FICTIONS

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I. INTRODUCTION

The amendments to the Constitution of the United States, to which we commonly refer as the Bill of Rights, were proposed by Congress on September 25, 1789, and became part of that Constitution on December 15, 1789. It was upon that ratification that the American revolution finally was completed; the amendments made explicit in the Constitution the premises of that revolution. The key terms in the previous two sentences are "Constitution," "revolution," and "Bill of Rights." Because we are celebrating political events which occurred in the last quarter of the eighteenth century, we should try to use those terms in the same sense that they were used at that time. The terms "Constitution," "revolution," and "Bill of Rights" had meanings for educated Americans in that quarter century which are not necessarily the same as the meanings with which we use those terms today.

Take the word "revolution." Most of us think of the American revolution as a war which commenced at Lexington, Massachusetts, on April 19, 1775, and which ended at Yorktown, Virginia, when General Cornwallis surrendered on October 19, 1781. That was not the eighteenth century usage of the word "revolution" among educated people. At that time, it primarily meant a change in the established order of things. True, most such changes in the established order of things were accompanied by—probably even caused by—a war. The term "revolution," however, referred not to the military outcome, which might simply have put the victor in charge of the same old structure of relationships in society, but to the new structure in those relationships.[1]

Take the term "Constitution." Most of us, when we hear that term, think of the American written Constitution enforced by the courts as law. In 1787 the term had been in use, however, for several hundred years to refer to something entirely different,

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[1] *See* COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2533 (2d ed. 1971).

namely, the appropriate boundaries, often vague, between the sovereign and his subjects.[2] In 1787, when the American written national Constitution was drafted, Englishmen had been struggling with the appropriateness of their constitution for several centuries, during which England underwent several revolutions. Americans, who had lived on this side of the Atlantic Ocean for a century and a half, had largely been spectators of those revolutionary events, rather than participants in them. Their happy situation as spectators, however, did not mean that they were ignorant of the issues of sovereignty which were being fought out in the British Isles.

Take, finally, the phrase "Bill of Rights." The eighteenth century use of this term was both specific and generic; it was specific in the sense that it originated as a reference to a specific English statute passed in 1689. It was generic in the sense that it referred, by 1789, to a theory of sovereignty which the 1689 statute was thought to reflect.[3] When, during the ratifying debates on the 1787 constitution, the Anti-federalists rallied under the banner of a bill of rights and forced the Federalists to propose one, they were less interested in the specific than the generic usage. It is that usage I propose to explore.

II. Seventeenth Century Sources of Legitimacy

In 1758, David Hume observed that all governments, whether despotic and military or free and popular, depend upon the good opinion of the governed.[4] Hume made this profound observation at a time when government on the western side of the Atlantic had been, relatively speaking, both free and popular for seven generations. During those same seven generations, the British Isles, in contrast, underwent periods of despotism and of civil war which tested the limits of public acceptance of the legitimacy of traditional theories of sovereignty. Appreciation of the uses in North America of late eighteenth century political vocabulary demands putting one's self in the position of those happy spectators who watched from afar the turmoil in the mother country.

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[2] *See* B. Bailyn, The Ideological Origins of the American Revolution 175-84 (1967).

[3] *See* G. Wood, The Creation of the American Republic 1776-1787, at 266 (1969); 1 J. Reid, Constitutional History of the American Revolution; The Authority of Rights 69-70 (1986).

[4] D. Hume, Essays and Treatises on Several Subjects *Of First Principle of Government* (1758).

Modern government came to England with the Norman Conquest.[5] The title "William the Conqueror" tells us the real source of Norman authority to impose such government. Norman political power came from the possession of superior force.[6] As Hume later observed, however, an elite minority could not in the long run maintain its ascendancy in the face of opposition from those governed. Thus, opposition to the Norman kings and their successors continued, culminating in the faceoff at Runnymeade on June 15, 1215, when King John, the Roman Catholic Bishops, and the Barons worked out a complicated set of legal fictions which served to legitimize royal sovereignty.

One legal fiction was that the monarch's right to govern had been confirmed by the Pope, as Christ's vicar on earth. Royal power to govern was legitimized by association with a source of power which, in the popular imagination, was more significant than force of arms. This fiction assumed that all rights were derived from the same spiritual source. The Magna Charta, after first acknowledging the special position of the Roman Catholic Church, continued with the statement that "[w]e also have *granted* to all the freemen of our kingdom, for us and our heirs for ever, all the underwritten liberties, to be had and holden by them and their heirs, of us and our heirs for ever."[7] The use of the language "we also have granted" confirms the fiction. Although King John used this rhetorical form, the reality was that the Bishops and Barons at Runnymeade commanded sufficient physical power to confront that of their Norman sovereign and assented to John's continuance in office on terms which they dictated. The Bishops and Barons, themselves a small minority in England, willingly embraced the fiction because their own special positions were also thereby legitimated. The Magna Charta says as much, putting in King John's mouth the following words: "All the aforesaid customs and liberties, which we have granted to be holden in our kingdom, as much as it belongs to us, towards our people of our kingdom, as well clergy as laity shall observe, as far

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[5] A comparatively sophisticated central government existed under the Anglo-Saxon kings which the Normans expanded and refined. *See* V. GALBRAITH, THE MAKING OF DOMESDAY BOOK (1961); DOMESDAY BOOK: A REASSESSMENT (P. Sawyer ed. 1985).

[6] William did in fact have a legitimate claim to the English throne. *See* D. DOUGLAS, WILLIAM THE CONQUEROR; THE NORMAN IMPACT UPON ENGLAND 169 (1964). Nonetheless, it took a military triumph for that claim to become reality. *See id.* at 176-77.

[7] Magna Charta, cap. 2 (1215), *reprinted in* N.J. STAT. ANN. Const. (West 1971) (emphasis added).

as they are concerned, towards their tenants."[8] The Magna Charta is a remarkably detailed code of laws on various subjects, all wrapped up in the fiction that the source of those laws is the king's exercise of authority of divine origin, confirmed by the church of Rome.[9] The fiction was not that God had created man with rights with which the sovereign could not interfere, but that God's vicar on earth recognized the sovereign's authority to grant or withhold rights. In theory, the king was the source of all law and even the Bishops and Barons, having empirically disproved the theory, continued to acknowledge the fiction.

By the late sixteenth century, when Englishmen began colonizing in the Western Hemisphere, disputes between the king and the church had seriously eroded the effectiveness of the Roman connection as a useful fiction for the legitimation of authority. The charters granted to various explorers and entrepreneurs by Henry VII, Elizabeth I, James I, and Charles I, authorizing colonization in their names, all commenced with the familiar announcement that each was sovereign by the Grace of God. Like the Magna Charta, colonization charters were couched in the form of grants of rights from a monarch exercising such dispensing spiritual authority.[10] Thus, the very titles of the leaders of colonial America to their positions of authority, like the titles of the Bishops and Barons at the time of the Magna Charta, depended on the same fiction. In England, however, by the early seventeenth century the fiction had been refined to accommodate the new reality that the forces aligned with Rome and the forces aligned with the English king opposed each other. For the Stuart kings, in particular, the refinement eliminated the Roman connection in favor of an assertion that their authority to rule was derived directly from God. It was from monarchs asserting this fiction that English colonial charters were received.[11] Thomas Hobbes was perhaps the leading expositor of a theoretical justifi-

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8 *Id.* at cap. 60.

9 *See id.*

10 *See, e.g.*, 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3783-89 (F. Thorpe ed. 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS] (First Charter of Virginia in 1606); 3 FEDERAL AND STATE CONSTITUTIONS 1846-60 (Charter of Massachusetts Bay in 1629); *id.* at 1677-86 (Charter of Maryland granted to Lord Baltimore in 1632).

11 THE POLITICAL WORKS OF JAMES I (C. McIlwain 2d ed. 1918); J.N. FIGGIS, THE DIVINE RIGHT OF KINGS 66-106, 137-76 (2d ed. 1965). *See generally* E. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 19-37 (1988) [hereinafter INVENTING THE PEOPLE] (discussing the elevation of kings by the governing elites to the status of spokesmen for the divinity).

cation for the new fiction in which the king, freed from the supposed constraints of the Roman church, became head of both church and state. Asserting that the Church of Rome was nothing more than the old Holy Roman Empire in disguise, he justified subjugation of the church to the nation-state, a state in which the fictional sources of all rights, in matters even of religion, were derived from a king who spoke directly for God.[12]

When the American colonists received their charters, the English Parliament had not yet emerged as a locus of sovereignty. In theory, it was no more than a collection of wise counselors, called at the king's pleasure to consult with him and propose laws which only he could promulgate, and to agree on behalf of the places they represented to grant him revenue. During the reign of James I, however, when colonization in North America was in its infant stages, the reality and the theory of the role of Parliament began to separate. While the king still proclaimed himself as the source of all rights and the authority for all law, he became increasingly dependent upon the members of Parliament in maintaining the good opinion of the country upon which his actual ability to govern depended.

Two new fictions were developed in the early seventeenth century to achieve that end. The first fiction was that members of Parliament were representatives of the people rather than counselors to the king.[13] The second fiction was that the king, as God's lieutenant, could do no wrong, although his ministers, bailiffs, or judges might occasionally misperceive the king's will.[14] In their representative capacity, the members of Commons could claim to speak for all subjects, although Commons was far from truly representative. But the representation fiction and the fiction that the king could do no wrong permitted the assertion, in the Petition of Right of 1628, that the king's subjects could not be taxed or confined by his ministers without "common consent

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12 *See* T. HOBBES, LEVIATHAN: PARTS I AND II 79-80, 241, 326-27 (1960).

13 E. MORGAN, INVENTING THE PEOPLE, *supra* note 11, at 38-54.

14 *Id.* at 53. A famous exchange between Charles II and Lord Rochester captured the distinction in a more lighthearted fashion. As a royal epitaph, Rochester once suggested:

> Here lies our sovereign lord the King
> Whose promise none relies on;
> He never said a foolish thing,
> Nor ever did a wise one.

OXFORD DICTIONARY OF QUOTATIONS 407 (2d ed. 1955). To which Charles replied: "This is very true; for my words are my own, and my actions are my ministers." *Id.* at 136.

by act of [P]arliament" and without "the process of law."[15] The fictions were carried a step further about that time when Commons began the practice of presenting to the House of Lords bills of impeachment of the king's ministers. Still, however, the source of all rights was God's lieutenant. Parliament merely began to assert that in some instances it knew the king's will better than he did.

The king's response to the assertion of rights, which his ministers must recognize even though he did not, was to refuse to convene a Parliament from 1630 to 1640. In the latter years, the necessity for restoring the good opinion of the country required that one be convened, and soon after it convened the parliamentarians forced the king to accept a Triennial Act which provided that Parliament would sit every three years whether he called them or not. By the device of impeachment, the self-proclaimed representatives of the people could, at least triennially, punish his ministers for misunderstanding his will. Thus, the first step was taken toward transferring accountability of governmental ministers from king to Parliament. Lord Coke summarized the new fictions in the oft-quoted aphorism "non sub homine sed sub Deo et lege." Coke has sometimes been associated with the assertions of a natural law jurisprudence but, if so, his jurisprudence still depended on the fiction of the divine authority for the exercise of sovereignty.[16]

The religious civil wars in England in the mid-seventeenth century placed enormous pressure on the fiction of divine origin of the sovereign's authority as the source of legitimation of the regime. They also exposed the fiction of representation, because when a Protestant Parliament came into being it simply stayed on from 1640 to 1653, carrying on a civil war against the nominal source of its authority to govern. Gradually purging 110 dissidents from its ranks, and thus, depriving of representation the geographic areas which had designated those dissidents, the Long Parliament first raised an army and eventually in 1649 deposed and beheaded their heretical king.[17] Interestingly, neither in the Long Parliament nor during the Commonwealth did the parliamentarians advance what we would today call a democratic

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15 3 Car. 1, ch. 4 (1628), *reprinted in* SOURCES OF OUR LIBERTIES (R. Perry & J. Cooper ed. 1978).

16 *See* C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 88-110 (1974).

17 *See* D. UNDERDOWN, PRIDE'S PURGE (1985); B. WARDEN, THE RUMP PARLIAMENT (1974).

justification for their actions. Issues like toleration of Roman Catholics would not be decided by majority vote of the people, but by their self-appointed and self-perpetuating representatives. In justification for their actions, the roundheads relied upon still another fiction. The newest fiction was that William the Conqueror's authority and that of his successors depended, not on conquest (which was the truth) and not on his legitimation by the Vicar of Christ (the older fiction), but on a contract between him and the people's representatives. If the king breached that contract, the people's representatives had a duty to depose him. If there was a people, it was the Parliament's so-called "New Model Army."[18] The roundheads' true source of authority, like that of William the Conqueror, was success in arms. But like William's successors on the throne, the roundheads needed more than this to persuade the mass of the population to submit to their government. There were obvious flaws in the roundheads' reliance on the sovereignty of the people, for if the people were sovereign they could depose Parliament, and it is likely that an actual majority in the kingdom had favored the king.[19]

An effort by the Levellers to promote an actual rather than fictional social compact—a proposed agreement of the people to be signed by every Englishman who agreed to transfer to his representatives specified but limited powers of government—was firmly rejected by the House of Commons as seditious. The roundheads' position was that once the fictional people conferred authority upon their fictional representatives in Parliament that authority was irrevocable. The representatives of the people thus could suppress heresy even if a majority in the kingdom was heretical. Oliver Cromwell did so, passionately and ferociously.[20]

The Leveller contractareans were soon put down. In 1653 Cromwell unilaterally dissolved the remnants of the Parliament elected in 1640 and proclaimed a new Instrument of Government, pursuant to which elections were held for a unicameral Parliament with a strictly limited franchise. Seeking a way to legitimate itself, this body created a new House of Lords and urged the restoration of a monarchy. The king, however, would be chosen by Parliament rather than by the hereditary hand of God.

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[18] So argued, among others, the influential parliamentary leader Sir Henry Vane. *See* H. VANE, A HEALING QUESTION (1656).

[19] *See* E. MORGAN, INVENTING THE PEOPLE, *supra* note 11, at 70-83.

[20] *Id.* at 20.

Cromwell accepted the kingly powers tendered, but declined the title.[21]

After Cromwell died in 1658, the surviving members of the Long Parliament, who first had been called to Westminster by the king eighteen years before and dismissed by Cromwell five years before, reassembled there. They struggled for two years to find a way to govern a country increasingly dissatisfied with the excesses of military dictatorship. In 1660 the Rump members restored those members of the 1640 Parliament who had been purged, and that body dissolved itself in favor of a Convention which it summoned into existence.

The Convention promptly restored Charles II to the throne. It also passed bills which confirmed the Magna Charta and the Petition of Right.[22] This reconfirmation, however, merely restored the fiction that the king alone was the locus of sovereignty and the source of rights. When Charles II called a new Parliament in 1661, the fiction of representation was temporarily interred. Its members disclaimed any legislative authority apart from the king, emasculated the Triennial Act, and restored the national Church of England with the king as its head. Charles II and his successor, James, failing to understand what Hume later explained, acted as if the fiction of their direct relationship with God was fact, and soon ran into trouble in dealing with their parliamentary counselors. Religious bigotry was the dominant opinion driving these English elects, and they reacted with alarm when Charles displayed a sympathetic attitude toward Catholics. Their alarm, however, did not immediately produce a resurrection of the fiction that Parliament represented the people. It would have been hard to make much use of that fiction as a way of assuring favorable opinion because the members of Parliament did not face an election from 1661 to 1679. Faced with the prospect that his Catholic brother might succeed to the throne, the Parliamentarians sought to change the succession, but Charles II would not agree, and between 1679 and 1681 he dissolved four Parliaments. It was in this climate that Algernon Sidney, who was hanged for treason in 1683, and John Locke, who escaped to Holland in 1682, began to develop a refined version of a fiction of representation. Locke's influential *Two Treatises of Government*, first published in 1698, but written earlier, was at bot-

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[21] *See* LEVELLER MANIFESTOS OF THE PURITAN REVOLUTION (D. Wolfe 2d ed. 1967); THE LEVELLER TRACTS (W. Haller & G. Davies ed. 1944).

[22] 3 Car., ch. 1 (1828); 7 *Statutes at Large*, 317-20 (1763).

tom a justification for parliamentary exclusion from the throne of Charles II's Roman Catholic brother, James.[23] Charles' steps in gerrymandering Parliament were so successful, however, that when he died in 1685 James succeeded to the throne challenged only by an abortive rebellion led by the Duke of Monmoth, Charles' bastard son.[24]

Unfortunately for James, his daughter Mary was married to William of Orange, who, like William the Conqueror and Oliver Cromwell, had the real rather than fictional source of sovereignty—an army with a proven record of success. Mary was next in line for the throne when a son was born to her father. The opponents of a king, sympathetic to Roman Catholics, encouraged William to spread the story that the child had not been born to the Queen, but had been smuggled into her bed. Acting on the fiction that he had to preserve God's true hereditary succession, William demanded that a new parliament, elected on the old apportionment plan, be called to determine the succession.[25] This ultimatum caused James to flee to France without calling a new parliament.

With the king out of the country, a "Convention" chosen in the manner William of Orange demanded, convened and, acting in the name of the people, declared that James had breached his fictional contract with it.[26] After declaring the throne vacant, this corporate embodiment of the people came up with an unusual blend of fictions, when it offered the throne not to Mary alone, who had a hereditary, and thus a divine claim, but to William as well. Therefore, the Convention attempted to blend in the throne both the fiction of the divine right of kings and the fiction that kings were selected by a social compact with the people. It was the government compact fiction which was most relied upon, however, because in offering the throne to William and Mary the Convention laid down conditions to which they had to assent. William and Mary accepted those conditions and ascended to the throne. Once they were in place, the Convention declared itself

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23 J. LOCKE, TWO TREATISES OF GOVERNMENT 45-66 (P. Laslett 2d ed. 1967).

24 *See* J. JONES, COUNTRY AND COURT: ENGLAND 1658-1714 (1978); J. JONES, THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISES 1678-83 (1961).

25 *See* THE EIGHTEENTH CENTURY CONSTITUTION 1688-1815 (E. Williams ed. 1970).

26 I use the pronoun "it," rather than "them," because this assertion of the new civil compact refers not to individual rights held by real persons, but to rights held collectively by the artificial construct, an elite group, one house of which was elected by a narrow and unequal franchise, embodying in its corporate self the ultimate source of sovereignty.

to be a parliament, and presented their conditions as a bill for the king's assent.[27] King William signed the bill on December 16, 1689 making it a statute.[28] That statute is the Bill of Rights, to which so many subsequent references were made in North America in the following century. The Bill of Rights, therefore, is the first physical manifestation of the theretofore entirely mystical, and even then entirely fictional, government compact.

The next year Locke's influential book, written earlier, was published.[29] His purpose seems to have been to legitimate a new constitution—a new order of things—in which king and parliament shared sovereignty. Locke wrote provocatively of man in a state of nature entering into a social compact, but made it quite clear that the dissolution of the government which had occurred with disturbing frequency during the religious wars did not restore that natural state. Society continued, the social compact continued, and representative elites who had power could undertake to act on behalf of all, including Jews and Catholics, women, children, and servants, who had never had a voice in the selection of those representatives. Moreover, members of those groups had no individual rights which the representatives of the fictional people in their collective sense were obliged to recognize. And, while kings formerly were restrained in theory, at first by their theoretical subservience to Rome and later by their own perceptions of God's will, the representatives of the people were never theoretically restrained in either manner. The fiction of the government compact was no more than a justification for the all powerful parliamentary state. As the Levellers had earlier discovered, efforts to act as if the fiction of the social compact was fact were suppressed as treason. Although the issue was later debated, the fiction of representation of the people in parliament was never carried so far as to require that members of Commons vote in conformity with the instructions of their borough or county constituencies.[30] For the vast number of disenfranchised persons, including overseas colonists, the fiction of representation was refined further. Although members of Commons were elected from specific boroughs or counties, each member became a representative of the entire people of the Empire, and thus the

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27 1 W. & M., ch. 2 (1689), 9 *Statutes at Large*, 67-73 (1689).

28 *Id. See also* Appendix A (reprinting England's Bill of Rights).

29 *See supra* note 23. For an examination of the parallels between William and Mary's 1689 Bill of Rights and John Locke's second treatise of government see Appendix A.

30 *See* E. MORGAN, INVENTING THE PEOPLE, *supra* note 11, at 174-208.

disenfranchised were virtually represented even though they had no voice in the selection of an all-powerful parliament.[31] The protection of individual persons from the fictional corporate people depended not upon recognition of individual rights, but upon the structure of government, a doctrine of separation of powers developed somewhat vaguely by Locke in his *Second Treatise*.[32]

That the fictional social compact was what the government rested on can be appreciated from the ambiguity of the title "Bill of Rights," for the term "bill" in eighteenth century usage was roughly the equivalent of "petition;" a petition could become a statute, and thus a law, only when a sovereign granted or approved it.[33] Thus this most famous manifestation of the Glorious Revolution, while embracing the fictions of the original government compact and of virtual representation, schizophrenically embraced as well the competing fiction of a divine origin, through God's lieutenant, of positive law. And, while the Bill of Rights restated some of the provisions of the Magna Charta, it did not entrench them for future generations. Indeed, by 1969 subsequent British parliaments had repealed thirty-three of the Magna Charta's sixty-two clauses.[34]

III. LEGITIMACY AND THE COLONIES

The fiction that the parliament of England was the present corporate embodiment of the people who made the social compact in the dim and distant past was irrelevant to the North American situation in the seventeenth century. As noted earlier, English colonization began there on the authority of charters which originated from queen or king alone. Those granted to Sir Walter Raleigh in 1584,[35] to the Virginia Company in 1606, 1609, 1612,[36] to the Massachusetts Bay Colony in 1629,[37] to

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31 *Id.* at 242-44.

32 J. LOCKE, *supra* note 23, at 143-44, 146-48, 151, 153, 159.

33 *See* S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 280-87 (1971).

34 A. PALLISTER, MAGNA CARTA; THE HERITAGE OF LIBERTY, at 32, 37-38, 73, 89 (1971).

35 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 10, at 53-57 (Charter to Sir Walter Raleigh granted in 1584).

36 *See* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 10, at 3783-89 (First Charter of Virginia in 1606). *See also id.* at 3790-3802 (Second Charter of Virginia in 1609); *id.* at 3802-10 (Third Charter of Virginia in 1612).

37 *See* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 10, at 1846-60 (Charter of Massachusetts Bay in 1629).

Lord Baltimore in 1632,[38] to the Duke of York in 1664,[39] and to William Penn in 1681[40] all antedated the emergence of the fictions of social compact and virtual representation. No act of parliament authorized them and no parliament, before or after their issuance, ever invited a colony to send representatives to it. Each conferred governmental authority as a grant from a sovereign purporting to be divinely endowed with authority to do so. There were differences in form among these charters, but all were essentially feudal. Indeed the charter to Lord Baltimore was modeled after the charter of the Durham palatinate, a crown feifdom.[41]

Reference is occasionally made to the Mayflower Compact of 1620 as a manifestation of the social compact. Certainly the forty-one males who signed it at Cape Cod in November of 1620 were more or less in the state of nature. The document they subscribed, however, clearly is no acknowledgment of the sovereignty of the people, individually or collectively. Rather it is an acknowledgment of the authority of the church in civil matters, which in turn acted on the authority of a king who claimed to be God's lieutenant: a reconfirmation of the representations of loyalty and orthodoxy made to King James I, two years earlier, in hopes of obtaining from the Virginia Company or the crown a patent for colonization.[42] It was nine years before King Charles accommodated the Mayflower survivors with such a patent.

Still, the fiction of the divine right of a king as God's lieutenant was not very useful as a source of legitimation of governmental authority west of the Atlantic. The king was a long way off and had no army close by to enforce his perception of the divine will. Proprietors like Lord Baltimore, capitalistic adventurers like the owners of the Virginia Company, or zealous clerics like the leaders of the Massachusetts Bay Colony thus were at least as dependent upon the good opinion of the populace as was the government in England; perhaps more so. Not surprisingly, all of

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38 *See id.* at 1677-86 (Charter of Maryland granted to Lord Baltimore in 1632).

39 *See* 2 FOUNDATIONS OF COLONIAL AMERICA 793-96 (K. Kavenagh ed. 1973) (Charter of New York From Charles II to Duke of York in 1664).

40 *See* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 10, at 3035-44 (Charter for the Province of Pennsylvania granted in 1681).

41 *See* C. HALL, THE LORDS BALTIMORE AND THE MARYLAND PALATINATE 32-34 (1902).

42 Mayflower Compact, *reprinted in*, SOURCES OF OUR LIBERTIES, *supra* note 15, at 60; *see* 1 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 249-99 (1934); The Leyden Agreement, *reprinted in* DOCUMENTS OF AMERICAN HISTORY 14 (H. Commager ed. 1946).

the charter grantees devised representative assemblies. By the time of the Glorious Revolution every English colony west of the Atlantic had some form of such an assembly. These functioned until the late 1760's with little effort made on either side of the Atlantic to define their relationship to Parliament.

The Privy Council in England and the royally-appointed governors in America exercised a veto power over colonial legislation,[43] but in theory this power was consistent with the older fiction that God is the source of all governmental authority. Moreover, the use of the veto proved ineffective. The Privy Council itself used the power sparingly.[44] The royal governors in contrast did make regular use of the veto which was just part of an arsenal that included powers to prorogue and dissolve assemblies and to remove judges at pleasure. In the wake of the Glorious Revolution, not even the crown enjoyed such powers in relation to Parliament. Yet practical factors, including the governors' high turnover rate, their limited discretion in light of binding instructions from London, and most of all, their lack of patronage insured that these inflated, paper powers remained just that.[45] For a century and a half prior to the 1760's each colony governed itself.

There was little occasion during that century and a half for serious speculation west of the Atlantic about sovereignty and rights. Unlike crowded England, white persons dissatisfied with the government of the place in which they found themselves, because of the abundance of land, were free to relocate. Thus, for example, dissenters from the theocratic government of the Massachusetts Bay Colony moved to Providence, Rhode Island, and to Hartford, Connecticut, where they established theocratic governments more to their liking.[46] To the extent that a fictional justification for governmental authority over individuals was required, the older divine source of that authority served their purpose. There was in fact, however, very little need to resort to fictions, because government in all the North American colonies, except at the local level, was minimal. The North Americans, until the French and Indian War, were mostly spectators rather than

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43 B. BAILYN, THE ORIGINS OF AMERICAN POLITICS 67 (1967).

44 For a detailed discussion of how the Privy Council would disallow a colonial measure see 1 J. GOEBEL, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 67-71 (1971).

45 B. BAILYN, *supra* note 43, at 59-105.

46 *See* E. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (1958).

participants in the wars of the European powers and the threat to external security posed by the Indian Nations did not require major government revenue. There were, it is true, occasional disputes over religious toleration,[47] but none that produced the kind of civil wars of the English seventeenth century. When government was almost completely unobtrusive upon individuals, the stimulus for speculation about the sources of its authority were largely lacking.

IV. EMERGENCE OF IMPERIAL LEGISLATIVE SUPREMACY

The development of British constitutional theory between the Glorious Revolution and the Stamp Act crisis is beyond the scope of this paper. It suffices to note that when Parliament decided in 1764 that the North Americans should bear a fair share of the cost of their external security and the North Americans resisted, the contractarian fiction in England had passed out of favor, while the virtual representation fiction had become dominant. Parliament had come to claim, first for Ireland in 1720,[48] and eventually for the entire Empire, an unlimited sovereignty.

The assertion of parliamentary supremacy involved two aspects: one structural or federal, the other individual. Both aspects emerged in the dispute, in 1761 in Massachusetts, over the enforcement of general warrants or writs of assistance authorized by acts of Parliament.[49] James Otis, Jr. made a structural argument against those statutes upon which the customs collector relied, urging that because the people of North America were not represented in Parliament that body could not bind them by legislation. He also contended, however, that even in England a law authorizing general warrants was void because no act of Parliament could establish such a writ in violation of so fundamental a right as the freedom of one's house.[50] Otis' federalistic argu-

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47 The Glorious Revolution produced a wave of anti-Catholic sentiment in Maryland in particular. Initially directed at the colony's Catholic elite, the movement soon became a rebellion that resulted in measures barring Catholics from holding office, worshipping publicly or educating children under Catholic schoolmasters. *See* L. CARR & D. JORDAN, MARYLAND'S REVOLUTION OF GOVERNMENT 1689-92 (1974).

48 6 Geo., ch. 10 (1719); *see* Note, *The Empire Strikes Back:* Annesley v. Sherlock *and the Triumph of Imperial Parliamentary Supremacy*, 87 COLUM. L. REV. 593 (1987).

49 8 Will. III, ch. 22 para. VI (1696); 3 *Statutes at Large* 586 (1696); 11 Will. III, ch. 3 (1699).

50 *See, e.g.*, M. SMITH, THE WRITS OF ASSISTANCE CASE (1978); J. Adams, *"Abstract" of the Argument in the Writs of Assistance Case* (1761), *reprinted in* S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS 66-71 (1980).

ment in favor of local control over economic issues would recur in North America until the Civil War.[51] In the short run, capsulized in the phrase "no taxation without representation," it became a rallying cry for the emerging movement toward independence. In that form, it was a rejection by the Americans of the fiction of virtual representation. Otis' individual rights point, which asserted that even for Englishmen who were represented in Parliament there were fundamental rights which could not be interfered with, was an argument which, if not entirely original, was at least a new variation of the older fiction that God's lieutenant would not act immorally.

By enacting the Sugar Act[52] and the Stamp Act[53] Parliament resoundingly rejected both Otis' federalistic argument and his individual rights argument. Parliament not only imposed taxes on the colonies, but shifted the burden of proof to defendants in enforcement proceedings, provided for non-jury trials, and conferred official immunity on customs officials from the traditional common law remedies against them for exceeding their authority. Thus, issues both of structural legitimacy and of individual rights were presented by their enactments. The Massachusetts legislature, on Otis' motion, sent a circular letter to other North American legislative assemblies, inviting them to consult together on the circumstances of the colonies. In the fall of 1765 nine colonies responded by sending delegates to the Stamp Act Congress in New York.[54]

When Parliament learned of North America's resistance to the Stamp Act it lacked, for the time being, the physical power of enforcement. Yielding to expediency, however, Parliament simultaneously asserted what had become in England the reigning virtual representation orthodoxy of total legislative supremacy, by enacting the Declaratory Act of March 18, 1766.[55] This pronouncement rejected both Otis' federalistic and structural arguments against virtual representation of Americans in Parliament

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[51] Indeed, it has resurfaced quite recently. *Compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Congress has the power to regulate a local government's governmental functions so long as it affects interstate commerce) *with* National League of Cities v. Usury, 426 U.S. 8833 (1976) (Congress has not the power to regulate areas of traditional local government concern even though it might affect interstate commerce).

[52] 4 Geo. III, ch. 15 (1763); 26 *Statutes at Large*, 33 (1764).

[53] 5 Geo. III, ch. 12 (1765); 26 *Statutes at Large*, 179 (1765).

[54] *See* E. MORGAN & H. MORGAN, THE STAMP ACT CRISES; PROLOGUE TO REVOLUTION 21-70 (1953).

[55] 6 Geo. III, ch. 11 (1766). *See* Appendix B.

and his individual rights argument that there were zones of individual autonomy which no legislature could invade.[56] Not only could Parliament legislate for the colonies; it could "bind the colonies and people of *America* . . . in all cases whatsoever."[57] The fiction of virtual representation applied not only to the disenfranchised residents of geographic areas represented in Parliament, but also to residents of geographic areas which had never sent a representative to Westminster. Moreover, the social compact restored by the Glorious Revolution and embodied in the Bill of Rights, was not entrenched for future generations. It bound the king, perhaps, but not the "representative" branch of government. Thus, by 1766, those in control of English parliamentary government had embraced the same totalitarianism which Thomas Hobbes had once advanced in defense of absolute monarchy.

Attenuation of the fiction of virtual representation, coupled with abandonment of the fiction of an entrenched social compact, resulted in the loss by the Parliament of the favorable opinion upon which, in David Hume's view, its ability to govern North America depended. The fiction that a member of the House of Commons from some obscure rotten borough in a remote corner of England acted as a representative for the residents of Philadelphia or Boston was simply too implausible to be useful, especially when Parliament recognized no limitations whatsoever on its powers over those residents. The combination of positions asserted by Parliament in the Declaratory Act made a revolution very likely, if not inevitable.

V. JUSTIFYING REVOLUTION

While the Sugar, Stamp and Declaratory Acts deprived parliament of the good opinion of most North Americans, their local leaders had not, in 1766, developed either a substitute theory

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56 Virtual representation served as the chief justification for the Sugar and Stamp Acts in the preceding Anglo-American debate. *See* T. WHATELY, THE REGULATIONS LATELY MADE CONCERNING THE COLONIES AND THE TAXES IMPOSED UPON THEM, CONSIDERED 100-14 (1765).

57 Ironically, the phrase "in all cases whatsoever" had originally been inserted in the Declaratory Act of 1766 in lieu of a specific assertion of the authority to tax. The Rockingham ministry did so in part to placate the colonies' great colonial champion, William Pitt. Pitt, however, objected to the more vague formula as well. In consequence, the "in all cases whatsoever" language, which had been intended to keep Parliament's claims designedly vague, was taken as an assertion of both a general power to legislate and a specific power to tax. E. MORGAN & H. MORGAN, *supra* note 54, at 277-79.

which would legitimate government, or a substitute governmental framework. The franchise was more widely shared in the colonies than in England, and thus, sovereignty of the people was an attractive fiction. Yet it was plain that neither a continent nor a single colony could be governed by actual participation, as in the New England town meetings. Thus, some sort of principle of representation was a necessary corollary to the fiction of sovereignty of the people. At the same time, however, the evolution in Parliament of the fiction of a virtual representation which produced the abolition of the jury trial and the enforcement of general warrants suggested that some limitation on that corollary was also necessary.

What emerged was the principle that certain rights were entrenched against the government, not by virtue of a fictional social compact entered into by a mythical people in the dim and distant past, but because those rights were inherent in the human condition. The Declaration and Resolves of the First Continental Congress used the words, "by the immutable laws of nature."[58] That 1774 document, before listing those statutes which must be repealed in order to restore harmony, set forth a ten paragraph "bill of rights" which demonstrated familiarity with the 1689 version. The case for a natural rights justification for entrenching the specifics referred to should not be overstated, for Congress relied also upon "the principles of the English Constitution and the several charters or compacts."[59] The document is an interesting mixture of inconsistent themes. Its first resolve, however, sets forth the contention that "they are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent."[60] This resolve, thus, rejected the fiction that by a social compact in the dim and distant past the people collectively surrendered to their virtual representatives the powers which parliament now claimed. The fourth resolve repeated the rejection of virtual representation in Parliament and disclaimed any interest in actual representation. The second, third and fifth resolves dealt with the extent to which colonial emigrants brought with them the protections of an entrenched English common law, particularly with respect to trials in local vicinages and by local jurors. The

58 1 JOURNALS OF THE CONTINENTAL CONGRESS 67 (W. Ford ed. 1904) [hereinafter JOURNALS].

59 *Id.*

60 *Id.*

sixth resolve contended that the colonists were entitled to the benefit of such English statutes as existed at the time of colonization "and which they have, by experience, respectively found to be applicable to their several local and other circumstances."[61] What parts of the English statutory Constitution applied in North America was, in other words, a matter of local autonomy.

The Declaration and Resolves of 1774 is a brief against the principle of parliamentary supremacy asserted in the Declaratory Act. As propaganda associating the Americans with the spirit of the Glorious Revolution, it probably was an effective justification for a similar "revolution." The charge that Parliament violated the English Constitution was, after all, the same charge made against James II and earlier against Charles I. The new idea, however, was that a proper constitution rested not on a fictional conformity with a social compact, but upon "the immutable laws of nature."[62]

Before this new idea could be explored in any depth, events overtook discourse. On April 19, 1775, General Gage's attempt to remove military stores from the control of local authorities—a sensible precaution considering the assertion in the Declaration and Resolves of the "right" to be free from coercion by a standing army—resulted in the Battle of Lexington and Concord. As a consequence of this action, the Continental Congress when it reconvened in Philadelphia on May 10, 1775, began by necessity to function as a *de facto* national government before its members could more fully develop a theoretical justification for its existence. Without practical experience in central government, the delegates governed to the extent that a minimum amount of government was necessary for their revolutionary situation. Having no leisure to grapple with the new and difficult questions of government they were facing, and divided by religious, class, and economic differences, the delegates proceeded for a year pragmatically.[63] Function preceded form. It was not until June of 1776 that the Continental Congress addressed the latter, when it appointed a committee to prepare a "plan of confederation."[64] Simultaneously, however, it appointed a committee to prepare a

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61 *Id.* at 69.

62 *See supra* note 58 and accompanying text.

63 *See* R. MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION 1763-1789, at 312-32 (1982).

64 The Lee-Adams resolution of June 7, 1776 provided:

> That these United Colonies are, and of right ought to be free and independent States, that they are obsolved from all allegiance to the

Declaration of Independence which has since become our most revered state paper.

That great state paper is rather ambiguous on the question of whether the Continental Congress spoke for the fictional people of a single nation, or merely as an agent for thirteen fictional peoples joined by a treaty.[65] This paper is not concerned, however, with structural or federalistic issues. What is significant for present purposes is the reference to the "self-evident [truth] that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."[66] It is "to secure these rights," Jefferson continued, that "governments are instituted among Men, deriving their just power from the consent of the governed."[67] When a government becomes "destructive of these ends," he urges, the people must abolish it.[68]

British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.

That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.

5 JOURNALS, *supra* note 58, at 425.

65 *See* E. MORGAN, THE CHALLENGE OF THE AMERICAN REVOLUTION 211-28 (1976).

66 The Declaration of Independence para. 2 (U.S. 1776).

67 *Id.*

68 *Id.* Regardless of other influences on Jefferson, the parallels between the Declaration and Locke's second treatise are striking. *See, e.g.*, G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1978). Locke wrote:

> The Reason why Men enter into Society, is the preservation of their Property; and the end why they chuse and authorize a Legislative, is, that there may be Laws made, and Rules set as Guards and Fences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society. For since it can never be supposed to be the Will of the Society, that the Legislative should have a Power to destroy that, which every one designs to secure, by entering into Society, and for which the People submitted themselves to the Legislators of their own making; whenever the *Legislators endeavour to take away, and destroy the Property of the People*, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men against Force and Violence. Whensoever therefore the *Legislative* shall transgress this fundamental Rule of Society; and either by Ambition, Fear, Folly or Corruption, *endeavour to grasp* themselves, *or put into the hands of any other an Absolute Power* over the Lives, Liberties, and Estates of the People; By this breach of Trust they *forfeit the Power*, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty, and, by the Establishment of a new Legislative (such as they

Read in the context of late eighteenth century political thought, these few sentences are remarkably illuminating. Rights, proclaimed Jefferson, are not dependent upon a social compact. They are inherent to the human condition. Social compacts are entered into only for the purpose of securing them. There is an acknowledgment of the fictional sovereignty of the people in the reference to the consent of the governed. But the reference to certain rights being "inalienable," is a rejection of the parliamentary assertion of virtual representation "in all cases whatsoever." Thus, Jefferson elegantly expresses the natural rights position of James Otis, of the Declaration and Resolves of 1774, and of many other Americans who were speculating about the relationship between men and their government.[69]

It is, of course, true that the Declaration of Independence proceeds to list specific grievances, most of which can be related either to the federalistic dispute over the status of Parliament vis-a-vis the colonies, or to specific provisions of the English Bill of Rights. Thus, one cannot dispute that colonial grievances were in part structural.[70] They were not solely structural, however, for

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> shall think fit) provide for their own Safety and Security, which is the end for which they are in Society. What I have said here, concerning the Legislative, in general, holds true also concerning the *supreame Executor*, who having a double trust put in him, both to have a part in the Legislative, and the supreme Execution of the Law, Acts against both, when he goes about to set up his own Arbitrary Will, as the Law of the Society.
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> * * *
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> *Great mistakes* in the ruling part, many wrong and inconvenient Laws, and all the *slips* of humane frailty will be *born by the People*, without mutiny or murmur. But if a long train of Abuses, Prevarications, and Artifices, all tending the same way, make the design visible to the People, and they cannot but feel, what they lie under, and see, whither they are going; 'tis not to be wonder'd, that they should then rouze themselves, and endeavour to put the rule into such hands, which may secure to them the ends for which Government was at first erected; and without which, ancient Names, and specious Forms, are so far from being better, that they are much worse, than the state of Nature, or pure Anarchy; the inconveniences being all as great and as near, but the remedy farther off and more difficult.

J. LOCKE, *supra* note 23, 430-33 (emphasis in original).

69 On the eve of the fighting, Adams, writing under the pseudonym "Novanglus" set out his views at length in a celebrated newspaper debate with the loyalist Daniel Leonard who wrote as Massachusettensis. For the latest edition of these exchanges see THE AMERICAN COLONIAL CRISIS: THE DANIEL LEONARD—JOHN ADAMS LETTERS TO THE PRESS 1775-1775 (B. Mason ed. 1972).

70 For a comprehensive revisionist view that colonial grievances leading to the Revolution rested solely on Parliament's infringement of distinctively English common law rights and precedents, see J. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986).

the Declaration of Independence is quite explicit in rejecting, with respect to *any* government, the fictions of an open-ended social compact resulting in virtual representation on all subjects whatsoever.

VI. THE NEW STATE CONSTITUTIONS

The Declaration of Independence justified revolution—change—but did not seriously address the consequences for government of the principles on which it relied for that justification. The process of developing new governments, however, had already begun before the Continental Congress formally proposed independence. By the end of 1775, three colonies had already sought from that body advice respecting the establishment of new governments replacing those dependent upon the crown.[71] Those colonies and Virginia were advised to call representatives of the people to form interim governments pending resolution of the dispute with Great Britain. Rhode Island unilaterally cut its ties with the crown on May 4, 1776, opting to retain its existing charter as a constitution. Less than a week later, the Continental Congress resolved to recommend to the respective charter governments and colonial conventions that where none had yet been established, new governments should be, which would suppress the exercise of any authority under the crown.[72] It was in the local conventions or legislative assemblies, therefore, that serious discussions of the nature, purpose, and limits of government took place. Structure was a major concern, and in the written constitutions which emerged great concessions were made to the theory and practice of separation of powers among independent branches of any government.[73] Many constitution makers did not, however, rely solely for the protection of republican freedom upon this Whig idea of a self-policing, internally balanced state. Five states in 1776, Virginia, Pennsylvania, Maryland, Del-

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71 G. WOOD, *supra* note 3, at 130.

72 The resolution read:

> *Resolved*, That it be recommended to the respective assemblies and conventions of the United Colonies where no government sufficient to the exigencies of their affairs have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.

4 JOURNALS, *supra* note 58, at 357-58. *See* 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed. 1947); G. WOOD, *supra* note 3, at 132.

73 G. WOOD, *supra* note 3, at 125-256.

aware, and North Carolina, included separate bills of rights which entrenched against legislative change explicit rights deemed to be fundamental.[74] New Jersey that same year included explicit guarantees in the text of its 1776 Constitution.[75] New York, South Carolina, and Georgia did likewise in 1777. Vermont in 1777 and Massachusetts in 1780 included in their constitutions separate bills of rights. Only the two charter states, Connecticut and Rhode Island, which were already republican in form, did not do so.[76]

Constitutionalism as we know it today is tied fundamentally to the public perception of judicial review. That innovation had only just begun to develop in this early period.[77] Thus, the distinction we now recognize between statutory and constitutional law was not as clear then as it later became. Nevertheless, the constitution makers of the early years of independence plainly intended that the entrenchment of bills of rights in their fundamental laws would be binding on future legislatures,[78] even if they had not yet refined that unique American contribution to government—judicial review. This paper does not address the development of early American thought on the superiority of constitutions over legislation, the generic problem of entrenchment. What it does address is the distinction between the entrenchment of a structure of government and the entrenchment of individual rights which that government was not free to transgress. The inclusion of such provisions in all eleven of the new constitutions adopted in response to the May 15, 1776 instruction from the Continental Congress is weighty evidence of the popularity of the natural rights position[79] expressed in the Decla-

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74 *Id.* at 271-72. New Hampshire established its bill of rights in 1783. N.H. REV. STAT. ANN. Const., art. 1 (1955).

75 N.J. STAT. ANN. Prior Constitutions, 599 (West 1971).

76 G. WOOD, *supra* note 3, at 276-78.

77 *Id.* at 453-63. Judicial review had begun to develop in several important state cases in the years leading up to the Federal Convention. *See, e.g.*, Rutgers v. Waddington, (New York 1784); Trevett v. Weedon (Rhode Island 1786); Bayard v. Singleton, 1 N.C. 5 (1787).

78 *See, e.g.*, B. GALE, BRIEF, DECENT, BUT FREE REMARKS AND OBSERVATIONS, ON SEVERAL LAWS PASSED BY THE HONORABLE LEGISLATURE OF THE STATE OF CONNECTICUT, SINCE THE YEAR 1775 (1782); THE FEDERALIST No. 49 (J. Madison); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

79 Virginia was an exception to this pattern where the first state constitution was adopted by the legislature rather than by a convention. Thomas Jefferson responded to this deficiency by advocating the entrenchment of fundamental rights against the caprice of subsequent legislatures, ultimately through a ratifying convention and "council of revision." Jefferson's "Bill for Establishing Religious Freedom" his "Notes on the State of Virginia" and his 1783 draft for a new Virginia

ration of Independence. In these constitutions the abstraction of the Declaration of Independence became an accepted principle of government.

The state bills of rights were largely, although not exclusively, derived from the Bill of Rights of 1689 which after all was only a statute. In the late eighteenth century, however, symbolically it was a good deal more. It was the manifestation, in law, of the fruits of what for English protestants was the critical constitutional event of British history.[80] Many of the provisions which were borrowed deal with matters of procedure or process rather than what today we refer to as substantive due process rights. That does not in any way detract from the late eighteenth century American insistence that those rights were entrenched, that the Declaratory Act was, therefore, unconstitutional, and that their new constitutions must entrench certain individual rights against future governments.

VII. The Error of the 1787 Convention

The *de facto* national government which had invited the adoption of new state constitutions technically committed suicide when, on November 15, 1777, it sent to the states for ratification the Articles of Confederation in which it acknowledged that each state was now totally sovereign.[81] A treaty model for the government of North America was not successful and, as we know, the Philadelphia Constitutional Convention of 1787 was called to rectify the error of 1777. That convention primarily addressed structural issues including the distribution of political power between the state and the national government, and the separation of powers among the three branches of the latter. Whether by design or as a result of fatigue, there was very little discussion in the convention of a bill of rights and, except for such textual provisions as the *ex post facto* clause, the reference to jury trials in

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Constitution all reflect his concern for the protection of individual natural rights. G. Wood, *supra* note 3, at 275-76.

80 It is probably still so regarded by Northern Ireland Protestants. *See* K. Boyle & T. Hadden, Ireland: A Positive Proposal 54-55 (1985).

81 Article II of the Articles of Confederation stated that "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II (1781). The suicide this clause represented, however, was more apparent than real. Congress continued to exercise substantial central powers, including the power to make war and peace, enter into treaties, assert admiralty jurisdiction, and compel national allegiance. R. Morris, The Forging of the Union 1781-1787, at 55-110 (1987).

Article III, and the habeas corpus clause, none of the specific guarantees of individual rights were included, which by 1787 were common in state constitutions.[82]

The Anti-federalists seized upon the absence of a bill of rights as a reason for opposing ratification.[83] The Federalists urged that none was necessary because the new government was one of limited specified powers and because separation of powers would prevent excesses.[84] What is significant in the ratification debates is not the dispute over whether there was a need for a bill of rights in the federal constitution. The significant point is rather that Federalists and Anti-federalists alike acknowledged the centrality in the American revolution—the change from one status to another—of the idea that real individual persons, not a fictional corporate "people," had rights which no government, whether monarchical or republican, could transgress. Ratification was a close thing, achieved in part because of the expectation that the federal constitution would be amended to include what most state constitutions already had—a bill of rights reflecting those principles.[85]

True to his word while electioneering, James Madison undertook in the first Congress the task of proposing the amendments we now call the Bill of Rights. Like their state constitution precursors, they borrow heavily from the Bill of Rights of 1689. Their ratification completed the American revolution, for it was only when the national constitution explicitly included the principle that certain individual rights were entrenched even against republican majorities that our Constitution—our order of things—conformed to the major premise of the revolution set forth in the Declaration of Independence.

VIII. CONCLUSION

The divine right of kings, the social compact, and virtual representation were all, I have suggested, fictions devised from time to time by governing elites to help maintain the consent of the governed. Is the natural rights premise of an entrenched bill of rights simply more of the same? Is the personhood of rational

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[82] *See id.* at 267-97; C. ROSSITER, 1787: THE GRAND CONVENTION 159-273 (1966).

[83] G. WOOD, *supra* note 3, at 536-43; *see* THE COMPLETE ANTIFEDERALIST (H. Storing ed. 1981).

[84] THE FEDERALIST No. 84 (Hamilton); *see* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 143-49, 313-14 (J. McMaster & F. Stone ed. 1942).

[85] *See* Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341, 370-72 (1989).

human animals, as Hans Kelsen argued, nothing more than a construction of juristic thinking?[86] The legal positivists pose a difficult question which might better be addressed to ontologists than to lawyers. Certainly the Bill of Rights has had at various times great utility as a symbol useful for preserving the consent of the governed. Equally certain is that there have been periods in our history when, despite the principle that some individual rights are entrenched against the government, many individuals were deprived of them. The American experience with slavery is, of course, the most graphic illustration of this paradox.[87] It is also the American experience which best illustrates Hume's point that governors depend for support on the favorable opinion of the governed, for it was over that issue that the government was effectively overturned. On balance, however, measured against other societies, it seems to me that our constitutionalizing of a philosophy of government based upon the premise that all men are "created equal and endowed by their Creator with certain inalienable rights" has produced more than a substitute for the fictions we rejected in 1776. In the world's history God's lieutenants often became tyrants. The virtual representatives of the people in Parliament often became tyrants. Our only guarantee that our own government will not become tyrannical lies in the constant insistence that individual rights entrenched in the Bill of Rights are living realities, not fictions.

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86 *See* H. KELSEN, PURE THEORY OF LAW 168-92 (M. Knight trans. 1967).

87 *See, e.g.*, E. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1978).

APPENDIX A
BILL OF RIGHTS[88]
DECEMBER 16, 1689

An act declaring the rights and liberties of the subject, and settling the succession of the crown.

WHEREAS the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did upon the thirteenth day of *February* in the year of our Lord one thousand six hundred eighty-eight, present unto their Majesties, then called and known by the names and stile of *William* and *Mary*, prince and princess of *Orange*, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons, in the words following, *viz.*

WHEREAS the late King *James* the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom.

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the great seal for erecting a court called, *The Court of Commissioners for Ecclesiastical Causes.*

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the court of King's bench, for matters

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[88] 1 W. & M. ch. 2 (1689), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 15, at 245 (emphasis in original).

and causes cognizable only in Parliament; and by divers other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons, upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King *James* the Second having abdicated the government, and the throne being thereby vacant, his Highness the prince of *Orange* (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal being Protestants; and other letters to the several counties, cities, universities, boroughs and cinque-ports, for the choosing of such persons to represent them, as were of right to be sent to Parliament, to meet and sit at *Westminster* upon the two and twentieth day of *January* in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws, and liberties might not again be in danger of being subverted: upon which letters, elections having been accordingly made,

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid; do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare;

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious.

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

7. That the subjects which are Protestants, may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of Parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premisses, ought to any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his highness the prince of *Orange*, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence, That his said Highness the prince of *Orange* will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and form all other attempts upon their religion, rights, and liberties.

II. The said Lords Spiritual and Temporal and Commons, assembled at *Westminster*, do resolve, That *William* and *Mary* prince and princess of *Orange* be, and be declared, King and Queen of *England*, *France* and *Ireland*, and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them the said prince and princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by the said prince of *Orange*, in the names of the said prince and princess, during their joint lives; and after their deceases, the said crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said princess; and for default of such issue to the princess *Anne* of *Denmark*, and the heirs of her body; and for default of such issue to the heirs of the body of the said prince of *Orange*. And the Lords Spiritual and Temporal, and Commons, do pray the said prince and princess to accept the same accordingly.

III. And that the oaths hereafter mentioned to be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them; and that the said oaths of allegiance and supremacy be abrogated.

I, A.B., do sincerely promise and swear, That I will be faithful, and bear true allegiance, to their Majesties King *William* and Queen *Mary*: So help me God.

I, A.B., do swear, That I do from my heart abhor, detest, and abjure as impious and heretical, that damnable doctrine and position, *That princes excommunicated or deprived by the pope, or any authority of the see of* Rome, *may be deposed or murdered by their subjects, or any other whatsoever.* And I do declare, That no foreign prince, person, prelate, state or potentate hath, or ought to have any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual, within this realm: So help me God.

IV. Upon which their said Majesties did accept the crown and royal dignity of the kingdoms of *England*, *France*, and *Ireland*, and the dominions thereunto belonging, according to the resolution and desire of the said lords and commons contained in the said declaration.

V. And thereupon their Majesties were pleased, That the said lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premisses, the said Lords Spiritual and Temporal, and Commons in Parliament assembled, for the ratifying, confirming and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of Parliament, do pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty God, in his marvelous providence, and merciful goodness to this nation, to provide and preserve their said Majesties royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts think, and do hereby recognize, acknowledge and declare, That King *James* the Second having abdicated the government, and their Majesties having accepted the crown and royal dignity as aforesaid, their said Majesties did become, were, are and of right ought to be, by the laws of this realm, our sovereign liege lord and lady, King and Queen of *England*, *France*, and *Ireland* and the dominions thereunto belonging, in and to whose princely persons the royal state, crown, and dignity of the said realms with all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully and entirely invested and incorporated, united and annexed.

VIII. And for preventing all questions and divisions in this

realm, by reason of any pretended titles to the crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquility, and safety of this nation doth, under God, wholly consist and depend, The said Lords Spiritual and Temporal, and Commons, do beseech their Majesties that it may be enacted, established and declared, That the crown and regal government of the said kingdoms and dominions, with all and singular the premisses thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them: And that the intire, perfect, and full exercise of the regal power and government be only in, and executed by his Majesty, in the names of both their Majesties during their joint lives; and after their deceases the said crown and premises shall be and remain to the heirs of the body of her Majesty; and for default of such issue to her royal highness the Princess *Anne* of *Denmark*, and the heirs of her body; and for default of such issue to the heirs of the body of his said Majesty: And thereunto the said Lords Spiritual and Temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterities for ever; and do faithfully promise, That they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever, that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom, to be governed by a popish prince, or by any King or Queen marrying a papist; the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are or shall be reconciled to, or shall hold communion with, the see or church of *Rome*, or shall profess the popish religion, or shall marry a papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown and government of this realm, and *Ireland*, and the dominions thereunto belonging, or any part of the same, or to have, use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be, and are hereby absolved of their allegiance; and the said crown and government shall from time to time descend to, and be enjoyed by such person or persons being prot-

estants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying as aforesaid, were naturally dead.

X. And that every King and Queen of this realm, who at any time hereafter shall come to and succeed in the imperial crown of this kingdom, shall on the first day of the meeting of the first Parliament, next after his or her coming to the crown, sitting in his or her throne in the house of peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen) make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirtieth year of the reign of King *Charles* the Second intituled, *An act for the more effectual preserving the King's person and government, by disabling papists from sitting in either house of parliament.* But if it shall happen, that such King or Queen, upon his or her succession to the crown of this realm, shall be under the age of twelve years, then every such King or Queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of the meeting of the first parliament as aforesaid, what shall first happen after such king or queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same, declared, enacted, and established accordingly.

XII. And be it further declared and enacted by the authority aforesaid, That from and after this present session of parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of parliament.

XIII. Provided that no charter, or grant, or pardon, granted before the three and twentieth day of *October*, in the year of our Lord one thousand six hundred eighty-nine shall be any ways impeached or invalidated by this act, but that the same shall be and

remain of the same force and effect in law, and no other than as if this Act had never been made.

APPENDIX B

An Act for the better securing the dependency of his Majesty's Domains in *America* upon the Crown and Parliament of *Great Britain*.[89]

WHEREAS several of the Houses of Representatives in his Majesty's Colonies and Plantations in *America*, have of late, against Law, claimed to themselves, or to the Governed Assemblies of the same, the sole and exclusive right of imposing Duties and Taxes upon his Majesty's Subjects in the said Colonies and Plantations; and have, in pursuance of such Claim, passed certain Votes, Resolutions, and Orders, derogatory to the Legislative Authority of Parliament, and inconsistent with the Dependency of the said Colonies and Plantations upon the crown of *Great Britain*: May it therefore please your most excellent Majesty, that it may be declared; and be it declared by the King's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the Authority of the same, That the said Colonies and Plantations in *America* have been, are, and of Right ought to be, subordinate unto, and dependent upon, the Imperial Crown and Parliament of *Great Britain*; and that the King's Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons of *Great Britain*, in Parliament assembled, had, hath, and of Right ought to have, full Power and Authority to make Laws and Statutes of sufficient Force and Validity to bind the Colonies and People of *America*, Subjects to the Crown of *Great Britain*, in all Cases whatsoever.

II. And it be further declared and enacted by the Authority aforesaid, That all Resolutions, Votes, Orders and Proceedings, in any of the said Colonies or Plantations, whereby the Power and Authority of the Parliament of *Great Britain*, to make Laws and Statutes as aforesaid, is denied or drawn into question, are, and are hereby declared to be, utterly null and void to all Intents and Purposes whatsoever.

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89 6 Geo. III, ch. 11 (1766) (emphasis in original).