.¹⁴³ New Hampshire, although rather slower to devote herself to resistance, could, when the crisis came, stand quite as resolutely in defense of her rights as the more aggressive colonies.¹⁴⁴ The pamphleteers contented themselves with brief exhortations published generally through the medium of the newspaper, and had no more to offer than was contained in the township resolves. For more argumentative pieces it is necessary to go to the very center of revolt.

Throughout 1774 and 1775 Massachusetts' towns and individuals sponsored resolutions very like those already noted.¹⁴⁵ Among the more elaborate resolves were the nineteen passed by the county of Middlesex in August, 1774, in defense of the natural and charter rights of the colonists, which had never been forfeited, although at the moment they were being transgressed by parliament. The famous Suffolk Resolves were more complete and, although they dealt only with rights, the theory of empire implicit in them was that of union through the king alone. Cumberland County adopted a report lauding the British constitution as the foundation of

¹⁴³ *Records of Rhode Island*, vol. vii, pp. 249, 272 *et seq.*, *Am. Archives*, 4 ser., vol. i, pp. 333-34, 343-44, 416-17, 705.

¹⁴⁴ *Am. Archives*, 4 ser., vol. i, pp. 337, 361, 888, 1180-82, 1245-46.

¹⁴⁵ *Ibid.*, pp. 336-37, 397-98, 421 *et seq.*, 434, 728, 750-52, 776-79, 795 *et seq.*, 868-9, 983-85.

colonial rights and liberties and deploring its violation by parliament. When a set of resolutions saw fit to mention rights in particular, self-taxation and trial by jury took a prominent place, with the Boston Port Bill as an example of parliamentary tyranny. Although most of the protests came from around Boston, some of the inland districts, particularly Worcester and Hampshire County, were scarcely less assiduous in behalf of the common cause.¹⁴⁶

Individuals were no less active than towns or counties. Some said no more than the scantiest of resolutions whilst others prepared elaborate defenses, full of learning and liberty. Among the latter the clergy were not the least important. William Gordon, who felt that the unconstitutional measures of parliament warranted his talking politics, declared that if the British legislature was the constitution, or superior to the constitution, Magna Carta, the Bill of Rights, and the Act of Settlement were but toys to please the vulgar and not the solid securities of British rights.¹⁴⁷ Gad Hitchcock in an election sermon told his audience that the colonies were not contending for trifles but for fundamental rights, not only for themselves but for posterity. John Lathrop argued that when rulers transgress the bounds of the constitution the subjects might defend their rights by force. This course, he maintained, had been justified "by the most celebrated Divines as well as civilians."¹⁴⁸ During 1775 this feeling grew apace. Samuel Langdon in a sermon at Watertown stated that the constitution had been undermined and its excellencies meant nothing under existing conditions. He thanked God that men had natural rights independent of all human laws and that these rights had been recognized by

¹⁴⁶ *Ibid.*, pp. 795-97, 1192-94; Lincoln, *History of Worcester*, pp. 77 et seq., 92-93.

¹⁴⁷ Thornton, *op. cit.*, p. 197 et seq.

¹⁴⁸ Quoted in Baldwin, *op. cit.*, p. 181.

the grand charter of British liberties. Likewise he applauded the events of April 19, describing the action of the patriots as a defense of their natural and constitutional rights.¹⁴⁹

The chief lay spokesman for Massachusetts in the crisis of 1774 was Josiah Quincy, Junior, who had already achieved some prominence in letters and essays in the Boston papers, in which as early as 1770 he had encouraged his fellow colonists to defend their rights.¹⁵⁰ In January, 1773, he showed his continued interest in the colonial cause by preparing the report of a committee of freeholders of Petersham, Worcester County, wherein it was stated that laws had been passed "in dishersion of the ancient common law", and that the raising of a revenue by parliament was a violation of the natural rights of man, the law of God, and the constitution.¹⁵¹ These rights he continued to defend in letters and tracts full of patriotic fire and great authorities. A trip to England only seemed to stir him to a still greater zest in defense of the colonies.¹⁵² When letters failed he resorted to his journal, and how happily he recorded the oratory of Chatham and Camden when they denounced parliamentary taxation as contrary to natural and constitutional rights.

The *Observations on the Boston Port Bill*, however, contained Quincy's most systematic and far-reaching appeal in defense of colonial rights.¹⁵³ Without denying the right of

¹⁴⁹ Thornton, *op. cit.*, p. 227 *et seq.* Other New England clergy who tended to advocate extreme measures were Timothy Dwight, Ezra Stiles, John Cleaveland, Elisha Fish, Peter Whitney, and Cotton Mather Smith. For this attitude see Baldwin, *op. cit.*, pp. 130-131, 182.

¹⁵⁰ Josiah Quincy, *Memoir of the Life of Josiah Quincy, Junior*, pp. 30-31.

¹⁵¹ Gordon, *Am. Revolution*, pp. 221-24. Reference was also made to "that patriot of patriots, the great Algernon Sidney."

¹⁵² Quincy, *Memoir*, pp. 73 *et seq.*, 181 *et seq.*

¹⁵³ The full title was *Observations on the Act of Parliament commonly called the Boston Port Bill; with Thoughts on Civil Society and Stand-*

parliament to legislate for America he implied that in the troubles between England and the colonies it had been the former rather than the latter which had violated the law of the constitution. Furthermore, he inferred that the presence of a standing army in the colonies was "repugnant to *Magna Carta* and inconsistent with the fundamental rights and liberties of a free people", and conducive to the overthrow of a free constitution since it was possible with such a threat to disregard the old maxim, so long recognized as a principle of the constitution, *quod omnes tangit, ab omnibus approbetur*. This and similar phrases formed the gist of Quincy's arguments, the distillation of which was a revolutionist's manifesto scarcely different from nameless and numberless contributions to the press which had arrived at the same conclusions.

The eve of the Revolution also saw a number of English writers still concerned with the colonial right under fundamental law to tax themselves and enjoy other unnamed privileges.¹⁵⁴ James Burgh in his *Political Disquisitions* stated that parliamentary taxation of the colonies violated the charters and the constitution. *Cosmopolite* argued that the natural and constitutional rights of the colonists had not been forfeited by their remoteness, but he was quite undecided as to what rights they actually had. The "pure Republican", Catherine Macaulay, lamented the efforts of parliament to wrest from the colonists their natural, constitutional, and charter rights, with especial reference to taxation. In parliament, Temple Luttrell spoke in favor of the natural

ing Armies, Boston, 1774. The tract is printed in the *Memoir*, pp. 361-469, by far the greater portion being devoted to the latter part of the title.

¹⁵⁴For what follows see the writer's "English Imperial Thinking, 1764-1783", *Political Science Quarterly*, vol. xlv, pp. 559-60, 563-64, 570-71; Dora M. Clark, *British Opinion and the American Revolution*, p. 269; F. J. Hinkhouse, *The Preliminaries of the American Revolution as seen in the English Press, 1763-1775*, *passim*.

rights of the colonists, while John Wilkes, not to be outdone, eulogized "the fundamental laws of human nature and the principles of the English constitution" as equally repugnant to parliamentary taxation. In 1776, Governor Johnstone, formerly of West Florida, maintained that the Americans were struggling only for a constitutional dependence on Great Britain.

It is scarcely necessary to make more than a reference to the course of events in America during 1775 and 1776. Colonial arguments differed in no wise from those of 1774; protestations of loyalty went page by page with statements of rights. From New England, the Middle Colonies, and the South, they continued to come, justifying what had taken place in the same phrases that had had common currency for a dozen years past. While the movement for legislative independence steadily swelled, frequent pleas were still heard in defence of self-taxation and trial by jury.

Typical of those who argued along these lines was *Camillus* of Philadelphia. Protesting against any desire for independence he declared that the legal government of America had ended in 1763, after which a series of acts had secured the enslavement of the colonists. He particularly denounced as violations of the constitutional rights of the colonists those acts touching taxation, jury trial, and Massachusetts.¹⁵⁵ Joseph Warren, likewise protesting that independence was not the colonial aim, devoted his Boston Massacre anniversary oration to stating the exclusive right of the colonists to levy their own taxes.¹⁵⁶ Committees of correspondence, groups of freeholders, writers to the press, all uttered the same dogmas, almost invariably being careful to mention their loyalty and their absence of desire for independence.

¹⁵⁵ *Am. Archives*, 4 ser., vol. ii, pp. 8-12.

¹⁵⁶ *Ibid.*, pp. 38-44. Oration delivered on March 6.

Yet while there were those who looked definitely to a constitutional dependence of the colonies on England, there were many who quite frankly accepted not only the possibility but also the desirability of independence. The first group, without saying too much about loyalty, limited their claim, specifically eschewing large generalizations about rights and expressing considerable fear of those writers who took the whole world of natural rights for their province. While some of them became Tories when the final break came, others undoubtedly accepted independence; whatever the choice, it was attended by no little searching of spirit.

The creed of the group that more and more considered independence as the solution, though it will be treated at length in the final chapter, can be summarized here. This group included several of the New England clergy who had tended to look toward independence as early as 1774, and the election sermon of Samuel West delivered in April, 1776, represented clearly the opinions of the extremists. Resistance to tyranny was justified, he said, by the very nature of government and by the law of nature. This law was so powerful that even God could not make a law contrary to it; therefore it was certain that the British government could not. Since parliament had invaded the rights of the colonists as Englishmen and, more especially, as men, independence was justified.

The advocates of this argument triumphed and they anticipated their triumph in a famous manifesto which gave a classic form to the reasoning that had appeared so many times in the preceding years. In fact, the Declaration of Independence only said, though somewhat more effectively, what hundreds of known and unknown writers had been arguing briefly or verbosely since the days of James Otis's *Vindication of the House of Representatives*.

CHAPTER IV

FUNDAMENTAL LAW AND THE PLEA FOR EXCLUSIVE INTERNAL LEGISLATION

I

It was not only parliamentary infringements of such rights as exclusive self-taxation and trial by jury, however, that excited colonial pamphleteers and caused them to appeal to fundamental law for defense. Some men saw in the efforts of the British ministry more than financial and judicial dangers; they saw a threat to what they considered a fundamental right and an established practice in the colonies, namely, exclusive control over all internal affairs.¹ The defenders of this right were men of legal acumen and practical political sense, searching for the *via media* between complete dependence and absolute independence. In spite of their virtues this centrist party, which had members scarcely distinguishable from the party of colonial self-taxation on the one hand and that of complete legislative independence on the other, had little lasting influence. Their failure, from one point of view, was one of the tragedies of British imperial history.

Between this group and the one discussed in the preceding chapter there was more than a difference in ends, there was also a difference in means, consisting largely in a more scholarly approach. This is not to say that the defenders

¹ Throughout this chapter when the term 'control over internal affairs' or any phrase synonymous with it is used, it is understood that the phrase connotes exclusive control by the colonists over their own internal government.

of the colonial right of exclusive self-taxation were merely ranters but rather that since they seized upon the most obvious claims they often defended those claims with the most obvious declarations. For the most part, Samuel Adams and the colonial assemblies were not interested in closely-knit constitutional arguments, but they did appreciate the value of positive statements as the surest method of catching the popular ear. For those who may be called advocates of home rule, the firmest defense of their claim was in the last analysis the British constitution. W. H. Drayton, one of the most important of this group, spoke for many when he stated that he had "established it as a first principle, not to travel any farther with any party, than I thought they travelled in the *Constitutional highway*."

Before analyzing in detail the pleas and arguments of those men who can be definitely classified by their clearcut adherence to the colonial right of self-legislation, it may be well to recall that a number of prominent colonial leaders did at times write in behalf of this larger right. The distinction between the claims of a Samuel Adams, to give the best example of a man who made generous and varied assumptions concerning the rights of the colonists, and those of a Richard Bland, who was a consistent upholder of this one solution, may be more than arbitrary. In the case of Adams a claim of home rule was largely incidental to his whole point of view; in the case of Bland home rule was a *summum bonum*, an end, even *the* end, in itself.

Among those who may be mentioned as incidental home rulers, while primarily interested in taxation, were several influential pamphleteers. Thomas Fitch, in the pamphlet already mentioned in the preceding chapter, argued the principle of no legislation without representation as fundamental to the British constitution, which endowed Englishmen with the right of consenting to all laws by which they

were affected.² In his sermon on the occasion of the repeal of the Stamp Act Jonathan Mayhew stated his belief in the exclusive right of the colonial assembly to lay taxes and regulate the internal concerns of the colony.³ Similarly Samuel Adams, while seeming to be exercised over taxation alone and unwilling to comprehend any middle ground between colonial dependence and American independence, at times went beyond his main interest to include self-government. This right he claimed to find given both by the charters and the British constitution. He maintained this point of view during 1764 and 1765 in the various Instructions and state papers which he wrote, holding that such rights as self-taxation, trial by jury, and self-government were "the very Pillars of the British Constitution founded in the common Rights of Mankind . . . the most essential Rights of Britons".⁴ Finally, Richard Henry Lee, in writing to a gentleman in London during 1764, proclaimed the colonists' right to be governed by laws made by their representatives as an essential principle of the British constitution.⁵ These men, however, scarcely went beyond affirmations of the right of the colonists to control their internal polity. To discover something like a systematic and elaborate defense of this claim it is necessary to turn to its most consistent and eloquent advocate, Richard Bland.

The Colonel Dismounted, published in 1763, while it is not as complete an exposition of what may be called "home

² Thomas Fitch, *Reasons why the British Colonies should not be charged with Internal Taxes by the Authority of Parliament*, *Conn. Records*, vol. xii, pp. 653, 657, 670-71.

³ Bradford, *Life of Mayhew*, p. 428.

⁴ *Writings*, vol. i, pp. 5, 8, 17-18, 28. *The Writings of Samuel Adams* (Cushing ed.), vol. i, p. 1 *et seq.* *Ibid.*, pp. 7-9. He here specifically stated that the charter had provided that internal government should be controlled by the assembly.

⁵ *Letters*, vol. i, p. 6.

rule" as Bland's later *Inquiry into the Rights of the British Colonies*, deserves attention since it was the first attempt to set forth logically and constitutionally the idea of colonial legislative independence in matters of internal polity. Herein Bland contributed the "great initial paper" of the revolutionary period, and stood rather ahead of other eminent propagandists in the breadth of his ideas.⁶ While Otis in his 1762 pamphlet limited himself to claims of rights, mostly financial, Bland with a similar starting point, namely the Two-Penny Bills, evolved an embryonic imperial theory. He began with the proposition that if the colonists had been a conquered people they could not pretend to the rights of Englishmen, but if they were the descendants of Englishmen their rights had not been forfeited by migration to America. As such they were born free and were subject only to laws made by their own consent. It is, he said, a vital principle of the English constitution that while externally the colonists were subject to parliament, internally the colonial legislature had full control. At the same time, he further argued, the charter, though taken away, is still in force and sustains the claim of self-government.⁷

The following year brought another tract which specifically included the right of self-government. The author, Stephen Hopkins, though mainly concerned with taxation, appreciated the larger question of legislation and took a

⁶ L. G. Tyler, "The Leadership of Virginia in the War of the Revolution", *William and Mary College Quarterly*, vol. xix, pp. 25-26, puts it a little too strongly when he says that "Bland is not only ahead of James Otis, Samuel Adams, or any other pamphleteer or writer of his time, but is far ahead of them in his views."

⁷ Bland, "The Colonel Dismounted", reprinted in *William and Mary Quarterly*, vol. xix, p. 31 *et seq.* In appealing to the charter in defense of his claims, Bland depended upon Coke's statement that "where the King by Charter, or Letters Patent, grants to a Country the Laws of England, or a Power to make Laws for themselves, he nor his Successours can alter or abrogate the same."

stand from which he did not waver during the whole decade of the controversy. Each colony, he wrote, "has a legislature within itself to take care of its interests, and provide for its internal government".⁸ Yet at the same time he was prepared to admit that everything which concerned the whole empire, notably matters connected with commerce, money, and credit, must of their nature come under a supreme imperial ruling authority. This authority could be found in the British parliament. Nevertheless, the British constitution, "the most glorious constitution, the best that ever existed among men", and the charters have guaranteed to the colonists the right "to take care of their own interests, and provide for their peace and internal government . . . only by laws to which they have some way consented".⁹

With the coming of the Stamp Act, statements of this kind were considerably multiplied. Several colonial assemblies in the course of resolving against what they charged was unconstitutional taxation, included as one of their rights that of internal government. The first and most famous of these resolutions were those framed by Patrick Henry for the Virginia House of burgesses and passed by the more radical members of that House over the protest of the more conservative members, many of whom, like Peyton Randolph, became widely respected leaders of the colonial opposition to parliament. After three resolves dealing with the more conventional colonial claims a fourth declared¹⁰

⁸ *The Rights of the British Colonies Examined* (1764), reprinted in *Rhode Island Records*, vol. vi, p. 420.

⁹ *Ibid.*, pp. 416-17.

¹⁰ *Journals of the House of Burgesses, 1761-1765*, p. 360 *et seq.* For Peyton Randolph, at that time attorney-general of the colony and later president of the Continental Congress, one need go no farther than his offer of five hundred guineas, "By God", for one vote to defeat Henry's resolutions.

That his Majesty's liege People of this his most ancient and loyal Colony have without interruption enjoyed the inestimable Right of being governed by such Laws, respecting their internal Polity and Taxation, as are derived from their own Consent, with the Approbation of their Sovereign, or his Substitute; and that the same hath never been forfeited or yielded up but hath been constantly recognized by the Kings and People of Great Britain.

Outside of Virginia—where seven resolves, including two that were not passed and one which was erased, were published—the effect was instantaneous. Not only was there no repudiation of these sentiments by colonial assemblies but there was widespread imitation and applause.¹¹ Francis Bernard regretted their existence as “an alarm-bell to the disaffected”. Daniel Leonard in after years recalled that people had read the resolutions with wonder and that almost all America followed the example in resolving that Parliament had no right to control the colonies.¹² Not all the assemblies, however, followed the example of Virginia. In fact only those of Massachusetts, Connecticut, Rhode Island and Maryland can be said to have included the claim of home rule as one of the fundamental rights of the colonies.¹³

¹¹ T. Hutchinson, *History of the Province of Massachusetts Bay*, vol. iii, p. 119.

¹² *Massachusettsensis*, Letter ii.

¹³ The Maryland assembly resolved “that his Majesty's liege subjects of this ancient province have always enjoyed the right of being governed by laws to which they themselves have consented, in the articles of taxation and internal polity; and that the same hath never been forfeited, or any way yielded up, but hath been recognized by the King and People of Great Britain.” Almon, *Prior Documents*, pp. 22-23; N. D. Mereness, *Maryland as a Proprietary Province*, p. 481.

The Rhode Island assembly declared “that his Majesty's liege people of this colony have enjoyed the right of being governed by their own Assembly, in the article of taxes and internal police; and that the same hath never been forfeited, or any way yielded up; but hath been constantly recognized by the King and people of Britain.” *Records of the Colony of Rhode Island*, vol. vi, p. 452.

Of these the contributions of the first two are worthy of closer examination since the others largely followed the wording of the Virginia resolution. The fifth of Connecticut's Stamp Act Resolutions declared

That his Majesty's liege subjects of this Colony have enjoyed the right and privilege of being governed by their General Assembly in the article of taxing and internal policy, agreeable to the powers and privileges granted and contained in the royal charter aforesaid, for more than a century past; and that the same have never been forfeited or any way yielded up, but have been constantly recognized by the King and Parliament of Great Britain.¹⁴

In Massachusetts the assembly through the pen of Samuel Adams reminded Governor Bernard that while it had "reverence for the supreme legislature of the nation" and did not "question its just authority", there were "boundaries to the power of parliament".

We beg leave to observe that the charter of this Province invests the General Assembly with the power of making laws for its internal government and taxation; and that this charter has never yet been forfeited. . . . The Right of the Colonies to make their own laws and tax themselves has been never, that we know of, questioned; but has been constantly recognized by the King and Parliament.¹⁵

One or two differences immediately suggest themselves. In

Lincoln (*The Rev. Movement in Penn.*, pp. 129-30) believes that in 1764 the Pennsylvania assembly made "as clear a claim to legislative independence of the British Parliament as one can find in any subsequent document issued by America", although the action to which he makes reference was concerned with taxation alone unless "imposition" be taken to mean legislation.

¹⁴ *Public Records of Connecticut*, vol. xii, pp. 422-23.

¹⁵ *Writings of Samuel Adams*, vol. i, pp. 17-18. The official resolves of the assembly prepared a few days later did not go beyond taxation.

the first place, these resolutions did more than affirm the colonial legislative competence in matters of internal polity. Proof of that right was adduced "in the royal charter aforesaid". Secondly, they concluded with the clinching statement that the rights claimed by the colonists "have been constantly recognized by the King and Parliament of Great Britain", whereas the other colonies claimed that such rights had been recognized by the "King and People of Great Britain". Connecticut furthermore appeared never to recant from its stand for home rule in later years when other colonies were content to emphasize the right of self-taxation and admitted parliamentary competence in other matters.

After this wave of resolutions it is important to turn to the full-length and rather rhetorical pamphlet published by Richard Bland in 1766, which carried still further the argument inaugurated by his earlier tract. A trained constitutional lawyer, Bland was at one with Lord Mansfield in making no distinction between taxation and legislation, though of course his theory as to the location of control over them was diametrically opposed to that of the noble lord. In stirring sentences, punctuated with a truly Carlylian affection for capitals, he elucidated a point of view which if not unique was at least rare enough to warrant attention. When subjects become "dissatisfied with the Place they hold in the Community", he wrote, "they have a natural Right to quit the Society of which they are members and to retire into another Country. Now when Men exercise this Right and withdraw themselves from their Country, they recover their natural Freedom and Independence: The Jurisdiction and Sovereignty of the State they have quitted ceases; and if they unite, and by a common Consent take Possession of a New Country; and form themselves into a political Society, they become a sovereign State,

independent of the State from which they have separated".¹⁶ Having stated the general principle Bland then went on to urge the concrete application. "From the Details of the Charters and other Acts of the Crown, under which the first Colony in North America was established, it is evident that the Colonists . . . had a regular Government and were respected as a distinct State, independent, as to their internal Government, of the original Kingdom, but united as to their external Polity, in the closest and most intimate League and Amity under the same Allegiance and enjoying the Benefits of a reciprocal Intercourse".¹⁷ America, he reminded his readers, was settled by Englishmen on their own initiative and at their own expense under certain definite stipulations which might not be infringed without injustice.¹⁸ The authority of parliament within the kingdom was not disputed for there it was undoubtedly supreme; but such supremacy ought not to preclude the possibility of royal prerogative outside of parliamentary jurisdiction. If the king had no such prerogative, of what good, Bland inquired, are the charters which were issued to the colonies.¹⁹ Furthermore there were other bases for colonial claims, and here again Bland employed history.

Chester was formerly independent, and, if the exemption of the inhabitants did not come from the crown, it came from the "Principle of the British Constitution". He held the colonies to be in the same position; they "contend for no other Right but that of directing their internal Govern-

¹⁶ *An Inquiry into the Rights of the British Colonies*, p. 14. Jefferson considered this tract a sounder and more accurate performance than Dickinson's *Farmer's Letters*.

¹⁷ *Ibid.*, p. 20.

¹⁸ *Ibid.* It is to be noted that Bland used "injustice" rather than "unconstitutionality" or "illegality".

¹⁹ *Ibid.*, p. 21.

ment by Laws made with their own Consent which has been preserved to them by repeated Acts and Declarations of the Crown". Precedents supporting this contention could be found as far back as the time of Charles II. The colonies, he further declared, "belong to the Crown" and the might of the British Parliament did not of necessity give it rightful authority over them.²⁰ Finally, with a magnificent, almost Pauline, peroration Bland concluded: "Great is the Power of Parliament but, great as it is, it cannot constitutionally deprive the People of their natural Rights; nor of their civil Rights, which are founded in Compact, without their own Consent".

Bland's arguments are noteworthy in many respects, not less for the felicity of their phrasing and their historical basis than for their variety. To the charters and the British constitution, which had been the bulwark of earlier defenses of colonial claims to home rule, Bland added the natural-rights argument, and between the three he struck a fairly even balance, placing his most solid dependence, however, on the charters. The natural-rights argument had not yet been sufficiently well tried to be drafted into the front line of imperial scrimmage. It seemed safer to rely upon those reliable veterans, the charter and the constitution; and Bland as a constitutional lawyer undoubtedly felt more at home with those ponderables, with which he had most familiarity, than with imponderables that had none too much currency in British legal thinking.

With the passage of the Townshend Acts several colonies were moved to re-state not only the right of self-taxation but also that of self-legislation in internal affairs. Tories as well as Whigs were calling for a definition of the respective powers of parliament and the colonial assemblies, no less a person than Francis Bernard believing that unless the

²⁰ *Ibid.*, pp. 22, 21

relation between England and America was established upon "fixed Constitutional Principles" the "Patchwork Government of America" would collapse.²¹ Although Thomas Hutchinson looked at colonial aspirations with a somewhat jaundiced eye his reporting cannot be neglected. Six weeks after the Circular Letter, which recognized the supreme legislative power of parliament, Hutchinson observed that "the authority of Parliament to make laws of any nature whatsoever *in the colonies* is denied with the same freedom their authority to tax the colonies has been for two or three years." The idea is new, he said, but it is spreading rapidly.²²

Indeed it was spreading rapidly, so rapidly in fact that within three months many Massachusetts leaders had ceased quite definitely to admit that parliament had any legislative power over the internal concerns of the colonies. The "Address of the Inhabitants of Boston" to Governor Bernard on June 14, 1768, after the seizure of John Hancock's vessel from Madeira, may be taken as indicative of the future attitude of Massachusetts. In that "Address" it was maintained that by the British constitution, the basis of safety and happiness, it was established that no man should "be governed by laws, nor taxed, but by himself, or representatives, legally and fairly chosen."²³ Three days later came the "Instructions to the Representatives of Boston", which were important not only as illustrating the more radical point of view but also as presaging the imperial theories of the author, John Adams.²⁴

²¹ *Barrington-Bernard Correspondence*, pp. 96 et seq., 246.

²² Frothingham, *The Rise of the Republic*, p. 205 n. What Hutchinson meant by this "denial" is impossible to say. He may have included all legislation or only internal legislation.

²³ Hutchinson, *op. cit.*, vol. iii, p. 488.

²⁴ *Ibid.*, p. 490; *Barrington-Bernard Correspondence*, p. 275.

Several other prominent figures were infected with much the same virus. William Samuel Johnson on February 13, 1768, wrote William Pitkin that by the charter of Charles II, Connecticut was vested with a complete power of legislation in internal affairs. He also told Lord Hillsborough directly that "the very creating of a corporation for the purpose of establishing a colony included in its idea full power of legislation."²⁵ Pitkin believed much the same and bolstered his belief with appeals to the English constitution, which was founded on reason and nature and bore resemblance to divine law. In a letter to Richard Jackson, the colony agent, he declared that Charles II gave the people of Connecticut a charter wherein "the right of legislation and taxation is vested in the General Assembly of the Colony." Nevertheless he admitted that parliament had a superintending power over the affairs of the whole empire.²⁶

Contemporaneously many of the assemblies issued resolves in defence of the colonial rights, and many of them included self-government along with self-taxation. The Pennsylvania petition to the commons implied a belief in the right of "home rule" when it stated in confirmation of self-taxation that the legislature of the colony was vested with "full power to support the internal government."²⁷ Virginia also registered a protest against the Townshend Acts in memorials to the king, the lords, and the commons, the three presenting an interesting comparison.²⁸ In those to the lords and the commons the burgesses were interested only in the defense of the right to tax themselves. In the memorial to the king, on the other hand, they "prostrated"

²⁵ *Letters of William Samuel Johnson to the Governors of Connecticut*, pp. 256, 258, 259.

²⁶ *Ibid.*, pp. 286, 280.

²⁷ *Votes and Proceedings*, vol. vi, p. 105. The main interest was, however, taxation, not legislation.

²⁸ *Journals, 1766-1769*, p. 165 *et seq.*

themselves before the throne to implore for Virginia and her sister colonies protection in the enjoyment of the ancient and inestimable right of being governed in matters of taxation and internal polity only by such laws as were "derived from their own Consent with the approbation of their Sovereign." This right the burgesses claimed to have exercised without interruption as one founded "upon the vital principles of the British Constitution."

In the meantime, as was natural, a number of full-length defenses of the colonial position were being published, the more notable of which went beyond reiteration of colonial rights of self-taxation to include the larger claim of home rule. Of these the most considerable was the performance of Edward Bancroft, whose contribution was published in England. The immediate stimulus of his piece was obviously William Knox's defense of British policy in his *Controversy between Great Britain and her Colonies Reviewed*, wherein it was specifically argued that parliament had full power to bind the colonies. Bancroft in his defense of America appealed to every kind of fundamental law conceivable, the law of God and nature, the natural rights of mankind, a royal charter, common justice, and the British constitution. He started with the claim that even if the colonists were outside the jurisdiction of parliament, they were entitled to all the rights, privileges, and immunities of Englishmen besides the natural right of freedom. Particularly he translated these rights and privileges of Englishmen into those of self-taxation and internal self-government and in their behalf he depended heavily upon the charters and the constitution. At the same time, while invoking various English legal precedents, he could without hesitation pronounce that "the laws of England in general never . . . had any force in America."²⁰ It is true, how-

²⁰ *Remarks on the Review of the Controversy between Great Britain*

ever, that aside from the charters, the strongest sources of appeal were intangible. It was repugnant to the laws of nature, or to the "spirit of the British Constitution", for the subjects of one state to exercise jurisdiction over those of another, thus compelling people to live under laws which they had not helped to make.³⁰ In the place of such tyranny, he concluded, "let the Colonies, in their own distinct internal Government, continue to obey such Laws only as shall be made by their respective Assemblies", and let final appeals relative to the colonists be made to their own assemblies.³¹

Rather less important was the work of another American in England, Arthur Lee, who has already been noticed in the preceding chapter. The true constitutional rights of Americans had been violated, he said, when the colonists were allowed no voice in the making of their own laws.³² Specifically he opposed the suspension of the New York assembly as unconstitutional because the people of that colony were thereby robbed of their legislative power.³³ Furthermore, he quoted as a sort of text for one of his pamphlets the "opinion of the judges of England" in the time of Richard III that "Ireland hath a parliament of its own, and maketh

and her Colonies, p. 22. This tract should not be confused with an English piece of similar title, *Observations on the Review of the Controversy between Great Britain and her Colonies* (London, 1769), a much slighter piece, but also containing arguments in behalf of home rule. For an appreciation of Bancroft's unconventional career see Margaret Miller, "The Spy-activities of Doctor Edward Bancroft", *Journal of American History*, vol. xxi, pp. 157-70.

³⁰ *Remarks on the Review*, pp. 45, 78. Bancroft also leaned heavily upon Locke and Sidney with some reference to Grotius and Montesquieu.

³¹ *Ibid.*, pp. 119-20, 122.

³² *The Political Detection or the Treachery and Tyranny of Administration both at Home and Abroad, displayed in a Series of Letters*, pp. 64-66. Lee here wrote over the pen name of Junius Americanus.

³³ *Ibid.*, p. 97.

and altereth laws, and our statutes do not bind them, because they do not send knights to our parliament.”⁸⁴ Aside from these scattered generalizations, Lee belonged clearly with those interested only in self-taxation. This conclusion may be further sustained by his own dictum that there was a vital difference between making laws and granting property, that is, between legislation and taxation.⁸⁵

In addition to the Americans in England who supported the idea of exclusive colonial control over internal government, a number of native Englishmen formulated arguments to the same end during the early years of the dispute.⁸⁶ English theorists, however, tended to argue more on the basis of expediency than on the basis of fundamental law. Typical of this approach were the writings of Thomas Crowley and Joshua Steele. On the other hand, the anonymous author of the *Letter to Lord Hillsborough* held that the exclusive right of the colonists to control their internal affairs could be vindicated on natural, constitutional, and charter grounds. This right had always belonged to Englishmen. The basis on which the author made this claim was that the colonists were not part of England and therefore any parliamentary efforts to control their internal policy was a usurpation and a violation of the fundamental principles of the constitution. A few writers to the press and other pamphleteers reached similar conclusions without any particularly formal argument.

In the colonies, during these and succeeding years, men were also defining their idea of the constitutional relation-

⁸⁴ *An Appeal to the Justice and Interests of the People of Great Britain in the present disputes with America. By an old Member of Parliament*, opposite p. 1.

⁸⁵ *Ibid.*, p. 35.

⁸⁶ For what follows see the writer's "English Imperial Thinking, 1764-83", *Pol. Sci. Quar.*, vol. xlv, pp. 549-50, 554-5; Hinkhouse, *Preliminaries of the Revolution in the English Press*, pp. 120-21.

ship that existed between England and the colonies. Samuel Adams, writing even more fully than usual, still talked self-taxation, although on one occasion at least he was ready to include internal legislation. While he admitted the supreme power of parliament in matters affecting the whole empire he also claimed for the colonial assemblies the exclusive right to exercise local legislative authority. This division of power he felt had its foundation in the British constitution which in turn was grounded on the law of God and nature.⁸⁷ Orators like Joseph Warren and James Lovell took advantage of the opportunity to defend colonial claims in addresses commemorating the Boston Massacre and thus mirror the steady growth of what Hutchinson called the "doctrine of independence of parliament."⁸⁸

At least two of the assemblies also protested at this intermediate time against the authority of parliament within the colonies. The Massachusetts assembly passed a number of resolves against parliamentary statutes which aroused a small tempest. According to Bernard, considerable dispute arose as to whether all the resolves had passed, the speaker maintaining they had not, the clerk that they had. Because of the argument the House reconsidered the resolves and qualified them so as to refer only to taxation, although as first passed one referred to all acts affecting the internal concerns of the colony. Bernard, however, saw that the assembly was "only procrastinating: for both their Arguments and their Intentions lead equally to all Acts of Parliament."⁸⁹ Some two and a half years later the New York assembly resolved that the power of the internal "legislature cannot lawfully be suspended, abridged, abrogated, or annulled by any power or prerogative whatsoever; the pre-

⁸⁷ *Writings*, vol. i, pp. 134-35.

⁸⁸ Niles, *op. cit.*, pp. 3, 5.

⁸⁹ *Barrington-Bernard Correspondence*, pp. 206, 207.

rogative of the crown, ordinarily exercised for prorogations and dissolutions, only excepted." ⁴⁰

II

So matters stood until 1774. Bland's 1766 pamphlet was still the ablest and most single-minded statement of the position. In fact none of his successors had advanced a jot beyond his outline. The gaps in his argument had not been filled, and nothing like a constitution for an empire in which certain parts should enjoy home rule had been developed. As affairs drew toward a crisis, however, men came forward both in America and England with more than declarations of abstract right,—with a *modus operandi* that was at once constitutional and practical. Of these, none contributed more than the two Pennsylvanians, John Dickinson and Joseph Galloway. The compromise character of the home-rulers cannot be better illustrated than by the fact that while the one became a revolutionary and the other a Tory, both opposed the extremists of their own side. Moreover, while Dickinson deserves considerable credit for re-stating the home-rule argument, with all of its constitutional decoration, the palm for formulating the most concrete solution of the difficulties besetting the mother country and the colonies must go to Galloway, who, whatever his faults, did not lack a large patriotism and a keen appreciation of imperial problems.

The evolution of Dickinson's conception of empire as expressed in the constitutional relations existing between Great Britain and the colonies forms one of the most interesting chapters in the intellectual history of the revolutionary period. In contrast to John Adams, Jefferson, and Wilson, who so richly contributed to the vindication of colonial claims in 1774, he had neither denied nor questioned par-

⁴⁰ *The Works of Alexander Hamilton*, vol. i, p. 174.

liamentary supremacy except in the matter of taxation. Therefore in arriving at his 1774 viewpoint, the sturdy "Farmer", a veritable Faithful, had experienced a genuine pilgrim's progress with all the hardships entailed in getting stuck in the sloughs of "Pittism", before releasing himself from the distinction between taxation and legislation. He was always conservative, opposing independence, and drawing down upon himself in the end the condemnation of Jefferson for having stopped at the halfway house in conceding to parliament the right to control the concerns of the whole empire, while pronouncing in favor of colonial rights of self-government in internal affairs. On the other hand, a Tory derided him for his inconsistency in once asserting the dependence of the colonies in the most positive terms.

Dickinson's change of mind in 1774 appears to have come with all the rapidity and subsequent conviction of religious conversion. No sooner had he seen the light than he revealed his discovery to the world. The Resolves of the Committee from the Province of Pennsylvania acting as deputies of the people, drawn up on July 15, 1774, embodied as declarations the conclusions reached by Dickinson in his *Essay on the Constitutional Power of Great Britain over the Colonies*. Both the Resolves and the accompanying explanatory "Instructions of the Committee to the Representatives in the Pennsylvania Assembly" were written by Dickinson. Although the first were largely limited to denouncing the unconstitutional power assumed by parliament, the latter argued that the Declaratory Act was utterly "subversive of our natural and civil liberties", and would assuredly result either in dreadful opposition or slavery.⁴¹ Dickinson further held that the "assumed parliamentary power of internal legislation" was the cause of

⁴¹ *Dickinson's Writings* (John Almon Reprint), p. 2 *et seq.*

all colonial woes, and therefore the appointed deputies should exert themselves to "obtain a renunciation" on the part of Great Britain of all exercise of that power. The definitely constitutional foundations of these declarations bespoke the point of view of their author's elaborate *Essay*.

When the *Essay* appeared no reader needed to remain long in doubt concerning its purpose, for Dickinson moved immediately to the heart of the legal and imperial problem as he saw it. Whatever difficulty, he declared, might occur in tracing the line of parliamentary authority, yet he was prepared to contend that by the laws of God and of the British constitution there must be a line beyond which the authority of Great Britain could not extend. These laws were appealed to because they were grounded on reason and were full of justice and true equity.⁴² Moreover, Dickinson not only believed that there were limits to parliamentary power but he further announced his conviction that the prerogative of the king might go only so far. By taking this stand he of course had to find much more than a charter basis for his arguments.

Dickinson's primary consideration, however, was not with the royal prerogative, but with parliamentary power; since he felt that the powers which parliament had arrogated to itself could diminish the happiness of the people far more than the king's prerogative, and anything tending to diminish the people's happiness went beyond the boundaries set by God and the British constitution.⁴³ Furthermore, there were precedents justifying resistance to the king. He held such resistance lawful even though the king did not directly go beyond his own express rights and his oppression might, strictly speaking, be legal. He cited Charles I and James II as kings who did not transgress their own prerogative

⁴² *Ibid.*, p. 34 *et seq.*

⁴³ *Ibid.*, p. 37.

rights yet he believed the resistance to them to be lawful. But the colonies in resisting parliamentary authority were in a far worse predicament than the opponents of the Stuarts had been, for parliament was trying to set itself up above both law and constitution and give itself omnipotence, which it might not lawfully do. In particular it had passed the Declaratory Act, thus dissolving any and every constitutional check upon its power and leaving to the colonies only two alternatives, either "supplication or violence", with no power of lawful redress.⁴⁴ Of those defenders of parliament who admitted no limitations upon that body he inquired rhetorically if it were true that because the constitution had not "expressly declared" a line between the rights of the mother country and those of the colonies, the latter, therefore, had no rights. Such "edifying logic" was for him a denial of constitutional precedents.

Looking to an historical basis for his contentions in behalf of colonial rights, Dickinson examined first of all the writings of those "dead but most faithful counsellors", Grotius, Pufendorf, and other philosophers. According to their pronouncements, he said, natural law itself led to the inference that parliament, instead of having unlimited power over the colonies, had no power whatever.⁴⁵ This, however, was not enough, but had to be buttressed with historical "facts". It is, Dickinson declared, "in our provincial legislature . . . founded on the immutable and unalienable rights of human nature, the principles of the Constitution, and charters and grants made by the crown at periods, when the power of making them was universally acknowledged by the parent state, a power since frequently recognized by her—subject to the control of the crown as by law established", that "the exclusive right of internal

⁴⁴ *Ibid.*, p. 38 *et seq.*

⁴⁵ *Ibid.*, p. 41 *et seq.* He only meant, however, over the internal concerns.

legislation" is vested. If this right were vested in parliament the colonists would be placed in exactly the same situation that the people of Great Britain would have been reduced to, had James I and his family succeeded in their scheme of absolute power. Changing Stuarts for parliament and Britons for Americans, he continued, the arguments of the illustrious English patriots of the seventeenth century could apply with "inexpressible force and appositeness" in the maintenance of the colonial cause.⁴⁶ Dickinson next proceeded to examine the British evidence in the case.

By what means, he queried, could Great Britain support her claim to parliamentary sovereignty over the colonies? Not by the laws of nature; not by the precepts of Christianity. Virtual representation was too ridiculous to be regarded seriously, for representation in England, though deformed, was alive. For Americans it had never existed. The "necessity of a supreme, sovereign legislature", the stock argument of most upholders of parliamentary supremacy, was for Dickinson a "notion equally unjust and dangerous". It was argued by some, he further said, that the "colonies are not dependent on Great Britain, if she has not a supreme unlimited legislature over them"; for, if they claim to be loyal subjects of the king and admit their allegiance to him, of what then are they legal subjects? George III had his title by act of parliament.⁴⁷ Such a contention did not baffle Dickinson. He answered that it was true that the settlement of the royal succession in England in 1688-9 extended to America, but evaded the consequences of so fatal an admission by asking if William was not king in England before an act of parliament made him so.

Continuing his examination of parliamentary contentions

⁴⁶ *Ibid.*, p. 68 *et seq.*

⁴⁷ *Ibid.*, p. 81 *et seq.*

and his defence of colonial arguments Dickinson affirmed that the colonists claimed to have no other head than the king of England who was also king of America. His prerogative was unquestioned, said Dickinson, though some pages earlier he had questioned it. It did not, however, follow, he maintained, that because George III was king of the colonies, the colonists were necessarily "subject to the general legislative authority" of parliament. "To be subordinately connected with England, the colonies have contracted. To be subject to the general legislative authority of that kingdom they have *never* contracted." Nevertheless he did not deny that Britain might preserve the connection with the colonies through the "authority of the sovereign" and through the control of their intercourse with foreign nations. The exercise of further legislative power would be a usurpation, hence parliamentary sovereignty over them must be limited.⁴⁸ In concluding these arguments Dickinson was moved by Blackstone's statement that the common law of England must be abridged as regards the colonies, to wonder if the power of passing statutes could not be treated as an analogy and also be abridged.⁴⁹

One other point may be mentioned before leaving the *Essay*. Like other exponents of colonial claims Dickinson saw the possibilities of using the Irish analogy in behalf of the Americans, and made something of the arguments put forward by Molyneux questioning parliamentary supremacy over Ireland. He did not, however, greatly concern himself with Irish precedents. Possibly he felt them none too good. In any case he complained that precedents were often quoted as an argument in favor of parliamentary authority, but he was quick to point out that submission to precedents did not legalize them. Precedents against the welfare or

⁴⁸ *Ibid.*, p. 93 *et seq.*

⁴⁹ *Ibid.*, pp. 99-100.

happiness of a people were void; practice must always conform to the principles, else it had no validity. Therefore parliamentary power of internal legislation over the colonies appeared equally against humanity and the constitution and was illegal.⁵⁰

Meanwhile the approaching Continental Congress became the stimulus of numerous "Instructions" and tracts whose point of view did not differ a great deal from that put forward by Dickinson. In Virginia the burgesses instructed its delegates to the Continental Congress to contend for independence in internal polity. While they deplored as unconstitutional the assumption of power on the part of parliament to bind the colonies in all cases whatsoever, the burgesses admitted that parliament had the right to legislate for the concerns of the whole empire. They maintained that the original constitution of the American colonies invested the assemblies of those colonies with the sole right of directing their internal policy. To suspend that power in any way would be absolutely destructive of the end of their institutions and toally unconstitutional.⁵¹

South Carolina was likewise the scene of similar declarations. In the debate on sending deputies to the Continental Congress, Rawlin Lowndes, the Speaker of the assembly, observed that it was well known that the northern colonies "totally denied the superintending power of Parliament; a doctrine which no one here admitted."⁵² While it may be wondered if Lowndes had forgotten Christopher Gadsden, the general accuracy of his statement need not be ques-

⁵⁰ *Ibid.*, p. 103 *et seq.*

⁵¹ Niles, *Principles and Acts*, p. 201. Lee's "Resolves" of June, 1774, did not go so far as these "Instructions", since he was concerned in this instance with taxation alone.

⁵² John Drayton, *Memoirs of the American Revolution as relating to the State of South Carolina*, p. 130.

tioned. At the same time it is clear that the leaders of public opinion in South Carolina had gone beyond the claim of self-taxation to that of control over internal affairs. The best evidence of this can be discovered in William Henry Drayton's *Letter to the Deputies of North America*. Herein Drayton laid down for the benefit of South Carolinians at the Congress and for Americans generally the "American Claim of Rights" as he saw them. At the outset he "established it as a first principle, not to proceed any farther with any party, than I thought they traveled in the *Constitutional highway*." This creed was sustained by the author's confession that he opposed popular protest up to that time because he felt such protest to be unconstitutional. To potential critics of his about-face he defended his action on the score that he had not changed his ground, but was merely turning his face to a new foe, for each of the five acts of parliament in 1774 ran counter to his ideas of the constitutional power of that body. If they were not illegal, then he was ignorant of the power of parliament.⁵⁸

Having written this brief *apologia* Drayton proceeded to formulate an American bill of rights. The question, he said, was not whether Great Britain had a right to tax but whether she had a right to exercise despotism, according to the constitution. He then enumerated various British acts which he considered violations of Magna Carta and the

⁵⁸ R. W. Gibbes, *Documentary History of the American Revolution, 1764-1776*, pp. 12-14. The *Letter* is reprinted here in full, along with several other letters and papers "relating to the Contest for Liberty." The full title of the tract was *A Letter from "Freeman" of South Carolina to the Deputies of North America, assembled in the High Court of Congress at Philadelphia*. Drayton had been largely educated in England, attending Westminster School and Balliol, before going to the Inns of Court. He became a King's judge and privy councillor in South Carolina but was suspended from this and other offices in 1774. Later he became Chief Justice of the colony. His description of the Continental Congress as a "High Court" is not without interest.

common law, and maintained that Americans were entitled equally with Englishmen to the common law and to all the rights specified in Magna Carta, the Petition of Right, the Bill of Rights, and the Act of Settlement.⁵⁴ These statutes were held to be declaratory of the fundamental laws of England, and were of much greater importance than the charters from the crown.

Drayton argued furthermore that the constitution not only limited parliament but also the king, thus to some degree evading the difficulties implicit in the reasoning of those who admitted the supremacy of the king while denying that of parliament. The king's prerogative, he said, could not be more extensive in America than in England where it was limited by the constitution, for although the king had granted the charter, the colonists by natural right were entitled to all the privileges of society. While Drayton, following Coke, allowed to the king the power to alter the laws of a conquered country, as America seemed to be to Drayton, he maintained that until the king actually changed the laws they were still in force except such as were contrary to the law of God. Even admitting that the king had such power, however, it did not follow that he could destroy rights defended by the fundamental laws of England nor could parliament delegate this power to him. If this were done, parliament would be constituting a sovereign above Magna Carta, and had not Coke pronounced that Magna Carta is such a fellow that he will have no sovereign?⁵⁵

As for the power of parliament over the internal affairs

⁵⁴ *Ibid.*, pp. 14 *et seq.*, 20, 27. Here he was following the lead taken by Coke with reference to the great statutes in 2 *Inst.*, proem. See also Gibbes, *op. cit.*, pp. 19-20 where he looks to the precedent of Durham and the English Parliament.

⁵⁵ Gibbes, *op. cit.*, pp. 18, 22 *et seq.*

of the colonies, Drayton continued, that could only be constitutionally exercised when they had given their consent in parliament. Since this consent had not been given it was "as clear as the sun at noon" that the recent parliamentary activities were unconstitutional and illegal.⁵⁶ Reverting to his original proposition, Drayton once again insisted on the absurdity of distinguishing between taxation and legislation, quoting both Locke and Hooker as well as the precedent of the county of Durham to show that internal legislation without consent was tyranny.⁵⁷ He then turned his attention to the problem of the judiciary, being especially opposed to the union of executive and judicial powers in the governor and council, a union which he considered contrary to the common law. Carrying this opposition a step farther back he refused to allow appeals from the colonial courts to the king in council, since under the common law the king could not distribute justice. Inasmuch as the colonists brought the common law with them, they were entitled to its protection and were not under the King in Council except in appeals from the Admiralty.

To this Drayton added little or nothing in his later writings. Although he engaged in a bitter controversy with Chief Justice Gordon of South Carolina, who denounced the *Letter*, written by "so impotent a railer", his point of view remained the same.⁵⁸ Depending for the most part on Coke, Blackstone, and the great statutes, with scattered references to a few philosophers, he had stated a case for home rule which, while it had the limitations of its legal character, was cogently presented and not easily overturned.

⁵⁶ *Ibid.*, p. 25 et seq.

⁵⁷ *Ibid.*, p. 28 et seq.

⁵⁸ *Ibid.*, p. 39 et seq. In Sept. 1775 he delivered a "Talk" to the Cherokees explaining the rights of English subjects and the wrongs suffered. Drayton, *op. cit.*, pp. 419-427.

Since his constitutional arguments led to such conclusions concerning the power of parliament it is no wonder that he was charged by the upper house of the South Carolina legislature with subverting the constitution.⁵⁹

In most of the other colonies the inclusion of control over internal policy as a right of the colonists was limited to resolutions from the assembly, groups of freeholders, or brief warnings from individuals. Connecticut held fast to its stand of October, 1765, the assembly of the colony resolving in May, 1774, that the colonists had and ought always to enjoy such rights of British subjects as self-taxation and self-government in internal affairs. At the same time the resolutions denounced the policy of the British government with regard to admiralty courts and the port of Boston as a violation of the British constitution.⁶⁰ Later in the year "A Watchman" in New Hampshire after some preliminary recitation of Roman history stated that the colonists acknowledged their submission to the provincial legislatures as the people of England did to their parliament. These legislatures composed of the constitutional representatives of the people were their sole defense against slavery.⁶¹

A few writers in the Middle Colonies likewise felt that the best interests of both England and America could be served by a division of power. Gouverneur Morris, writing to John Penn in May, 1774, was willing to concede to Great Britain the right to regulate trade while each colony con-

⁵⁹ Gibbes, *op. cit.*, pp. 70-71. The core of Drayton's controversial point of view can be best discovered in his own observation, made in a speech on the enforcement of the Association of 1774, "that it was always safer to follow the letter, than to explore the spirit of a law." Cicero, Cato, the Long Parliament, Lord Hale, and "all history in general" show this, he thought. Drayton, *op. cit.*, p. 185.

⁶⁰ *Conn. Records*, vol. xiv, pp. 347-48.

⁶¹ *Am. Archives*, 4 ser., vol. i, pp. 1063-65.

trolled its own internal affairs. Men, by nature being free as air, had the right to govern and tax themselves, but it was absurd that the control of trade should be anywhere but in the British parliament.⁶² The tone of a speech on American grievances at Lewestown, Delaware, on July 28, 1774, was not so conciliatory. A "gentleman", after introducing the business of the meeting by an encomium on the British constitution and American liberties, forthwith delivered a pronouncement to the effect that "no *Englishman* is bound to any laws to which he has not consented by himself, or his chosen Representatives." The inclusiveness of this declaration was limited, however, by a subsequent reference to internal government. About the same time the freeholders of the county, meeting at Lewestown, resolved that "every Act of the *British* Parliament respecting the internal police of *North America* is unconstitutional, and an invasion of our just rights and privileges."⁶³ Similarly a meeting of the freemen of all the Delaware counties on August 2, under the chairmanship of Caesar Rodney, resulted in a resolution that it was the right of the freemen "to be governed by laws made by their General Assembly in the article of taxation and internal police."⁶⁴

The South was equally inclined to incorporate "internal police" among the rights of the colonists. Virginia, in addition to the "Instructions" of the burgesses already noticed, abounded in county resolutions which put forward the same claim. A typical example came from Frederick County on June 8, 1774, where the freeholders resolved that it was "the inherent right of *British* subjects to be governed and taxed by Representatives chosen by themselves only; and that every Act of the *British* Parliament respect-

⁶² *Ibid.*, p. 343.

⁶³ *Ibid.*, p. 658 *et seq.*

⁶⁴ *Ibid.*, pp. 667-68.

ing the internal policy of *North America*, is a daring and unconstitutional invasion of our said rights and privileges.”⁶⁵ In Spottsylvania County it was declared that the British parliament could have no constitutional power to make laws for the colonies except where the power of the assemblies did not extend, as for instance in the realm of trade. Consequently the freeholders recognized no authority in “any Act of the British Parliament that is, or shall be made, respecting the internal police of this Colony.”⁶⁶ The freeholders of Middlesex and York Counties, while making the same claim acknowledged a constitutional dependence on parliament which included parliament’s right to regulate trade.⁶⁷

The basis on which the colonists founded their right to legislate for themselves was most generally the constitution and the rights of Englishmen. Sometimes, however, there was a variation. The resolves from Granville County, North Carolina, contained references to the “immutable Laws of Nature”, to the compact between the king and the people, to the rights of self-government, and to the fact that the king of Great Britain and the assembly of the colony formed the legislature of the province with powers totally distinct from those of the British parliament.⁶⁸ Such a tone makes it easier to agree with William Hooper of North Carolina, who wrote in April, 1774, that he anticipated “the important share which the Colonies must soon have in regulating the political balance”, that they were “striding fast to independence, and ere long” would “build

⁶⁵ *Ibid.*, p. 392.

⁶⁶ *Ibid.*, pp. 448-49. New-Kent and Chesterfield counties stated simply that the legislative control of the colony was vested in the colonial assembly. *Ibid.*, pp. 535, 537.

⁶⁷ *Ibid.*, pp. 551, 596.

⁶⁸ *North Carolina Records*, vol. ix, pp. 1034-36.

an empire upon the ruins of Great Britain", adopting the British constitution "purged of its impurities".⁶⁹ Notwithstanding this, the majority of resolutions indicated a less advanced viewpoint. As has already been shown, by far the greatest number dealt with taxation and trial by jury and not more than two or three went beyond a claim for control over internal policy. While many of the freeholders took refuge behind such elastic phrases as the "rights of Englishmen", either charter, constitutional, or natural, such had been the case long before independence was in the air. When the colonists became specific in regard to their rights, they became fairly conservative.

In the meantime the Continental Congress was in full session and the "home rulers" under the leadership of Galloway and Duane were trying hard to secure a compromise with the extremists who looked only to complete independence of parliament. Notwithstanding their ultimate failure, these advocates of compromise presented sufficient strength to cause among more radical members of the Congress the fear that people would be weaned away from more extreme measures by the plausibility of the moderate view. The Congress itself was of diverse character. Every shade of opposition to British policy was represented, from those interested merely in self-taxation to believers in the independence of the colonies from any form of parliamentary control.⁷⁰

⁶⁹ *Ibid.*, pp. 984-85. Hooper also compared Britain with Rome in its decline which "from being the nursery of heroes, became the residence of musicians, pimps, panders, and catamites." Hooper to James Iredell.

⁷⁰ See the writer's "Imperial Ideas at the First Continental Congress", *Southwestern Social Science Quarterly*, vol. xii, no. 3. The opinions which the members of the Congress had of one another are extraordinarily interesting. Caesar Rodney, for example, though the Bostonians moderate when compared to the delegates from Virginia, South Carolina, and Rhode Island. E. C. Burnett, *Letters of Members of the Continental Congress*, vol. i, p. 27.

Among the prominent "home rulers" at the Congress were Bland, Hopkins, and Dickinson, but the chief advocates of this solution in one form or another were, as has been said, James Duane and Joseph Galloway. The former formulated his conception of home rule in an address before the committee appointed to state the rights of the colonies.⁷¹ He argued that the rights of the colonies should be discussed and established on the solid principles of reason and justice as expressed in the common law and ancient statutes and in the charters. On these grounds Duane concluded that it was absolutely essential to the liberty of the subject that he should not be bound by laws to which he had not consented. These ideas he further elaborated in some propositions before the committee on rights. The colony constitutions, he said, were based on the common law of England, the statutes existing at the time of colonization, the charters, and the colonial codes of law. Of these, the common law, ancient statutes and charters formed the basis of colonial rights, for the preservation of which it was only necessary that in each colony the assembly should exercise an exclusive control respecting taxation and internal polity, subject only to the negative of the crown when that negative had not been ceded by royal charter.⁷² On the other hand, Duane was quite ready to admit that parliament had the right to control trade and regulate the affairs of the whole empire.

Duane was supported not only by the earlier home-rulers but also by a number of other considerable men. John Rutledge of South Carolina argued, basing his views on the common law and the charters, that the colonists were entitled "to a free and exclusive power of legislation *in all cases of taxation and internal policy.*"⁷³ Samuel Chase of Mary-

⁷¹ Burnett, *op. cit.*, p. 23 *et seq.*

⁷² *Ibid.*, pp. 38, 40, 44, 88.

⁷³ *Ibid.*, p. 44 and note.

land, somewhat more guarded than Duane, not only claimed the colonial right of home rule but conceded that parliament had only a limited constitutional right to regulate trade, except where the good of the empire required it.⁷⁴ John Sullivan of New Hampshire, who was credited by Galloway with having "thought solidly on the subject", actually composed a resolution for the Congress which embodied the claim of home rule. Therein it was declared that "the power of making laws for ordering or regulating the internal polity" of the colonies was vested in the provincial legislatures, and that all parliamentary statutes usurping that power "in any manner or in any case whatsoever" were illegal and therefore void.⁷⁵ Finally, Joseph Galloway composed a constitutional treatise in which he set forth at some length the constitutional basis of the claim for internal legislative competence.

The discredit which has attended Galloway as a Tory has blinded most students of the period to his well-conceived suggestions for relieving imperial difficulties. Realizing that the measures of the Continental Congress ran the danger of being dismissed as unconstitutional and illegal he wished to formulate at once a defense of America and a basis of reconciliation between the colonies and England. This he did in *A Candid Examination of the Mutual Claims of Great Britain and the Colonies*, to which the plan of union was appended. In order to discover a sound starting place he determined to rely mainly on the British constitution, where the rights of parliament and the colonists were defined. He was sure that by the constitution America had rights as firmly established as those of parliament, rights which had by no means been lost because they had not

⁷⁴ *Ibid.*, p. 63.

⁷⁵ *Journals of the Continental Congress* (Ford ed.), vol. i, p. 67. This resolve was superseded by the more radical offering of John Adams.

always been exercised. "The subjects of a free state ought . . . to enjoy the same fundamental rights and privileges" wherever they might live; hence each colony should "regulate its own internal police."⁷⁶

The plan of union—"almost a perfect plan" according to Edward Rutledge—although defeated by six colonies to five, was widely supported in the Congress. Notwithstanding this defeat the solution continued to attract supporters outside, although the character of some of them was such as to preclude any wide popular support. By the end of 1774 a number of men who were to remain loyal to the mother country, looked to something like home rule as a *modus operandi*. Without concerning themselves with rights, the Anglican divines, Chandler, Seabury, and Inglis, while irritated by the action of the Congress, were shrewd enough to see that expediency demanded that the colonists should be granted certain privileges, the sum total of which would seem to have been control over internal polity.

Despite their claims to reasonableness these Tories succeeded in stirring up considerable animosity. Seabury played the rôle of *agent provocateur* to Alexander Hamilton, while Myles Cooper aroused General Charles Lee and, more pertinently, Philip Livingston, a member of the Congress from New York. The latter deserves credit for having written one of the very few amusing pieces during the whole controversy. He admitted that he answered Cooper to en-

⁷⁶ *A Candid Examination*, pp. 54, 36. Burnett, *op. cit.*, p. 6. Galloway's imperial ideas are treated in the writer's "Tory Imperialism on the Eve of the Declaration of Independence", *Canadian Historical Review* (Sept. 1931), pp. 267-270. For the plan of union see *A Candid Examination*, p. 65 *et seq.* Burnett, *op. cit.*, p. 54 *et seq.* The plan provided for a British and American legislature to regulate general affairs while each colony controlled its own internal concerns. Affairs of the whole empire were to be handled as of yore by the British parliament, of which the British and American legislature would be a branch.

courage the paper manufactory, to reimburse the printer "who must be sadly out of pocket" by publishing such woeful performances as Cooper's, and to reassure "many weak women . . . frightened by that awful compound of threats, and texts, and homilies." The point of view of the pamphlet was fundamentally utilitarian but Livingston did insist that the Americans had legal rights in addition to the protection afforded them "by the eternal laws of right reason." Both as men and as Englishmen the colonists had the right to make the laws controlling their internal affairs, and since these rights were given by the King of Kings no earthly power could take them away.⁷⁷

In addition to defining colonial rights Livingston indicated what seems to have been a very prevalent feeling, namely, a desire for conciliation. This feeling was especially strong in New York although none of its advocates wished to weaken the rights of the colonies. The assembly in January, 1775, resolved that the colonists owed the same allegiance to the king as did other Englishmen, and that they also owed obedience to such acts of parliament as were not contrary to their rights as Englishmen.⁷⁸ Some two months later a committee of the assembly resolved that "this Colony owe obedience to all Acts of Parliament calculated for the general weal of the whole Empire, and the due regulation of the Trade and Commerce thereof, and not inconsistent with essential rights and liberties of Englishmen."⁷⁹

⁷⁷ *The Other Side of the Question: or a Defense of the Liberties of North America* (reprinted in the *Magazine of History*, extra no. 52), p. 12 et seq. In 1769 Livingston in the New York assembly had declared British acts relating to America unconstitutional but his interest then was taxation. *American Archives*, 4 ser., vol. i, p. 252 n.

⁷⁸ C. L. Becker, *The History of Political Parties in the Province of New York*, p. 177. See also *The Diary and Letters of Gouverneur Morris*, vol. i, p. 4.

⁷⁹ *American Archives*, 4 ser., vol. i, p. 1302. See also *ibid.*, p. 1450.

The colony of Georgia likewise put itself on record as adhering to a similar solution of imperial difficulties. During January, 1775, after protesting loyalty to Great Britain in various addresses to the governor, Sir James Wright, the assembly resolved that according to "the immutable laws of nature, the principles of the English Constitution, and the several Charters or compacts" the colonists were "entitled to a free and exclusive power of Legislation . . . in all cases of Taxation and Internal Polity."⁸⁰ While other expressions of the same sort are to be found during 1775 and 1776, it must be said that for the most part the generality of resolves continued to deal mainly with taxation or to advocate legislative independence. It was apparently a more natural step to go directly from the doctrine of theoretical rights to that of virtual independence than to take a slower transition through home rule. Yet the continued existence of the more moderate claim illustrates not only how universal was the opposition to parliamentary policy but also how self-conscious that opposition had become.

Before leaving this particular group of opponents of British policy the final statements of a few particular patriots may be noted. Although many of the leaders of colonial thought had moved on to a more advanced theory of imperial relationship, a few still argued for reform in terms of home rule. Among the more prominent representatives of this view in the last months before the Declaration of Independence, may be mentioned William Smith, John Rutledge, and James Iredell, in addition to some who had already spoken in behalf of this form of settlement. Smith, in a sermon preached in Christ Church, Philadelphia on June 23, 1775, claimed the right of the colonists to govern themselves in their internal concerns by their own laws as

⁸⁰ *Ibid.*, pp. 1156-57.

fundamental and derived from the supreme power of the state, the British constitution.⁸¹ He emphasized the fact that the idea of independence of Great Britain was totally foreign and the colonies were contending only for the sanctity of their charters and laws and their constitutional rights. John Rutledge, in a speech to both houses of the South Carolina legislature, exhorted his listeners to enlighten their constituents if any were found who did not know the principles of the struggle in which the colonies were engaged. They were to explain the inherent rights of the colonists, showing how by the British constitution they were entitled to exercise full control over their internal government.⁸² Iredell, in an essay in defense of American claims, advocated colonial home rule as constitutionally belonging to the colonies.⁸³ Rawlin Lowndes, in writing the reply of the South Carolina assembly to a speech by Lord William Campbell, informed the noble lord that the only constitutional guardians of the colonists' welfare were their own representatives.⁸⁴ Such arguments, however, were but the last gesture of conciliation on the American side, for by 1776 not only the radical leaders but also the great body of colonial opinion had with some outstanding exceptions gone on to the view that home rule was not enough, that it was, in spite of the words to the contrary, too difficult to draw a line between the powers of the British parliament and the rights of the colonial assemblies, and that therefore the best solution was to be found in the denial of all parlia-

⁸¹ *A Sermon on the Present Situation of American Affairs*, p. 13 *et seq.* Smith made no mention of natural rights but constantly referred to the birthright of Britons.

⁸² Gibbes, *op. cit.*, p. 274. The speech was delivered on April 11, 1776.

⁸³ McRee, *Life and Correspondence of James Iredell*, vol. i, p. 283 *et seq.*

⁸⁴ Drayton, *Memoirs*, vol. ii, pp. 7-8. The "Reply" was delivered on July 12, 1775.

mentary power. More than this, there had appeared a tract, *Common Sense*, which recommended the repudiation of all British power, whether parliamentary or royal.

Meanwhile, in England a number of ardent defenders of colonial claims to home rule had come forward with arguments similar to those of Dickinson, Drayton, and Duane.⁸⁵ Matthew Robinson, who had spent some time in New England, wrote two pamphlets in which he stated that the "American colonies are as to their internal constitution a very free people." Their exclusive right to govern themselves so far as internal policy was concerned was justified by that law "higher and stronger" than acts of parliament, the law of nature, supplemented by the constitution and the charters. Another pamphleteer reviewed the whole of English constitutional history and on the basis of the precedents of Wales, Chester, and Durham, and the libertarian philosophy of such men as Algernon Sidney he reached the same conclusion as Robinson. Richard Price also believed that the fundamental rights of Englishmen prevented the colonists from being subject to parliament "in respect of taxation and internal legislation" and that the Declaratory Act was a concise definition of slavery. These same contentions were argued by a number of other writers, who without contributing a great deal to the discussion, at least indicated that the idea of the colonists exclusively controlling their own internal government was not limited to America or propounded by an inconsiderable group of theorists.

⁸⁵ R. G. Adams, *Political Ideas of the American Revolution*, passim; the writer's "English Imperial Thinking, 1764-1783", *Political Science Quarterly*, vol. xiv, pp. 557-59, 562-63.

CHAPTER V

FUNDAMENTAL LAW AND EQUALITY OF STATUS

I

THE final group of theorists who appealed to fundamental law in justification of their idea of the imperial connection differed somewhat from those whose contributions have already been analyzed. In the first place, they were fewer in number; secondly, they comprised the greatest names in early American national history; and finally, their claims were in the last analysis grounded on natural law. In seeking a status that involved practical independence of parliament they could not depend very heavily upon a fundamental law that gave parliament its being and meaning, nor could they find much in the charters alone that would sustain so extreme a view. Hence they were compelled to appeal to a law which controlled all men and recognized neither Englishman nor American as having any heritage which the other lacked.¹ Occasionally, efforts were made

¹ Compare the views of Professor McIlwain who says (*Amer. Rev.*, p. 149), that "fundamental law provides no justification whatever for the total denial as made by the Congress of the whole legislative authority of Parliament over America", that "the only adequate justification for that lies in the argument drawn from the relation of realm and dominions", and that on this "argument the Americans' cause must really stand or fall." These statements seem to me to be erroneous. The arguments and proofs adduced by Professor Schuyler (*Parliament and the British Empire*, chaps. 1, 2) seem to dispose of the validity of the realm and dominions argument. As for natural law, the colonists themselves demonstrated their belief in its efficacy. Even though they did appeal to the constitution very frequently they were prone to identify it with the law of nature or to speak of the principles of the constitution, which in most cases meant natural law.

to identify the natural rights of men with the constitutional rights of Englishmen, but the attempts were never carried too far, lest certain untoward duties should enter to modify the claim of unqualified rights.

In considering the proponents of the idea that parliament had *no* authority over the colonies and that America was connected with England only through the king, it is necessary again to say that there were colonial leaders who, without contributing anything like a systematic exposition of this relationship, appeared willing to oppose parliamentary sovereignty in all of its manifestations. They denounced parliamentary taxation, internal legislation and legislative control of any kind. Thus, to classify them either as imperial or political theorists is rather difficult.

The idea of independence of parliament went back, as has already been seen, into the middle years of the seventeenth century and found occasional supporters from the time of the Puritan Revolution onward. Too much reliance, however, cannot be placed on these early statements, and not until 1774 did there appear clearcut expositions of the theory of empire which called for equality of status as between the colonies and the mother country. Nevertheless, in the decade and a half previous to that date observers noticed that men in the colonies were denying the power of parliament in all cases whatsoever.² But this spirit made no conspicuous advances until the revenue acts of 1764 and 1765. Under the impulse of these threats to American freedom some men seemed willing to deny the authority of parliament in all cases as readily as many

² Andrew Burnaby in 1759 found colonists considering the colonies as independent states bound to England only through the king. *Travels through the Middle Settlements of North America*, pp. 27, 67. Cf. C. M. Andrews, *The Colonial Background of the American Revolution*, p. 54. "It is safe to say that...before 1763 the colonists...made no denial of parliament's right to legislate for them."

American opponents of parliament denied the constitutional right of that body to tax the colonists. Governor Bernard wrote at this time that the colonies claimed "to be perfect states, no otherwise dependent upon Great Britain than by having the same King."³

To test the accuracy of such a statement is not easy, for colonial claims have had different meanings for different people. Two distinguished historians, one English and the other American, have considered that James Otis denied "that the British Legislature had any rightful authority in America."⁴ But the fact is that Otis, while protesting against parliament's right to tax, conceded parliamentary supremacy over the colonies. What was true of Otis was true also of Samuel Adams, Christopher Gadsden, and Patrick Henry, and of less influential figures like Joseph Hawley and Roger Sherman.

Although, as is well known, the opposition of the colonists in 1764-65 was to the immediate tax, it was also true that some few inquired concerning all parliamentary legislation. An anonymous writer in the *New York Gazette* asked if any plausible argument could "be urged for the supposed Subordination of the Colonies to Great Britain, but what has equal Force with regard to the Subordination of the Electorate of Hanover." His conclusion was naturally in the negative.⁵ Equally radical sentiments were expressed by John Morin Scott, a New York lawyer and a leader of the popular party, in *Holt's Gazette* of New York. Writing over the favorite *nom de plume*, "Freeman", he declared that if "the welfare of the mother-country neces-

³ *Barrington-Bernard Correspondence*, pp. 96, 266-67. See also Beer, *British Colonial Policy, 1754-1765*, pp. 306-307.

⁴ W. E. H. Lecky, *History of England in the Eighteenth Century*, vol. iv, p. 88; E. Channing, *History of the United States*, vol. iii, p. 1.

⁵ Beer, *op. cit.*, p. 311.

sarily requires a sacrifice of the most natural rights of the colonies", especially their right of making their own laws, then the connection between the two ought to cease.⁶ Such expressions caused Lieutenant-Governor Colden to deplore the denial of the legislative authority of parliament over the colonies.⁷

The British government was less sensitive than Colden, passing the Stamp Act over the remonstrances of the colonies and paying no immediate attention to their constitutional protests after the passage. As a consequence, more leaders appeared among the colonists who were paving the way for the doctrine of virtual independence. Christopher Gadsden, in protesting that the colonists should "stand upon the broad and common ground of those natural and inherent rights that we all feel and know, as men and descendants of Englishmen", was recommending a line of reasoning which did not permit of a sovereign parliament.⁸ Such a statement contained the germs of independence, if not of England at least of parliament. Joseph Hawley, some months later, was even more forthright, asserting that parliament had no right to legislate for the colonies, for he did not know how such a right had been acquired. This view he defended by the question, "Is it not most plain that at the very instant the positive laws of the society (that is, the laws which are grounded on the civil compact) cease or are suspended, the laws of nature must emerge" and take their place.⁹

⁶ H. B. Dawson, *The Sons of Liberty in New York*, p. 70.

⁷ *Ibid.*, p. 71.

⁸ Gibbes, *Documentary History*, pp. 8-9.

⁹ Wells, *Life and Public Services of Samuel Adams*, vol. i, p. 127; M. C. Clune, *Joseph Hawley's Criticism of the Constitution of Massachusetts*, p. 6; E. F. Brown, "The Law Career of Major Joseph Hawley", *New England Quarterly*, vol. iv (1931), p. 506.

The year 1767 brought the Townshend Acts and therewith some positive statements concerning the right of the colonies to control their own affairs. Thomas Hutchinson observed that the colonists were more inclined to independence than they had been and denied that parliament had the right to make laws of any nature whatsoever for the colonies.¹⁰ Confirmation of this view may be found in the shrewdly argued anonymous *Nature and Extent of Parliamentary Power Considered*, which, although published at Philadelphia in 1768, was said by the author to have been written before the repeal of the Stamp Act. The introduction contained a denunciation of the attempts of parliament to reduce the colonists to a subordination "inconsistent with their natural rights and not to be reconciled with the spirit" of the constitution. The colonists themselves looked no farther than a connection founded on natural right, for if they were "entitled to the liberties of British subjects" they "ought to enjoy them unlimited and unrestrained." Parliament's claim to supreme authority could not be maintained upon the principles of the British government. Parliament might legislate for England, but how with equity could that power extend to those from whom it had received no "delegated power." If the Americans were represented in parliament, then the authority of that body would be fixed on a constitutional basis, though even then such authority would only relate to commerce; the internal affairs of each colony would still be regulated by its own legislature "in conjunction with the deputy of the crown."

In the body of the pamphlet these generalizations were developed by means of an analysis of historical and constitutional precedents. "Upon the indispensable principles of their own constitution, the Lords and Commons of England can no more covenant with the Crown for limiting and

¹⁰ Frothingham, *Rise of the Republic*, p. 205 n.

restraining our natural liberties than they can give and grant the most valuable of our property to be disposed of for their own private purposes." When the emigrants from Great Britain crossed the Atlantic to "settle the deserts [*sic*] of America, they brought with them the spirit of the English Government." They "cannot easily conceive that they have left there the freemen of England vested with a *sovereign, supreme* power to restrain their natural liberty, or to dispose of their acquired property."¹¹ And again, "To suppose the British Parliament to be vested with a sovereign and supreme legislative power over the colonies is advancing a supposition inconsistent with the principles of their own constitution." It is, he explained, a fundamental maxim of that constitution that no new regulation may be framed without the consent of the nation. *Quod omnes tangit ab omnibus approbetur.*¹²

After attacking as unsound Pitt's distinction between legislation and taxation, as summed up in his statement that parliament could control the colonists in every way except that of taking money out of their pockets, the author turned to the asking of several questions.¹³ Among these inquiries were two or three of more than rhetorical importance. "When the parliament of Great Britain arrogate to themselves this sovereign jurisdiction over the colonies", he said, "I should be glad to know on what principles they found their claim." Is it on their own constitution or on "a power *virtually inherent* in the name of parliament?" Neither foundation had for him any validity, and therefore he could easily dismiss the authority claimed over the colo-

¹¹ *Nature and Extent*, p. 3 *et seq.*

¹² *Ibid.*, p. 7.

¹³ *Ibid.*, pp. 10-11, 28. *Cf.* the author's observation that "if we oppose only the Stamp Act and not legislative competence, we have not combated the reality but only the mode of oppression."

nies by parliament as sheer usurpation. Furthermore, how could the colonists be said to possess the natural rights of mankind, or even the peculiar privileges of Englishmen, while they were subordinate to a parliament in which they were not represented.¹⁴ Several years elapsed before equality of status was argued with greater skill or restraint, and in the meantime the colonists were content to declare rather than explain their position.

In New England the situation continued much as Bernard had predicted when he wrote in January, 1768, that conciliation was no more than a suspension of animosity, "the seeds of which will be left in the ground ready to start up again whenever there shall be a new occasion for the Americans to assert their independence of the Authority of Parliament."¹⁵ The following month he felt that in the Circular Letter the colonists had certainly questioned, if they did not openly deny, parliament's right to enact laws binding the colonies in any case whatever.¹⁶ Sustaining this belief was the "Address of the Inhabitants of Boston", which declared that no man could be constitutionally bound by laws to which he had not given his consent.¹⁷

It is plain that these ideas were appearing more frequently and that the doctrine of independence of parliament enjoyed a steady growth in popularity. Silas Downer, in a *Discourse* at the dedication of a tree of liberty in July 1768 in Rhode Island, stated that the colonists had no other dependence upon England than that of allegiance to the king.¹⁸

¹⁴ *Ibid.*, pp. 13, 23.

¹⁵ *Barrington-Bernard Correspondence*, p. 246.

¹⁶ *Ibid.*, p. 269 *et seq.*

¹⁷ *Ibid.*, p. 275.

¹⁸ *A Discourse, delivered in the Colony of Rhode Island upon the 25th day of July, 1768, at the Dedication of the Tree of Liberty* (reprinted in the *Magazine of History*, extra no. 64, p. 311 *et seq.*). *Providus in*

"It is of the very essence of the British constitution", he declared, "that the people shall not be governed by laws in the making of which they have had no hand, or have their monies taken away without their own consent." These were natural rights and inherent in the colonists as men. Magna Carta did not give them but was merely declarative of them. Since, therefore, self-government was the very spirit of the constitution and a necessary bulwark against tyranny, and since the colonial legislatures were complete, Downer could not be persuaded to allow that the parliament of Great Britain had any lawful right to make any laws whatsoever to bind the colonists; they could not constitutionally be subjects of subjects. In conclusion he cited prohibitions on American manufactures as illustrations of parliamentary infractions of colonial rights.

It was opinions of this sort that moved Colden to reiterate his earlier passivism.¹⁹ "Papers are daily published", he complained, "denying the legislative authority" of parliament over the colonies. While such "papers" were being published, they were largely fiery declarations which were taken more seriously by the Tories than by those who might have agreed with their opinions. Despite the need for constitutional arguments to supplement the declarations, they were long incoming. One may search the writings of Franklin in vain for any systematic theorizing. Although by 1768 he had begun to lean toward the idea of independence of parliament, he at the same time refused to speak dogmatically:²⁰

I am not yet master of the idea these writers have of the relation the *Boston Evening Post* for November 21, 1768, went still further to declare that he knew nothing "of laws, kings, or dominions, independent of the will of the people", the natural source of all right whatsoever.

¹⁹ *Coll. New York Hist. Soc.*, vol. x, pp. 149, 182.

²⁰ *The Writings of Benjamin Franklin* (Smyth ed.), vol. v, p. 115.

between Britain and her colonies. I know not what the Boston people mean by the "subordination" they acknowledge in their assembly to Parliament, while they deny its power to make laws for them, nor what bounds the Farmer sets to the power he acknowledges in Parliament to "regulate the trade of the colonies". . . . The more I have thought on the subject the more I find myself confirmed in opinion that no middle doctrine can be well maintained, I mean not clearly and with intelligible arguments. Something might be made of either of the extremes: that Parliament has a right to make all laws for us, or that it has a power to make *no laws* for us; and I think the arguments for the latter are more numerous and weighty than those for the former.

A year and a half later Franklin told William Strahan that a submission to acts of parliament was no part of the colonies' original constitution, and that parliamentary interference in colonial affairs dated from the time of the "great Rebellion."²¹ Some time afterward he explained to another friend that although "the Parliament of Great Britain has arrogated to itself the power of taxing the colonies, it has no more right to do so than it has to tax Hanover. We have the same King, but not the same legislature."²² A further expression of Franklin's views appeared in a letter in June, 1770, where he maintained that the colonies were originally constituted distinct states and that parliamentary power over them was an usurpation: the king with his plantation parliaments, not the British parliament, was the sole legislator of the colonists.²³ A year later he wrote that it had long been his opinion "the Parliament had

²¹ *Ibid.*, p. 238.

²² *Ibid.*, p. 280. No wonder that Josiah Quincy said that Franklin's "ideas are not constructed within the narrow limits of exemption from taxes, but are extended upon the broad scale of total emancipation." *Memoir of the Life of Josiah Quincy, Jun.*, p. 250.

²³ *Writings*, vol. v, pp. 260-61, 295-96. See also *ibid.*, vol. vi, p. 217.

originally no Right to bind us . . . without our Consent." ²⁴ Finally, in a letter to Galloway in 1774 he insisted that before any lasting settlement could be made between England and America it would be necessary for all acts of parliament binding the colonies, including the Declaratory Act, to be repealed.²⁵

The "cordwainer statesman", Roger Sherman, was of a mind similar to Franklin's. In a letter to Thomas Cushing on April 30, 1772, he declared his own position quite explicitly, holding that it was a fundamental principle of the British constitution that no laws bound the people except those to which they had consented. Therefore he maintained that so far as the colonists were bound by laws made without their consent they were in a state of slavery.²⁶ Both Franklin and Sherman furnished excellent statements of a position. In fact it is doubtful if all the erudite arguments of Adams, Jefferson and Wilson are as convincing as the reflections of Franklin. His realism saved him from some of their more extreme contentions, yet before the ultimate translation of Franklin's diagnosis into completed fact it seemed necessary for some one to explain and justify the American claims and to place them on a legal and constitutional foundation.

II

This demand was met with varied and comprehensive skill during the years 1774 and 1775. Declarations and affirmations gave way to elaborate legal defenses of the colonies' exclusive right to legislate for themselves under any and all circumstances. The first exposition of the idea of equality

²⁴ *Ibid.*, vol. v, pp. 324, 454.

²⁵ *Ibid.*, vol. vi, pp. 312-13.

²⁶ L. H. Boutell, *The Life of Roger Sherman*, pp. 61-62. See also J. P. Boyd, "Roger Sherman: Portrait of a Cordwainer Statesman," *New England Quarterly*, vol. v, pp. 221-36.

of status to be considered is that written by James Wilson. His tract, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, although published in August, 1774, was said by him to have actually been written during 1770. If this be true, it deserves even more credit than it otherwise would get on the ground of its lucidity and learning. The point of view differed somewhat from those of Jefferson or John Adams, which will be set forth presently, in that its approach was more legal, depending less on the *contra mores bonos* form of argument. Wilson announced, somewhat defensively, that he had approached the problem without preconceptions and with a sincere desire to find a dividing line between the powers of parliament and those belonging to the colonies.

In order to satisfy this desire Wilson attempted a flank attack by adopting a hedonistic approach as the best means of discovering constitutional facts. "The happiness of the society", he said, "is the first law of government." The relevance of this postulate became evident by his inquiry whether it would "increase the happiness of America if Parliament has complete authority." As might be expected, he concluded that the full assumption of parliamentary power would not increase American happiness. To him it seemed unquestionable that the "people of England would suffer less if the Commons were made independent of them than the Colonies if Parliamentary authority" was extended over them.²⁷ By way of proof, he pointed out the various constitutional securities which the people of England had against the people who represented them in parliament. Since the colonists did not have these securities, they did not owe the same allegiance to that body. Having introduced his argument with a little hedonism, some constitutional history, and a refutation of the doctrine of virtual repre-

²⁷ *Works of James Wilson* (Andrews ed.), vol. ii, pp. 508-9.

sentation, Wilson, equipped with the formidable weapons of legal knowledge, came to grips with his central problem.

For him it was "repugnant to the essential maxims of jurisprudence, to the ultimate end of all governments, to the genius of the British Constitution, and to the liberty and happiness of the colonies that they should be bound by the legislative authority of the Parliament of Great Britain." This contention he sustained by what he regarded as proof furnished in numberless "books of law."²⁸ Moreover, beyond the weight of books were various analogies and precedents such as Ireland, Gascony, Calais, and Guienne. In the case of the first he undertook to show that as far back as the second year of Richard III the courts had held that English statutes did not bind the Irish because they did not send knights to parliament, but he neglected to say that in the next term of court the judgment was reversed.²⁹ Concluding from the first judgment that parliamentary authority was derived solely from representation, Wilson next declared that the American colonies were therefore not bound to submit to parliamentary control.³⁰ This conclusion, he felt, was clinched by the Jamaica case of *Blankard and Galdy* wherein Lord Chief Justice Holt had held that acts of parliament and the statutes of England were not in force in that island. Later on Holt was credited with the further application of this doctrine by affirming that the laws of England did not apply to Virginia.³¹ To these decisions Wilson appended what to him was the logical deduction, that the colonies were not bound by parliamentary statutes even when they were expressly named in such

²⁸ *Ibid.*, pp. 526-27. For a summary of Wilson's legal theories see R. G. Adams, *Pol. Ideas of the Amer. Rev.*, ch. 7.

²⁹ Schuyler, *Parliament and the British Empire*, pp. 63-64.

³⁰ *Works of James Wilson*, vol. ii, pp. 528-29.

³¹ *Ibid.*, pp. 529-30.

acts. In this respect he parted from the view of one of his great masters, Coke, who held the opposite doctrine, admitting that colonies could be bound legally when they were named.

Having reached the conclusion that parliament had no right to legislate for the colonies in any case whatsoever, Wilson turned to defend himself against any charge of advocating complete separation. The denial of legislative authority, he said, was not at all inconsistent with the connection that ought to exist between the colonies and Great Britain. This could come through the king. Just as the people of Ireland and other outlying portions of the British dominions had from an early date been subjects of the king, so were the Americans, and to him alone did they owe allegiance.³² The people of England could have no lawful dominion over their fellow-subjects in America, but the king of England was also king of America. Thus the two parts of the empire would be linked by the legal prerogative of the crown rather than by the authority of parliament.³³

Although the *Considerations* represented Wilson's scholarly contribution to the problem of constitutional relationship, it was not his sole word on the subject. In January, 1775, in his *Speech in the Convention of the Province of Pennsylvania*, he contended that the rights of the colonists had been invaded by regulations of their internal polity and that colonial resistance was justified by the spirit of the British constitution which had been so completely violated.³⁴ He maintained that the "intolerable acts" were unconstitutional, unwarranted by the common law and therefore void. The crown could not lawfully alter the constitution of Massachusetts, nor could parliament close the port of

³² *Ibid.*, p. 534 *et seq.*

³³ *Ibid.*, p. 542.

³⁴ *Ibid.*, p. 548.

Boston or quarter troops upon the inhabitants. Under these unlawful circumstances the people had a right to resist by the letter as well as the spirit of the constitution.⁸⁵ Wilson's conclusion, then, was the same here as in the *Considerations*: acts of parliament binding the colonies without their consent were void.

His rôle in the Continental Congress was not especially distinguished. During the troublesome months of 1775 he contributed nothing further. In January, 1776, he supported the motion "that the Congress may expressly declare to their Constituents and the World their present Intentions respecting an Independency."⁸⁶ A month later he brought in an "Address to our Constituents which was very long, badly written and full against Independency (Wilson perceiving the Majority did not relish his Address and Doctrine never thought fit to stir it again)."⁸⁷ The "Address" did, however, make some positive statements about colonial rights. "*That all power was originally in the People—that all the Powers of Government are derived from them—that all Power, which they have not disposed of, still continues theirs—are maxims of the English Constitution, which, we presume, will not be disputed.*" These rights, it was maintained, had been invaded by the Declaratory Act and other unconstitutional acts of the British legislature. The Congress, which had been charged with unconstitutionality, aimed only at the "Defence and Re-establishment of the Constitutional Rights of the Colonies", that is, government by their own representatives. There was, he said, no desire for independence but merely for the preservation of

⁸⁵ *Ibid.*, p. 556 et seq.

⁸⁶ Burnett, *Letters of Members of the Cont. Cong.*, vol. i, p. 304.

⁸⁷ *Ibid.*, p. 348. Cf. *Journals of the Continental Congress*, vol. iii, p. 146 n. Wilson later told Madison that the "Address" was meant to lead the public toward independence, since he saw that it was inevitable. He supported independence on June 24, 1776.

the colonists' rights as Englishmen. The Commons had violated the fundamental law; let them cease to exercise arbitrary power and the perpetuation of the empire would be guaranteed.⁸⁸

In interesting contrast to Wilson's arguments was Jefferson's advocacy of the doctrine that the king was the only constitutional link of empire. The reasoning of the former, as we have seen, was direct and grounded on constitutionalism, while the latter secured his effects as much by inference as by positive proof. Jefferson, acquiring his learning piecemeal and after the manner of a dilettante, was the master of varied and curious information which might at any time be brought into play on the imperial question. He was more inclined to natural law than Wilson, and although he had studied Coke and the reporters in whose pages the law of nature had little or no place, he had also explored the regions of philosophy where he had come into contact with that most convenient source of appeal. In the few cases which he argued before the Revolution there was considerable reference to the law of nature, both in its indicative and imperative character. It is no cause for wonder, then, that when he brought his facile pen and his subtle mind to bear upon the imperial problem, he turned to a law that was above all human law, whether statute or common.

Jefferson's first important statement on the constitutional problem of the colonies occurs in the "Resolutions of the Freeholders of Albemarle County", drawn up July 26, 1774.⁸⁹ Therein he declared that

the inhabitants of the several *states* of British America are subject to the laws which they adopted at their first settlement, and

⁸⁸ *Journals*, vol. iii, pp. 134-46. For similar expressions see Burnett, *Letters*, vol. i, p. 349.

⁸⁹ *Writings of Thomas Jefferson* (Ford ed.), vol. i, pp. 418-19.

to such others as have been since made by their respective Legislatures, duly constituted and appointed with their own consent; that no other Legislature whatever can rightly exercise authority over them; and that these privileges they hold as the common rights of mankind, confirmed by the political constitutions they have respectively assumed, and also by several charters of compact from the Crown.

Jefferson's defense of the rights of men rather than those of Englishmen, and his dependence upon nature rather than the constitution, marked off this resolution from the generality. The same characteristics were to appear again in his *Summary View of the Rights of British America*, written as a guide to Virginia's representatives to the Continental Congress of 1774, but never officially used.

Perhaps before analyzing Jefferson's treatment of the legal position of the colonists, it may be of value to summarize briefly his own story of how he came to take his stand.⁴⁰ From the very beginning, he said, he took the ground which alone seemed "orthodox or tenable, . . . that the relation between Great Britain and these colonies was exactly the same as that of England and Scotland after the accession of James and until the union, and the same as her present relations with Hanover, having the same executive chief but no other political connection." In this doctrine, however, he was never able to get anyone to agree with him but George Wythe, the dean of Virginia lawyers. Peyton Randolph, the Lees, and others had "stopped at the half-way house of John Dickinson who admitted that England had a right to regulate our commerce, and to lay duties on it for the purposes of regulation, but not of raising revenue." For this ground, he concluded, there was no real

⁴⁰ *Ibid.*, pp. 12-13. For Jefferson's education see Gilbert Chinard, *Thomas Jefferson, the Apostle of Americanism*, p. vii, and bk. i, ch. 2; and *The Commonplace Book of Thomas Jefferson* (Chinard ed.).

foundation either in the charters, in any acknowledged principles of colonization, or in reason.

Jefferson began the *Summary View* by recalling that the Saxon ancestors of the British had emigrated from their native land, and no authority over them had ever been exercised by the country from which they departed. By analogy, he asked, why should the British government exercise any authority over the American colonists. Although Great Britain had assisted the settlement of America, parliament was not thereby entitled to arrogate to itself any legal supremacy over the colonies. As soon as the settlements were established in America, the people adopted the common law of England and continued their union with the mother country by submitting to the "same common Sovereign who was thereby made the central link connecting the several parts of the empire."⁴¹

Having placed the problem in its historical setting, Jefferson next protested against parliamentary restraints on the colonists' natural right to trade with any part of the world. By several acts of parliament during the reign of Charles II the Virginians were shown "what hopes they might form from the justice of a British Parliament, were its *uncontrouled power admitted* over these states." Beware therefore, he warned, of parliamentary despotism. Various acts, especially those passed during the reign of George II, had shown its quality. Yet all such acts, Jefferson declared, were void because under natural law the "British Parliament had no right to exercise its authority over us."⁴²

Usurpation of power, however, had not been confined to the realm of trade and commerce but had extended to the regulation of internal affairs. The Sugar Act, the Stamp Act, the Declaratory Act, the Townshend Acts, the act sus-

⁴¹ *Writings of Jefferson*, vol. i, pp. 430-31.

⁴² *Ibid.*, pp. 432-34.

pending the New York assembly, and the Boston Port Bill were all usurpations of the right of the colonists to regulate their own internal polity, in so far as they were "acts of power, assumed by a body of men, foreign to our constitutions and unacknowledged by our laws."⁴³

Jefferson next turned to the king, upon whom he had already served notice "that he is no more than the chief executive of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government."⁴⁴ He reminded the king that it was time for him "to resume the exercise of his negative power, and to prevent the passage of laws by one legislature of the empire, which might bear injudiciously on the rights and interests" of another part of the same empire, even though the exercise of the veto power had long been discontinued. At the same time he warned the king, as well as his readers, that the use of the veto could not justify its abuse with reference to the acts of the colonial legislatures, or, more particularly, in the matter of dissolutions. "From the nature of things every society must at all times possess within itself the sovereign power of legislation." When assemblies are dissolved, he continued, sovereignty reverts to the people as of right.⁴⁵ In conclusion he pictured the colonists as a free people claiming their rights. It would not, therefore, be wise for the king to persevere in allowing one part of the empire to sacrifice the rights of another. Let no act be passed by one legislature infringing the rights of any other. The colonies do not wish to separate, but let it not be proposed that their properties within their own territories should be taxed or regulated by any power on earth

⁴³ *Ibid.*, p. 434 *et seq.*

⁴⁴ *Ibid.*, p. 429.

⁴⁵ *Ibid.*, pp. 440, 443.

save their own legislatures duly and lawfully elected with their own consent.⁴⁶

From the "Sage of Monticello" it is altogether natural to turn to his equally important contemporary, John Adams, whose ideas on the imperial relationship closely resembled those of his great rival of later years. Such a similarity is to be expected when we realize that both of them received largely the same type of legal training. The chief difference between the two men consisted in the fact that Adams's participation in the controversy with Great Britain was of far longer duration than Jefferson's, and as a result, it is possible to discern some evolution in his point of view.

From the outset Adams steadily interpreted Coke's common law to mean common right, and common right to mean natural right, which in turn was supported by natural law, so that in the final analysis he endowed the common law with the principles of natural law. With such sanction, elaborated by other weighty authorities, he could protest against any activity of the British parliament which hindered the freedom of the colonies. In the *Dissertation on the Canon and Feudal Law*, written in 1765, he set up an abstract basis for his theory of law and government by expressing his belief in the potency of abstract rights over and above positive law. British liberties, he said, are original rights, and the foundation of British laws may be discovered in the frame of human nature.⁴⁷ His authorities for such a theory were the "Brookes, Hampdens, Vanes, Seldens, Miltons, Nedhams, Harringtons, Nevilles, Sidneys, Lockes", and Robertson, Kames, and Rousseau, which indicated that by this time he had supplied an earlier lamented deficiency in natural law. In the light of such a theoretical

⁴⁶ *Ibid.*, pp. 446-47.

⁴⁷ *The Works of John Adams* (C. F. Adams ed.), vol. iii, p. 44 *et seq.* For an appreciation of Adams's ideas see R. G. Adams, *op. cit.*, ch. 5.

basis for his point of view Adams' contribution to the Stamp Act controversy may be largely anticipated. Privately he grounded his arguments against that act on the fact that the colonists had never consented to it.⁴⁸ Publicly, in the "Instructions of the Town of Braintree to their Representatives", he stated that the Stamp Act was unconstitutional because it tended to divest the colonists of their most essential rights and liberties, since it was a recognized fundamental principle of the British constitution that no freeman should be taxed without his consent nor be tried except according to the law of the land. Therefore the Stamp Act, which violated this principle both by levying a tax and providing that breaches of the act should be tried in the admiralty courts, without jury, was repugnant to the constitution, Magna Carta and the common law.⁴⁹

In the same vein he wrote a series of letters over the pseudonym of the *Earl of Clarendon* in which he continued to lay the theoretical foundation for his imperial constitution. He argued that as the Star Chamber Act of Henry VII was unconstitutional, since it was contrary to Magna Carta, so was the extension of admiralty jurisdiction over the colonies.⁵⁰ His own principles in government, he said, were founded in law, liberty, and justice, and he was not to be seduced from the law and the constitution. The gallant struggle of the colonists was founded "in principles so indisputable in the moral law, in the revealed law of God, in the true constitution of Britain."⁵¹ The colonists had a deep knowledge of the British constitution; they knew "the true constitution and all the sources of liberty in it, as well as in

⁴⁸ *Works*, vol. ii, pp. 158-59.

⁴⁹ *Ibid.*, vol. iii, p. 465 *et seq.*

⁵⁰ *Ibid.*, p. 471. The letters were occasioned by an article in a London paper over the name of Pym.

⁵¹ *Ibid.*, p. 472 *et seq.*

the law of nature, which is the one principle foundation of it."

With this Adams entered into a discussion of the meaning of the British constitution. It was not the practice of parliament or the judgments of the king's courts or even custom. Some indeed had defined it as the whole body of laws. But whatever definitions were offered, Adams was able to say that he was at no loss in regard to the real meaning and end of the constitution: the end, use and drift of the British constitution was liberty. It was grounded upon the principle "that the meanest and lowest of the people are by the unalterable, indefeasible laws of God and nature" free and equal with nobles or king. The drift of the constitution had been to preserve this equality and the necessary liberty which went with it, the two forming the fundamental bases of the constitution.⁵² Later in 1766, Adams entered into a short controversy with Jonathan Sewall, in which he denounced Bernard's conduct as totally unconstitutional.⁵³

Two years afterward Adams translated these maxims into the formal "Instructions of the Town of Boston to their Representatives" and extended the principles into what he considered the constitutional relation of England and America.⁵⁴ In the "Instructions", which were inspired by the seizure of John Hancock's vessel, Adams said comparatively little concerning the constitution but he did talk much about rights. In words which Hutchinson thought "a singular manner of expressing the authority of parliament" he emphasized the fixed resolution of the colonists to maintain loyalty to the king and "due subordination to the British parliament, as the supreme legislative in all cases of necessity, for the preservation of the whole empire." In these words

⁵² *Ibid.*, p. 477 *et seq.*

⁵³ *Ibid.*, p. 488 *et seq.*

⁵⁴ *Ibid.* no. 501-A: Hutchinson. *History*. vol. iii, pp. 193, 489-91.

it is clear that John Adams conceded to parliament no inherent power over the colonies; in fact his words are a rather striking anticipation of his resolution at the Continental Congress in 1774.

The year 1769 brought similar "Instructions" to the representatives wherein Adams reiterated his doctrines on the constitutional rights of the colonies.⁵⁵ Bernard's projected attack on the Massachusetts government was denounced as a flagrant violation of the rights of British subjects. British revenue and judicial legislation was again charged with contravening the constitution and that fundamental statute, Magna Carta. During the succeeding five years John Adams contributed little or nothing to the questions at issue between England and America. He was engaged for some time in the winter of 1772-1773 in a controversy with William Brattle on the independence of the judiciary, but its chief importance was educational. He acquainted himself more fully with a wide variety of legal sources and was therefore better armed for the controversial struggle to come.

The year 1774 brought forth as has already been seen the most significant contributions to the pre-military struggle with Great Britain, and it is doubtful if any tracts had either the intellectual power or the political value of the *Novanglus Letters* of John Adams. In addition to the stimulus from parliamentary policy he was inspired by personal controversy with a man of redoubtable knowledge and skill. Daniel Leonard in his *Massachusettensis Letters* not only wrote in behalf of parliament, he also drove John Adams to produce an unsurpassed defense of the colonial cause.

After a few preliminary flourishes Adams stated his thesis by affirming that the colonists knew that parliament had no authority over them, "excepting to regulate their trade, and this not by any principle of the common law, but merely by

⁵⁵ *Works*, vol. iii, pp. 505-10.

the consent of the colonies."⁵⁶ He continued with the thrust that the *British Empire* was a term of pamphlets and papers but not known to the common law, and began to marshal his forces of defense.⁵⁷

I would ask [he said] by what law the parliament has authority over America? By the law of God, in the Old and New Testament, it has none; by the law of nature and nations, it has none; by the common law of England, it has none, for the common law and the authority of parliament founded on it, never extended beyond the four seas; by statute law it has none, for no statute was made before the settlement of the colonies for this purpose; and the declaratory act, made in 1766, was made without our consent, by a Parliament which had no authority beyond the four seas. What religious, moral, or political obligations then are we under to submit to Parliament as a supreme legislative? None at all.

In the fourth *Letter* Adams attempted to find historical justification for his extreme stand, with the result that he denied what earlier Whigs had admitted. Especially did he deny that America had ever generally acknowledged the authority of parliament. Massachusetts and Virginia, he said, had both protested against the Navigation Acts, and from that time down to 1774 the general sense of the colonies had been that "the authority of parliament was confined to the regulation of trade, and did not extend to taxation or internal legislation." Although the colonies considered themselves as connected with Great Britain, they had never thought that parliament was the supreme legislature over them, since its authority was limited to trade and to matters which affected all the colonies. So far as internal affairs were concerned, no authority had ever been allowed, and

⁵⁶ *Ibid.*, vol. iv, pp. 32-33. The full title is *Novanglus: or A History of the Dispute with America, from its origin, in 1754, to the present times.*

⁵⁷ *Ibid.*, pp. 37-38.

acts of parliament for regulating internal polity were in no sense familiar or constitutional. On the other hand, parliamentary regulation of trade had always been conceded voluntarily. The real sovereign over the colonies, then, was not parliament, but the king, to whom the Whigs acknowledged a subordination "in as strict and strong a sense as the Tories."⁸⁸

He continued the same aspect of his argument a little later by saying that "from the necessity of a case not provided for by common law . . . America has all along consented, still consents, and ever will consent, that Parliament, being the most powerful legislature in the dominions, should regulate the trade of the dominions." But he was careful not to concede any inherent right to parliament to do this, for he immediately stated that the authority of parliament to regulate colonial trade was founded upon the consent of the colonies, "not upon any principle of common or statute law; not upon any original principle of the English constitution; not upon the principle that Parliament is the supreme and sovereign legislature over them in all cases whatsoever."⁸⁹

Having driven home so steadily the voluntary subordination of the colonies in matters of trade while denying any legal right of parliament to bind them, Adams developed another line of theorizing, namely, a discussion of the constitutional organization of the British realm and dominions. The colonies were not part of the British Empire, because the British government was not an empire but a limited monarchy; indeed, it might almost be called a republic. The question, then, should be, Adams argued, whether the colonies were a part of the kingdom of Great Britain. Clearly they were not, therefore the supreme power of that kingdom

⁸⁸ *Ibid.*, p. 47 *et seq.*

⁸⁹ *Ibid.*, pp. 99-100.

was not supreme over them. Further proof of the lack of that supremacy could be adduced by the fact that the colonies had no representation in the governing body.⁶⁰

From this Adams reverted to the history of Virginia, Maryland, and New England legislative independence.⁶¹ Admitting that the Massachusetts legislature had twice acknowledged the supremacy of parliament, this was not to be taken too seriously because it was directly repugnant to a multitude of other votes, by which that supremacy was denied. The people of the colonies have learned, he said in effect, what they did not appreciate when they first protested against parliamentary taxation while admitting parliamentary legislative sovereignty, that the distinction between legislation and taxation has no validity in a constitutional discussion.

What then was to be the constitutional relation of Great Britain and the colonies? The bond was to be found in the king. There was no absurdity, he argued, in the idea of a personal union. The colonists owed allegiance "to the person of his majesty, King George, whom God preserve." Yet it should be remembered that allegiance was due universally both from Britons and from Americans "to the person of the King, not to his crown: to his natural, not his politic capacity."⁶² It could be said in favor of this constitutional relation that it would guarantee the blessings of the English constitution. The provincial assemblies had exercised every power of the house of commons and this they could continue to do were the colonies linked to Great Britain only through the king. If parliament were supreme

⁶⁰ *Ibid.*, pp. 106-107.

⁶¹ *Ibid.*, pp. 108-113.

⁶² *Ibid.*, pp. 113-114. The revolutionary settlement of 1688 in England, he said, did not extend to Massachusetts. William and Mary became rulers there through the Charter and the laws of the province.

the colonies would be under a complete oligarchy or aristocracy not under the British constitution.⁶³

Again, Adams sustained his declarations by appeal to historical analogy and to metaphysics. When a man left the kingdom of Great Britain lawfully he derived his laws thereafter "not from Parliament, not from the common law, but from the law of nature, and the compact made with the king" in the colonial charters. America had never been annexed to the realm; for when settlement took place there were three realms, England, Scotland, and Ireland. Then Adams made a curious admission for a man who denied any rightful power over the colonies to parliament. No act of parliament, he said, ever annexed America to the realm of England, therefore America was not under the supremacy of parliament. Nevertheless if America was under the king but not under parliament it must be remembered that the king was not absolute. He had duties as well as rights and must live up to his part of the contract; but Adams anticipated no danger from this source, and he once more reverted to his declarations against parliament, stating that the Americans recognized that by the common law and by the English constitution parliament had no authority over them. They did not, he again insisted, deny that parliament might make laws binding the colonies in matters of trade. Internal independence was totally compatible with an external dependence where that dependence was desirable, practical, and voluntary.⁶⁴

In the latter part of the *Novanglus Letters*, Adams elaborated his case by references to Wales and Ireland, with a heavy dependence upon Coke's somewhat conflicting *dicta* as to the relation of those territories to England.⁶⁵ Differing

⁶³ *Ibid.*, pp. 117-18.

⁶⁴ *Ibid.*, p. 122 *et seq.*

⁶⁵ *Ibid.*, pp. 132-141, 160-5.

with Coke on the position of Wales, Adams declared that before its conquest Wales gave feudal allegiance to the king of England and thereafter to the crown until its formal annexation to the realm under Henry VIII. In regard to Ireland he felt that Coke's statement that parliamentary statutes bound Ireland if she were specifically named was wholly arbitrary and groundless " unless Ireland was a conquered territory or had consented to be bound. Since America was in Adams' eyes neither a conquered country, nor one which had consented to be bound, there was no basis for admitting the supremacy of parliamentary acts. Furthermore, he thought that Coke had intimated that representatives had been and ought to be called from Ireland to the English parliament when Ireland was to be included in the statutes. Adams finally concluded his " fatiguing ramble " by drawing upon the analogies of the Channel Islands, Durham and Chester, all of which furnished precedents to help him prove his point.⁶⁶

Meanwhile he not only expressed his ideas in controversy, but he wrote his legal theories into colonial resolutions, and for the first time clear-cut official declarations caught up with philosophical *apologiae*. The fourth resolution of the Continental Congress declared,

That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances cannot be properly represented in the British Parliament, they are entitled to a free and executive power of legislation in their several Provincial Legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such a manner as has been heretofore used and accustomed. But, from the necessity

⁶⁶ *Ibid.*, p. 169 *et seq.*

of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are, *bona fide*, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America, without their consent.⁶⁹

The view expressed here was backed up by further statements of rights as defined in the common law, the English constitution and the charters. As before, he made the colonial claims very lawful, illustrating his own favorite thesis drawn in part from Harrington that "good government is an empire of laws."

III

In addition to the great triumvirate there were a number of lesser contributors who denied that parliament had a legal right to legislate for the colonies. Of course the most spectacular was he to whom the words of Dryden apply:

A beardless chief, a rebel ere a man,
So young his hatred to his prince began.

That Alexander Hamilton had a great deal to offer concern- in the constitutional relationship which he believed to exist between the colonies and the mother country was not to be expected. Nevertheless in his *The Farmer Refuted* of 1775, this eighteen-year-old school boy showed as much ability to pick out historical precedents and as much argumentative power as many of the veteran pamphleteers. Nor was he completely demolished in his controversy with Seabury who, everything considered, was the ablest of the Tory controversialists.

⁶⁹ *Journals of the Continental Congress*, vol. i, pp. 68-69. For authorship, see footnote on p. 63.

In the *Full Vindication* written in November, 1774, he began by describing those who wished to see their fellows enslaved as enemies to the natural rights of mankind. These rights supported by the fundamental principles of the British constitution entitled the Americans to freedom. Since the colonists had not, by any act of theirs, empowered the British parliament to make laws for them it followed that the pretensions of that body were contradictory to the law of nature, subversive of the constitution, and destructive of the charters and therefore without just authority.⁶⁸ "Give me", he concluded, "the steady, uniform, unshaken security of constitutional freedom . . . the right to be tried by a jury of my own neighbors, and to be taxed by my own representatives only."

In *The Farmer Refuted* Hamilton depended less upon the constitution and the charters than upon the laws of nature. Seabury had concluded in his skillfully written tracts of late 1774 that parliament constitutionally was the sovereign legislature of the whole empire, although he conceded that expediency might recommend granting considerable self-government to the colonies. Under these circumstances Hamilton wisely shifted ground and advised his learned opponent to apply himself without delay to the study of the law of nature, through the writings of Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui. Since the British constitution was susceptible of a dual interpretation, being employed by the defenders as well as the opponents of parliament, he turned to a more abstract norm. God has constituted, he said, "an eternal and immutable law", the law of nature which is superior, binding, and coeval with mankind and from which human laws derive their authority, mediately or immediately. On this natural law the natural rights of mankind depended. Since absolute rights were invested in in-

⁶⁸ *The Works of Alexander Hamilton* (Lodge ed.), vol. i, pp. 4, 6-7.

dividuals by the immutable laws of nature the primary end of human laws was to regulate and maintain these rights.⁶⁹

Following these reflections Hamilton turned to the relation of the colonies to England. Dependence on the king, he said, was both "just and rational." The charters, constitution, and law of nature as well as the authority of Coke sustained the idea of allegiance to the person of the king but subjection to parliament was an entirely different matter.⁷⁰ The right of parliament to govern the colonies could not be accounted for at all since it was the birthright of every Englishman, established by Magna Carta, to participate in making the laws which bound him. Since the colonists had not given their consent parliament had no right to govern them.⁷¹ Although the colonists had an inherent right to govern themselves, it did not follow that they were not a part of the empire. They were free-born subjects of the king, the only sovereign of the empire. The parliament of Great Britain was supreme in its sphere, the colonial legislatures in theirs and the king was the bond of unity.⁷² To his opponent's contention that colonial claims to legislative independence were "unsupported by any authoritative record of the British constitution, ancient or modern" Hamilton returned the argument, unanswerable in that day, that the foundation of the constitution rested upon natural rights.⁷³

At the same time he considered the charters as having a power superior to that of parliament and as proof that the

⁶⁹ *Ibid.*, p. 62 *et seq.*

⁷⁰ *Ibid.*, pp. 66-68.

⁷¹ *Ibid.*, pp. 74-75. Like John Adams Hamilton conceded that parliament might regulate trade.

⁷² *Ibid.*, pp. 78-79, 86. In his "Remarks on the Quebec Bill" he expressed doubts about conceding the king too much power. *Works*, vol. i, pp. 183-84.

⁷³ *Ibid.*, pp. 89-90.

king was the only bond of union.⁷⁴ Elizabeth and James I, acting within their power as proprietors of the land of England and America, issued charters giving the recipients the right to enjoy all the privileges that would have been theirs had they remained in England. If the royal power in granting these charters had been a usurpation, parliament would have condemned it as unconstitutional. After justifying in this way the power of the king alone to bind the colonies, Hamilton seemed to remember that New York like the majority of the colonies, had no charter. Thereupon he admitted that for the colonies to enjoy the right of self-government charters were not necessary; the sacred rights of mankind were adequate protection.⁷⁵

James Iredell of North Carolina appears as another advocate of the idea of equality of status. In an "Address to the Inhabitants of Great Britain", while mainly concerned with the right of colonial self-taxation, he argued that each legislature had its own sphere of activity and that the king was the executive head of all.⁷⁶ The right of the colonists to self-government he found in the British constitution and the law of God, with more special emphasis upon the former which, he firmly believed controlled parliament. In his "Principles of an American Whig" Iredell sustained the same creed,⁷⁷ as he did again in June, 1776, in his "Essay" in defense of American claims, although in the latter case he concentrated on the exclusive right of internal legislation rather than on general legislative freedom.⁷⁸

Meanwhile the Continental Congress had come into exist-

⁷⁴ *Ibid.*, p. 93 *et seq.*

⁷⁵ *Ibid.*, p. 113.

⁷⁶ G. L. McRee, *Life and Correspondence of James Iredell*, vol. i, p. 205 *et seq.*, especially pp. 218-19.

⁷⁷ *Ibid.*, p. 245 *et seq.*

⁷⁸ *Ibid.*, p. 283 *et seq.*

ence and during the autumn of 1774 a number of its members, without offering anything like systematic expositions, did explicitly deny parliament's legislative power over America. Notable among these were Thomas Lynch of South Carolina, Samuel Ward of Rhode Island, and Edmund Pendleton of Virginia. Lynch specifically stated that parliament had no constitutional right to regulate trade or anything else, since if a right to regulate was allowed in one case it might be extended to all matters.⁷⁹ Samuel Ward, arguing on the basis that every man was born free to choose his own form of government, held that the colonies were bound only by their charters and no acts of parliament could bind them since they were exclusively under the king.⁸⁰ Pendleton claimed for the colonies complete legislative power and suggested that the solution to the problem of trade regulation lay in treaties between Great Britain and the colony legislatures. His denial of parliamentary power was founded "on the principle of the British Constitution."⁸¹

At the same time scores of freeholders were supporting a more revolutionary stand than had been maintained before, except by a few. A Philadelphian, addressing "the freemen of America" on May 18, 1774, declared that the British parliament had violated the constitution in usurping supreme jurisdiction.⁸² Similarly some two weeks later a letter addressed "to all the English Colonies of North America" explained that it was a principle of the English constitution that Englishmen should be bound only by laws to which they had consented, and that this right was founded in the charters, the constitution, and nature.⁸³

⁷⁹ Burnett, pp. 64, 72.

⁸⁰ *Ibid.*, pp. 71-72.

⁸¹ *Ibid.*, p. 75.

⁸² *American Archives*, 4 ser., vol. i, pp. 335-36.

⁸³ *Ibid.*, pp. 377-78. This also came from Philadelphia.

In Virginia Thomson Mason, writing under the title of "British-American" in the *Virginia Gazette* in June and July, 1774, argued that parliament lacked power to legislate for the colonies and that the colonial legislatures were supreme in America.⁸⁴ Two sets of Virginia county resolutions put forward the same doctrine. The New-Kent County resolves held that Americans had all the rights of Englishmen, including the rights both of taxation and legislation since the two were inseparable; no distinction was made between internal and external legislation.⁸⁵ The freeholders of Fairfax resolved on July 18, 1774, that "the most important and valuable part of the *British Constitution*, upon which its very existence depends, is the fundamental principle of the people's being governed by no laws to which they have not given their consent by Representatives freely chosen by themselves." By their activity, it was further resolved, the British have violated their own constitution.⁸⁶

Elsewhere the same views received popular support. In New Jersey the Declaratory Act was declared to be unconstitutional.⁸⁷ In Delaware the freeholders resolved that no Englishman was bound by laws to which he had no consented.⁸⁸ Middlesex County, Massachusetts, declared that

⁸⁴ *Ibid.*, pp. 522, 541 *et seq.* See also Schlesinger, *Colonial Merchants*, pp. 367-68.

⁸⁵ *Am. Archives*, 4 ser., vol. i, p. 525.

⁸⁶ Rowland, *Life of Mason*, vol. i, pp. 418-27. Earlier in the controversy Mason had contented himself with general declarations in behalf of colonial rights, with particular reference to taxation. *Ibid.*, p. 318 *et seq.* In a case touching Indian slavery tried in 1772 Mason held that "all acts of the legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God. . . . All human institutions which contradict his laws, we are in conscience bound to disobey." *Virginia Reports* (Jefferson ed.), vol. i, pp. 60-61.

⁸⁷ *Am. Archives*, 4 ser., vol. i, p. 624. See also *ibid.*, p. 702.

⁸⁸ *Ibid.*, p. 658.

the province had not forfeited its natural and charter rights and that the "intolerable acts" infringed those rights. Suffolk County went still further, maintaining that the late acts violated the rights which the colonists had by the laws of nature, the constitution and the charter, and recognizing George III as the only rightful sovereign over Massachusetts.⁸⁹ This *modus operandi* was partially elaborated by a writer "to the inhabitants of New York", who in October, 1774, boldly stated that it had been fully proved "that the Assemblies or Parliaments of the *British Colonies in America* have an exclusive right" of legislation; and that the British parliament, so far from having a right to make laws binding the colonies in all cases whatsoever, had really no just right to bind the colonies at all. The exclusive right of self-government belonged to the colonies and the king comprised the only bond of union.⁹⁰

In England two prominent defenders of colonial rights came forward in 1774 and 1775 to argue along the lines indicated by Wilson, Jefferson and Adams, while a number of others drew the same conclusion on the basis of expediency rather than natural and constitutional right.⁹¹ Granville Sharpe in his *Declaration of the People's Natural Right to a Share in the Legislature* and John Cartwright in his *Ameri-*

⁸⁹ *Ibid.*, pp. 750, 776-77. Stamford County, Conn., resolved the same. *Ibid.*, p. 827. See also M. W. Willard, *Letters on the American Revolution, 1774-1776*, pp. 9-10, 12.

⁹⁰ *Am. Archives*, 4 ser., vol. i, p. 821 *et seq.* Similar pronouncements came steadily from the County of Hampshire, Mass. *Ibid.*, vol. ii, pp. 18 *et seq.*, 98, 248-50. See also *ibid.*, p. 274, where "A Freeholder of Hempstead" in an address "to the Publick" in April, 1775, denounced the Declaratory Act as contrary to the colonists' rights "both as men and Englishmen".

⁹¹ Clark, *British Opinion and the Amer. Rev.*, ch. 6; and the present writer's "English Imperial Thinking, 1764-83", *loc. cit.*, pp. 560-62, 564-66, 575 *et seq.*

can Independence the Interest and Glory of Britain considered that the constitutional organization of the empire had in it no place for a sovereign parliament. The first took his inspiration from Pufendorf and propounded the thesis that "law, to bind all, must be assented to by all" as a fundamental principle of law and politics. This natural law, however, was opposed by the "baneful" theory of parliamentary supremacy, a doctrine, which so far as it applied to America, was based on the Irish Declaratory Act, itself a "mere assertion." In defense of his claim that parliament's efforts to legislate for America had no foundation in the English constitution, Sharpe depended upon legal precedents. The common law, which is founded on reason, justice, and the laws of God, forbade parliament's control over America since the colonists were not represented in that body. The constitutional government of the colonies consisted of the king and the respective colony legislatures.

Less eloquent but more comprehensive were the arguments of Cartwright, who like Sharpe was interested both in imperial and domestic reform. He began with the declaration that parliamentary pretensions to the sovereignty of America were entirely without foundation. A knowledge of the constitution, the law of nature and the doctrines of Christianity proved, he felt, that the colonists were subjects only of the king. These fundamental principles guaranteed that the colonies were free, and independent of parliament. The English constitution in no sense justified the belief that the colonists were subjects of subjects as would be the case were the supremacy of parliament allowed. To support these contentions Cartwright appealed, as had Sharpe, not only to abstract principles but to legal precedents, history, and to the Irish analogy. In fact both men seemed to feel that the whole of English history, with one or two important exceptions, indicated that parliament was limited in its power by

the fundamental law of the constitution which was itself no less than an expression of divine justice.

With so uncompromising a stand taken by the colonists and their English allies and an equally unyielding position maintained by the British ministry it was no wonder an impasse prevailed. It was felt that the Americans would never recognize the legislative power of parliament, and that parliament would never relinquish its claim to such power. The climax to this situation came with the publication of *Common Sense* by the yet unknown Tom Paine. Where his pamphleteering predecessors had claimed this or that amount of self-government as the natural right of the colonists, always admitting some superintending power to Great Britain, Paine proclaimed an exclusively American government, with no connection with Great Britain, as a natural right of the American people.⁹²

That Paine did not stand alone in his views soon became evident. More legalistically, William Henry Drayton, long an advocate of moderation, reached the same conclusion in May, 1776. After reviewing the early constitutional history of South Carolina he catalogued the crimes of the British government. He drew an analogy between James II and the government of George III, recalling James' violations of the constitution, the fundamental laws, and the social contract. Similarly Drayton charged George III with having suspended the laws of New York and Massachusetts, levied money without consent, violated elections, kept a standing army and broken the contract. Following the analogy still farther, Drayton reminded his listeners of the resolution of

⁹² *The Political Works of Thomas Paine* (London, 1817), vol. i, pp. 33-34. See also John Carmichael's sermon, *A Self-defensive War Lawful* (Phila., 1775) in which the author maintained that war was justified by such invasions of the colonists' rights as had taken place. He further emphasized that the colonists were subjects of the king, not of parliament, else they "would have above 500 kings".

the Convention Parliament of 1688 whereby the throne of England was declared vacant, the resolution being only declaratory of the law of nature and reason. The throne of America, he concluded, is declared vacant on the same count.⁹⁸ Such a charge as this might also lead one to the suspicion that Drayton had seen the rough notes of the Declaration of Independence.

IV

The movement for independence, however, did not mature, as is well known, until the colonial leaders felt that conciliation was impossible. Before adopting a policy of separatism they had arrived at an interpretation of a British imperial constitution not far different from that incorporated in the Act of Westminster in 1931. Yet, notwithstanding this similarity, it should be remembered that the method of reaching such a conclusion differed fundamentally in the two cases. In concluding that the American colonies were united constitutionally to England only through the king, the colonial pamphleteers and their English allies of 1775 were attempting by inductive reasoning to make the condition fit their theory. Modern imperial statesmen, on the other hand, have provided a theoretical statement to describe an actual condition.

⁹⁸ Gibbes, *op. cit.*, p. 277 *et seq.* George Mason expressed almost identical ideas at about the same time. Rowland, *Life of Mason*, pp. 433-36.

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