1977

In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution

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I. INTRODUCTION

Words play a role in the ebb and flow of constitutional tides. Over the centuries usage and definitions may remain more constant than has been thought. A case in point is the word "arbitrary." After news was received that the Stamp Act had been passed by Parliament, Virginia's Richard Henry Lee warned that "the mother country" might soon be "converted into an arbitrary, cruel, and oppressive stepdame." The colonies, he argued, were on notice to devise measures preventing "the future extention of arbitrary unconstitutional power." Up in New England the voters of Boston were saying much the same. America's complaint, they resolved, was against "arbitrary and unconstitutional Innovations." Submission to the Stamp Act, the lower house of the Massachusetts general court agreed, "supposes such a wanton exercise of mere arbitrary power, as ought never to be surmised of the patrons of liberty and justice."


1. 5 Geo. 3, c. 12 (1765).
2. Letter from Richard Henry Lee to Arthur Lee (July 4, 1765), reprinted in 1 THE LETTERS OF RICHARD HENRY LEE 1762-1778, at 10 (J. Ballagh ed. 1911) [hereinafter cited as LEE LETTERS].
3. Letter from Richard Henry Lee to Landon Carter (June 22, 1765), reprinted in LEE LETTERS, supra note 2, at 7, 9.
5. Answer of the House of Representatives to Gov. Francis Bernard, Oct. 23, 1765, in
When members of the Massachusetts house resolved that actions of their governor tended "to overthrow the constitution of this government, and to introduce arbitrary power into the province," they were thinking of more than personal or political corruption. The danger, they knew, lay in institutions as much as with officials: the courts of law, for example. Virginia’s House of Burgesses asserted in 1770 that by setting trials at civil rather than common law, recently-enacted imperial revenue statutes "expose the persons and estates of your Majesty’s affectionate subjects to the arbitrary decisions of distant Courts of Admiralty . . . ." Being deprived of trial by jury, New York’s general assembly explained, meant that "Individuals are at the arbitrary Disposition of the executive Powers." The same was true for judicial tenure and compensation. Any Justice of the Superior Court, the Massachusetts house resolved, who accepted his salary from the crown and not the general court, "is an enemy of the constitution, and has it in his heart to promote the establishment of an arbitrary government in the province." For judges to be independent of the colony for their support threatened "an arbitrary rule," a fact especially obvious when one considered America’s "great distance from the throne."

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6. Resolutions of June 2, 1773, The Boston Evening Post, June 7, 1773, at 3, col. 1; Letter from the House of Representatives Addressed to the Speakers of the Several Houses of Assembly on the Continent (June 3, 1773), in SPEECHES, supra note 5, at 403.


12. Letter from Massachusetts House of Representatives to Lord Camden (Jan. 29, 1768), The Boston Post-Boy, Apr. 4, 1768, at 1, col. 2.

13. "[Y]our unhappy subjects in this province, especially at so great a distance from
Arguments that the colonies were not harassed by Great Britain are irrelevant. Historians have not appreciated that under an unwritten constitution the threat of arbitrary rule can be as important as the reality. It is not material, for example, that the British government never removed stubborn colonial judges. In fact, there had never been a hint it might do so. The mere power, unchecked and unaccountable, was enough to create a situation that lawyers called "arbitrary." The possibility was as dangerous as the actuality. The painful truth, as William Hicks pointed out, was "that liberty is only to be supported by a steady opposition to the first advances of arbitrary power." The adjective "arbitrary," not the noun "power," was the operative consideration. Power per se could be dangerous, not because of its nature but because it might become arbitrary. Fail to resist, and all could be lost.15

II. THE MEANING OF "ARBITRARY"

Throughout American colonial and English history, the word "arbitrary" was loosely used, sometimes as an adjective implying bad public policy,16 sometimes as the equivalent of "unlawful," of "unjust," or of "slavery,"17 and sometimes in a way that today the throne, are exposed to an arbitrary rule and the preversion of law and justice by judges absolutely dependent for their commissions and Support." Petition of the Massachusetts House of Representatives to the King, March 6, 1773, reprinted in 6 DOCUMENTS OF THE AMERICAN REVOLUTION 1770-1783: TRANSCRIPTS 1773, at 100, 102 (K. Davies ed. 1974) [hereinafter cited as 6 DOCUMENTS].

14. William Hicks, as quoted in S.C. Gazette, Apr. 4, 1768, at 1, col. 4.
16. E.g., the statement that quartering troops in private houses would be opposed "as Arbitrary and Contrary to the natural Liberty of the Subject." Letter from Agent Joseph Sherwood to the Governor and Company of Rhode Island, Apr. 11, 1765, reprinted in 2 THE CORRESPONDENCE OF THE COLONIAL GOVERNORS OF RHODE ISLAND 1723-1776, at 362 (G. Kimball ed. 1903).
17. UNLAWFUL: E.g., the power to issue habeas corpus in cases of persons imprisoned by legislative fiat for breach of privilege was defended as "the strongest Barrier . . . to preserve the Liberties of the Subject, and secure the People from arbitrary Violence and Oppression." Speech of Chief Justice Robert Wright to the South Carolina Council, Apr. 27, 1733, S.C. Gazette, May 19, 1733, at 2, col. 2. UNJUST: The words "unjust" and "arbitrary" were often coupled as, for example, by another South Carolina judge who described the grant by the colony's commons house of assembly of £1,500 to the defense fund of John Wilkes as an "arbitrary and unjust" measure. E. LEIGH, CONSIDERATIONS ON CERTAIN POLITICAL TRANSACTIONS OF THE PROVINCE OF SOUTH CAROLINA (1774), reprinted in THE NATURE OF COLONY CONSTITUTIONS 63, 75 (J. Greene ed. 1970). A century earlier, the title of a 1647 pamphlet coupled "arbitrary" and "unjust" by saying soldier's rights were "[v]indicated against all arbitrary unjust Invaders of them." ENGLAND'S FREEDOM, SOULDIER'S RIGHTS (Dec. 14, 1647), reprinted in LEVELLER MANIFESTOES OF THE PURITAN...
would imply "unconstitutional." Usually the word was employed with enough precision to satisfy a lawyer, and certainly those using it had confidence that the reader would understand what was meant, for "arbitrary" was seldom defined.

Perhaps the clearest definition of the word "arbitrary" was that it meant the opposite of "liberty." In a pamphlet published in 1649, for example, the author had common soldiers from among Cromwell's troops protesting "that we were not a Mercenary Army, hired to serve any Arbitrary power of a state, but called forth and conjured by the several Declarations of Parliament to the defence of our own, & the peoples just Rights & Liberties." This usage of "arbitrary"—as the opposite of "liberty"—is found in Great Britain early during the eighteenth century as well as in the colonies during the prerevolutionary debate. "The idea of unlimited power," an American wrote, "is inconsistent with the genius of liberty." In English constitutional theory unlimited power implied tyranny, and the lesson taught by English constitutional history was that tyranny lawfully could be resisted:

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18. E.g., the Stamp Act was described as one of those "Arbitrary Measures as are incompatible with [Americans'] constitutional Rights and Privileges." The Mass. Gazette, June 16, 1766, at 3, col. 2. Earlier Boston voters told their representatives that Americans were "complaining of arbitrary & unconstitutional Innovations." Instructions of the Town of Boston to its Representatives in the General Court, Sept. 18, 1765, reprinted in 1 THE WRITINGS OF SAMUEL ADAMS 7-8 (H. Cushing ed. 1904).


20. A bill in Parliament to revoke colonial charters was described as an exercise of "arbitrary Power." J. DUMMER, A DEFENSE OF THE NEW-ENGLAND CHARTERS 21 (1721) [hereinafter cited as DUMMER]. Later when Massachusetts' charter was reformed by Parliament, Bostonians were described as "victims sacrificed to the shrine of arbitrary power." Resolves of Stonington, July 11, 1774, reprinted in R. WHEELER, HISTORY OF THE TOWN OF STONINGTON 37 n.1 (1966).


There is an essential difference between government and tyranny at least under such a constitution as the English. The former consists in ruling according to law and equity; the latter, in ruling contrary to law and equity. So also, there is an essential difference between resisting a tyrant and rebellion. The former is a just and reasonable self-defense; the latter consists in resisting a prince whose administration is just and legal, and this is what denounces it a crime. Now it is evident that King Charles’s government was illegal and very oppressive through the greatest part of his reign: and, therefore, to resist him was no more rebellion than to oppose any foreign invader, or any other domestic oppressor.\footnote{J. Mayhew, A Discourse Concerning Unlimited Submission and Nonresistance to Higher Powers 45 (1750) [hereinafter cited as Discourse], reprinted in 1 Pamphlets, supra note 15, at 212, 241. I do not deny but that the Parliament, as the stronger power, can force any laws it shall think fit upon us; but the inquiry is not what it can do, but what constitutional right it has to do so. And if it has not any constitutional right, then any tax respecting our INTERNAL polity which may hereafter be imposed on us by act of Parliament is arbitrary, as depriving us of our rights, and may be opposed. But we have nothing of this sort to fear from those guardians of the rights and liberties of mankind.}

As “arbitrary” was the opposite of “liberty,” and the opposite of “liberty” was also “unlimited power” or “tyranny,” it followed that another antonym of “arbitrary” was “law” or “rule of law.” Any check on unlimited power moved government away from arbitrariness and closer to constitutional liberty, and English experience had uncovered no other check than the rule of law. “We know that it is better to live under an hard and harsh known written law,” radicals argued during the upheavals of the 1640’s “than under the mildest arbitrary government, where the Subject is condemned at the will of their Judges.”\footnote{Vox Plebis, as quoted in Leveller Manifestoes, supra note 17, at 13. It is the liberty of every subject to enjoy the benefit of the law and not arbitrarily and illegally be committed to prison, nor to have his or their lives, liberties, goods or estates diseased or taken away, but only by due process of law, according to Magna Charta, and the Petition of Right . . . .}

Earlier the House of
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Commons, protesting arbitrary proclamations promulgated by prerogative fiat, had told James I that:

Amongst many other points of happiness and freedom, which your majesty's subjects of this kingdom have enjoyed under your royal progenitors . . . there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law, which giveth both to the head and members that which of right belongeth to them; and not by any uncertain or arbitrary form of government.  

Later Chief Justice Sir Matthew Hale said much the same. "Itt is better," Hale contended, "to be Governed by certaine Laws tho' they bring Some Inconvenience att Some time then under Arbitrary Governm[ent] w[hi]ch may bring many Inconveniences that the other doth not."  

Because Chief Justice Hale's definition of "arbitrary" would later be Americanized by John Adams in the constitutional maxim of "a government of laws and not of men," it is often forgotten that it had an honourable lineage in English constitutional tradition. "In the Laws we have a native interest," Sir Francis Bacon wrote in 1616, for "under a Law we must live, and under a known Law, and not under an arbitrary Law is our happiness that we do live."  

As far as it may lie in you," he urged the Duke of Buckingham, "let no arbitrary power be introduced. The people of this kingdom love the laws thereof, and nothing will oblige them more than an assurance of enjoying them." The Levellers of the English Revolution were so taken by the concept that they sought to have it promulgated as fundamental law.

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25. Petition of Grievances by the Commons in 1610, reprinted in 2 State Trials 519, 524 (1816).
30. The Levellers were the radical political party during the 1640's who opposed both the King and Oliver Cromwell. They proposed constitutional reform that later would be seen as presaging republicanism. S. Low & F.S. Pulling, DICTIONARY OF ENGLISH HISTORY 705 (republished 1971).
“Wee must therefore pray you,”31 the famous Remonstrance of Many Thousands told the House of Commons,

to make a Law against all kinds of Arbitrary Government, as the highest capitall offence against Common-wealth, and to reduce all conditions of men to a certainty, that none hence-forward may presume or plead anything in way of excuse, and that ye will leave no favour or scruple of Tyrannicall Power over us in any whatsoever.32

The difficulty was that the English constitutional mind had not then and never would evolve a system under which power could be restrained by any force other than custom.33 Indeed, few Americans, until well after the Revolution had begun, were prepared to accept the proposition that restraint could be institutionalized.34 The way out of the dilemma posed by unlimited power for most legal theorists was to adopt the Cokean solution and claim that something denominated as “law” was supreme.35 As “law” would in time come to mean “common law,” many legalists began to think of common law procedure, with its ine-

31. R. Overton, A Remonstrance of Many Thousands Citizens, and Other Free-Born People of England, to Their Owne House of Commons 8 (1646) [hereinafter cited as A Remonstrance]. Puritans at that time viewed the Anglican establishment in similar terms. It was, for example, said that “in the Civil Government, every man from the greatest to the least, hath some share in the Government,” while “in the Government of the Church, all is in the hands of one man, in the several Diocesses.” Hence, church government was referred to as “a sole, absolute, and arbitrary way of proceeding” and as “this sole and arbitrary power of Bishops.” A Speech of the Honorable Nathanael Fiennes . . . in Answere to the Third Speech of the Lord George Digsby, Feb. 9, 1640, at 17-18 (1641).

32. A Remonstrance, supra note 31, at 8.

33. It is not possible for any humane Constitution whatsoever to be so perfect as to answer exactly to every Circumstance of affairs. And therefore in the Estimate and Measure of the goodness or Convenience of Governm[en]t we are to weight w[hi]ch answer most Exigences of humane life, and tho’ it answer not all, yett it deserves a p’ference before any other than answers Some Occasions but not Soe many or Soe well as the former.

Hale, supra note 25, at 512.

34. Happy would it be for a people who seriously cultivate the growth of liberty, if any refinement in political knowledge could enable them to frame laws, so applicable and equal to every emergency, as to remove the necessity of lodging a discretionary power in the breast of any individual: But since the imperfection of human wisdom will not admit of such a refinement, we can only exert our utmost endeavours, in every delegation of our natural power, to guard, by the most prudent reservations, every such concession from those ill consequences, which may possibly follow an arbitrary exertion of this necessary, yet dangerous authority.

The Farmer, supra note 21, at 1, col. 4.

suitable faults and antiquarian technicalities, as the reverse of "arbitrary." "It is one of the things of greatest moment to the profession of the Common Law," Chief Justice Hale argued,

to keep as near as may be to the Certainty of the Law and the Consonance of it to itself, that one age and one Tribunal may speak the same things and carry on the same thread of the Law in one uniform rule as near as is possible; for otherwise that which all places and ages have contended for in laws namely Certainty and to avoid Arbitrariness and that Extravagance that would fall out, if the reasons of judges and advocates were not kept in their traces would in half an age be lost.  

Hale in the seventeenth century was making a point more telling for the eighteenth century than we, in the twentieth century, might imagine. He was exalting as a restraint upon arbitrary government one of the constitutional safeguards of which Americans, during the prerevolutionary controversy, felt most deprived. "There is a confusion in our laws," John Dickinson complained, that permits "an artful judge, to act in the most arbitrary manner, and yet cover his conduct under specious pretences." A consequence of legal "uncertainty" was to render "property precarious, and greatly exposes us to the arbitrary decision of bad judges."

Dickinson touched a sensitive nerve of the constitution. One of the central tenets of British whiggism was that "[a]n effective check to arbitrary power could be maintained only if the rights of property were scrupulously observed." The explanation or constitutional theory was that Parliament, because it possessed a constitutional monopoly on the power of taxation, protected property from arbitrary seizure; that "parliament in its taxing function was nothing more than an institutional crystallization of the sanction of property." Thus the safeguard lay in the institu-

36. Hale, supra note 26, at 506.
37. Id. Interestingly, at a later date a French lawyer, comparing common law to the Code of Napoleon, was able to conclude that Hale's very safeguard against arbitrariness was a law controlled through "the exercise of arbitrary power." M. BLOOMFIELD, AMERICAN LAWYER IN A CHANGING SOCIETY, 1776-1876, at 82 (1976).
38. Letters From a Farmer in Pennsylvania to the Inhabitants of the British Colonies 46 (1768), reprinted in 1 THE WRITINGS OF JOHN DICKINSON: POLITICAL WRITINGS 1764-1774, at 364, 369 (P. Ford ed. 1895) [hereinafter cited as DICKINSON WRITINGS].
39. Id. at 370.
40. Id. at 369-70.
tion itself and, for Americans, up to the time of the Sugar Act, that safeguard had lain in the assurance that they would be taxed only by their own assemblies. That was why the decision of the British ministry to raise a colonial revenue by parliamentary edict came as a double shock: by threatening property it removed the chief barrier to arbitrary government. As militant Whig David Ramsay explained, “the guards which the constitution had placed round property, and the fences which the ancestors of both countries had erected against arbitrary power, were thrown down, so far as they concerned the Colonists.” Or, as Dickinson expressed the same thought: “If, indeed, to be subject in our Lives and Property to the arbitrary Will of others, whom we have never chose nor ever entrusted with such a Power, be not Slavery, I wish, any Person would tell me what Slavery is.”

III. THE COMPONENTS OF “ARBITRARY”

It may be thought that the danger to Americans lay in the fact that they were not represented in Parliament. That proposition is true—property in Great Britain was safeguarded by Parliament’s exclusive power to tax because the people there were represented in the guardian institution. Representation, however, was not the operative constitutional consideration; accountability was. Representation was the mechanism that made Parliament accountable to property owners. What troubled people about power during the eighteenth century, what made arbitrary power less arbitrary, was accountability. Parliament was not accountable to Americans and, therefore, it was arbitrary or potentially arbitrary. In fact John Wilkes’s newspaper, North Briton, called Parliament’s claim to tax the colonies an “arbitrary Power” because it was exercised “at Discretion.” In that context, “Discretion” meant “not accountable.”

43. 4 Geo. 3, c. 15 (1764).
45. J. Dickinson, An Address Read at a Meeting of Merchants to Consider Non-Importation, Apr. 25, 1768, reprinted in Dickinson Writings, supra note 38, at 411, 415. The same complaint could be made of arbitrary monarchical government. Thus a petition from Lincolnshire to Charles I prayed:

[T]hat since you have disclaimed all Arbitrary Government in Your selfe, you would not suffer it to reicide in any whatsoever else, That the Monies contributed by your People, may be to these ends onely, for which they were given by act of Parliament . . . protesting we will not contribute to the keeping of the Seas or Townes against You . . .

Two Petitions Presented to the King’s Most Excellent Majestie at Yorke, The First of August, 1642, at 7 (1964).
46. North Briton #CXCI, reprinted in Boston Post-Boy, Apr. 21, 1766, at 2, col. 2.
Before the prerevolutionary dispute between America and Great Britain, the concept of governmental arbitrariness was usually associated with monarchy. William Livingston, who used the word "arbitrary" in conjunction with "despotic" and in opposition to "limited," was conjuring up a danger that no longer existed when he warned that the constitution would be robbed "of its brightest Glory, by exalting a limited Monarch, into an arbitrary and unaccountable Pontentate":48

When one considers the Difference between an absolute, and a limited Monarchy, it seems unaccountable, that any Person in his Senses, should prefer the former to the latter. For, notwithstanding the pretended Advantages under an unlimited Prince, Despotism is a Task above the Capacity of human Nature. . . . 'Tis true, that a Prince, who would never abuse his uncontrollable Authority, might, in some Instances, promote the public Welfare, beyond a Ruler whose Hands are tied by the Law: But such a Prince is rather a Creature of the Imagination, than a real Existence; and so unequal are the Chances against it, that it is the Height of Phrensy, to make the Experiment.49

In summary, "unlimited Power, must ever be an Object of Terror, unless it is accompanied with infinite Wisdom and Goodness to direct its Motions."50

It is somewhat odd that eighteenth-century British and American political theorists would put monarchy in juxtaposition with arbitrary government. Thomas Paine even defined "republic" as "the public good," adding that "in this sense it is naturally opposed to the word monarchy" which "means arbitrary power in an individual person, in the exercise of which, himself, and not the res-publica, is the object." Everyone knew that


50. Freeman, in the New York Gazette, reprinted in Boston Post-Boy and Advertiser, Dec. 2, 1765, at 2, col. 1. Moreover, power itself was seen by John Dickinson and other American Whigs as possessing "an encroaching nature," "what it seizes it will retain." 1 Pamphlets, supra note 15, at 38-39, 663-64.

51. Paine, supra note 24, at 193.

52. Id.

53. Id.
Great Britain was not then and had never been an unlimited monarchy. "The government of Britain," James Wilson boasted, "was never an arbitrary government." The same, perhaps, could be said about old England. Yet even Wilson, speaking of the present, could not escape the monarchical example, for he immediately added that "our ancestors were never inconsiderate enough to trust those rights, which God and nature had given them, unreservedly into the hands of their princes."

One reason theorists thought of monarchy when speaking of arbitrary power may have been that the components of arbitrary government most frequently emphasized were more easily associated with individuals than with institutions. Those components were "will" and "pleasure." The subjects of George II should rejoice, a North Carolina governor once asserted, "that they are govern'd by Law, and not by the arbitrary Will and pleasure of any person whatsoever."

Degrees of arbitrariness could be measured by the twin standards of "will" and "pleasure." In English constitutional theory—at least for the disciples of Coke and the later Whigs—"will" "came to be thought of as a power divorced from custom and standing over against it." In colonial America, where custom remained important as a source of constitutional law despite its disappearance from British constitutionalism, "will" was also thought of in terms of limits restraining discretion. When the Maryland assembly failed to reform the schedule of official fees in the colony, the governor decreed a new schedule by executive proclamation. Legal theory then viewed fees as a form of taxation, and Charles Carroll of Carrollton saw nothing farfetched in comparing the governor's promulgation of the revised schedule to Charles I's proclamation of ship money.

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55. Id. at 747, 753.
56. Address by Governor Gabriel Johnston to the Lower House of Assembly, reprinted in S.C. Gazette, Aug. 9, 1735, at 1, col. 2.
were executive decrees and had in common the fact that they were contrary to custom. "[T]he assessment of ship-money was a more open, and daring violation of the constitution," Carroll admitted, yet the Maryland proclamation granting fees without legislative concurrence was "equally subversive in its consequence of liberty." To sustain the argument, Daniel Dulany replied, Carroll "must prove it to be an arbitrary tax." "What is this power, or prerogative of settling fees by proclamation," Carroll asked, "but the mere exertion of arbitrary will?" The arbitrariness was not in the exercise of will alone, but in the exercise of discretion unchecked by customary constitutionalism.

The second component was "pleasure." Considering human weaknesses, an unrestrained will could lead nowhere but to self-gratification. "Most men," William Livingston believed, "being naturally ambitious, and aspiring after illimitable Dominion, are too apt to measure the Extent of justifiable Authority, by their insatiable Appetite for an unbounded Licentiousness." As previously noted, Livingston framed the danger in terms of a single individual. The reason is probably that he was writing against the local colonial governor and blunted direct criticism by disguising it in terms of a general "Ruler." Yet Livingston was not alone; others did the same.

Many Americans expressed concern about

60. D. Dulany, Antillon’s Third Letter (April 8, 1773), reprinted in Maryland and the Empire, 1773: The Antillon-First Citizen Letters 101 (P. Onuf ed. 1974) [hereinafter cited as Maryland].
61. Id. at 101.
62. Id.
63. C. Carroll, First Citizen, reprinted in Maryland, supra note 60, at 144. Interestingly, John Dickinson also defined an arbitrary tax. It was a sales tax, the ultimate payment of which was passed on to the consumer. "This mode of taxation . . . is the mode suited to arbitrary and oppressive governments." Letter No. 7 From a Farmer in Pennsylvania to the Inhabitants of the British Colonies (1768), reprinted in Dickinson Writings, supra note 38, at 349, 353.
65. For were the Imperfections of the Ruler considered with due Attention, that System of Civil Rule, which is nothing more than the Will of a despotic Tyrant, would quickly be exploded. It is unreasonable to suppose, that Government which is designed chiefly to correct the Exorbitancies of human Nature, should entirely consist in the uncontrollable Dictates, of a Man of equal Imperfections with the Rest of the Community, who being invested with the Authority of the Whole, has an unlimited Power to commit whatever Exorbitancies he shall think fit.
individual will and pleasure long after monarchical arbitrariness had been erased from British constitutionalism. Jonathan Mayhew, for example, wondered why "millions of people should be subjected to the arbitrary, precarious pleasure of one single man" who could take their property, even their lives, "if he happens to be wanton and capricious enough to demand them." The explanation may be that due to English constitutional history and English constitutional myths, people associated arbitrary "will" and "pleasure" not with government itself but with the royal prerogative. There were some, however, bold enough to say that the problem faced by the American colonies was not individual or prerogative will. "To what purpose," Richard Henry Lee asked of Pennsylvania, "do her merchants toil, her people labor for wealth, if Arbitrary Will, uninfluenced by reason, and urged by interest, shall reap the Harvest of their diligence and industry!" John Dickinson, the man to whom Lee wrote, knew the danger was not monarchy but Parliament, and that the "pleasure" of an unchecked institution could be as avaricious as the "pleasure" of an unchecked individual. "If the parliament succeeds in this attempt," Dickinson wrote of the Townshend Acts, other statutes will impose other duties. Instead of taxing ourselves, as we have been accustomed to do, from the first settlement of these provinces, all our usual taxes will be converted into parliamentary taxes on our importations; and thus the parliament will levy upon us such sums of money as they chuse to

67. Id.
68. Id.
69. It must not be forgotten that the English never associated prerogative privilege with unrestrained will. Among the charges deposing Richard II as king were allegations that he had "expressly stated, with an austere and shameless face, that his laws were in his mouth and at times in his breast, and that he alone could change and enact laws of his kingdom." Dunham & Wood, The Right to Rule in England: Depositions and the Kingdom's Authority, 1327-1485, 81 AM. HIST. REV. 738, 746 (1976) (quoting ROTULL PARLIAMENTORUM (J. Strachey ed. London 1676)). Thus, it is not surprising, that when complaining of obvious actions by the governor of South Carolina, the colony's agent, while acknowledging "Your Majesty's royal prerogative," petitioned against "arbitrary and unwarrantable abuse of that prerogative." Petition of Charles Garth to the King, Jan. 23, 1773, reprinted in 6 DOCUMENTS, supra note 13, at 56-57.
71. Letter No. 10 From A Farmer in Pennsylvania to the Inhabitants of the British Colonies (1768), reprinted in DICKINSON WRITINGS, supra note 38, at 383.
72. Particularly the Revenue Act of 1767. 7 Geo. 3, c. 46 (1766).
take, without any other LIMITATION, than their PLEASURE.73

IV. THE ENGLISH REVOLUTION

An odd feature about the colonial association of arbitrary power with individual will was that Americans revered the English revolutions of the past. Neither the Puritan Revolution against Charles I during the 1640's nor the Glorious Revolution of 1688 against James II had been a rebellion against the institution of monarchy. The crown survived even the execution of a King. Although Charles was beheaded, the first English Revolution had, as Americans of the prerevolutionary era well understood,74 not been a revolt against the social or constitutional order, but an armed movement to preserve the ancient customary law of England from being obliterated by "arbitrary rule."75 A prime consideration motivating the commons to present the Petition of Right76 had been the Five Knights case.77 To the extent that it was "a protest against arbitrary government,"78 the petition stressed the grievance "of imprisonment by the King without any cause being shown."79 Americans later believed that the "greatest danger from ambition is in criminal cases,"80 and it was counted a milestone in freedom that one of the first acts of the Long Parliament was abolition of the Court of Star Chamber, for, as the preamble to the act asserted, "the Proceedings, Censures and Decrees of that Court, have by Experience been found to be

73. Letter No. 10 From A Farmer in Pennsylvania to the Inhabitants of the British Colonies (1768), reprinted in DICKINSON WRITINGS, supra note 38, at 383.
74. "For what reason, then, was the resistance to King Charles made? The general answer to this inquiry is that it was on account of the tyranny and oppression of his reign." DISCOURSE, supra note 23, reprinted in 1 PAMPHLETS, supra note 15, at 212, 239.
75. Robbins, European Republicanism in the Century and a Half Before 1776, in DEVELOPMENT, supra note 7, at 31, 45.
76. The Petition of Right (1628), reprinted in CROWN AND PARLIAMENT IN TUDOR-STUART ENGLAND: A DOCUMENTARY CONSTITUTIONAL HISTORY, 1485-1714, at 200-02 (P. Hughes & R. Fries eds. 1959) [hereinafter cited as CROWN AND PARLIAMENT].
77. 3 State Trials 51 (1815).
78. F. RELF, THE PETITION OF RIGHT 1 (1917) [hereinafter cited as RELF].
79. Id.
80. The greatest danger from ambition is in criminal cases. But here they [Congress] have no option. The trial must be by jury, in the state wherein the offence is committed; and the writ of habeas corpus will in the mean time secure the citizen against arbitrary imprisonment, which has been the principal source of tyranny in all ages.

Address by James Iredell before the North Carolina Ratifying Convention, reprinted in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 144 (J. Elliott ed. 1881).
an intolerable Burthen to the Subjects, and the Means to introduce an arbitrary Power and Government.”

Restrictions on the prerogative solved but part of the problem. It was soon realized that Parliament could be as arbitrary as the crown. By the time the civil war was winding down and Charles I was a prisoner, Levellers were complaining that committees of the commons had been arresting and imprisoning persons for committing acts which were not made criminal by any statute. In the “large petition,” a sort of party platform or manifesto of the type the commons called “seditious” and jailed men for reading, the Levellers prayed “that you will take off sentences, fines and imprisonments imposed on Commoners by any whomsoever, without due course of Law, or Judgement of their equals, and . . . that you will enact all such arbitrary proceedings, to be Capitall crimes.”

Protests came too late. Parliament began the struggle against Charles I by relying on the ancient constitution of England, premised on the theory that there were fundamental laws defining English liberties—laws even the prerogative could not ignore. Once finding itself at war with the King, the House of Commons assumed a more kingly role: What had been formulated to restrain the crown was not allowed to restrain the voice of the people. “The High Court of Parliament, and the whole Kingdom which it represents,” lawyer William Prynne wrote

81. 16 Charles I, c. 10 (1640).
83. To the Right Honourable and Supreme Authority of this Nation, the Commons in Parliament Assembled 5 (1647), reprinted in facsimile in 3 Tracts on Liberty in the Puritan Revolution 1638-1647, at 403 (W. Haller ed. 1933) [hereinafter cited as 3 Tracts]. The following year another Leveller petition prayed that “no Person be molested or imprisoned by the wil or arbitrary powers of any, or for such Matters as are not Crimes, according to Law.” To the Supreme Authority of England, the Commons Assembled in Parliament (1648), reprinted in Leveller Manifestoes, supra note 17, at 266.
84. Thus the speaker of the Short Parliament told Charles I:
Kings as Kings are never said to erre, onely the best may bee abused by misinformation; this the highest point of Prerogative that the King can doe no wrong; if then by the subtilty of misinformers, by the specious false pretences of publicque good . . . [the king] bee surprized and overwrought to command contrary to law, and be executed accordingly; this commands will be void.
The Speech of Sergeant Glanvill in the Upper House of Parliament for Peace and Unitie 6 (1641).
early during the struggle, “may in divers respects be truly and properly said, to be the Highest Sovereign power of all others, and above the King himselfe.”

Prynne, who soon discovered that he was as readily subject to arbitrary arrest under Puritans as he had been by Star Chamber, would have restrained parliamentary supremacy by keeping the two Houses of Parliament equal. Other lawyers, however, were prepared to let the Commons rule alone, and there were even some who were willing to argue that parliamentary supremacy, or the supremacy of one house, despite being arbitrary, was the best type of government. Arbitrary power per se need not be a constitutional evil avoided at all costs, partly, as Henry Parker (a common law barrister and secretary to the Puritan Parliament) explained, because it could not be avoided. Besides, with the King gone, so too was what Parker called the “danger” of arbitrary power. “If the State intrusts this [arbitrary power] to one man, or few, there may be danger in it; but the Parliament is neither one nor few, it is indeed the State itself.”

The Parliament maintains its own Councell to be of honour and power above all other, and when it is unjustly rejected, by a King seduced, and abused by private flatterers to the danger of the Common-wealth, it assumes a right to judge of that danger, and to prevent it: the King says, That this gives them an arbitrary unlimited power to unsettle the security of all mens es-

86. William Prynne, as quoted in Leveller Manifestoes, supra note 17, at 4.
87. C. Firth, The House of Lords During the Civil War 191-92 (1910); F. Worrinuth, The Origins of Modern Constitutionalism 88 (1949) [hereinafter cited as Worrinuth].
88. “First, because I ever thought that the Commons made the King, and the King made the Lords, and so the Commons were the Prime foundation.” Anon., Pease, supra note 85, at 124 (quoting J. Price, The City-Remonstrance Remonstrated).
89. [Thill some way was invented to regulate the motions of the peoples moliminous body, I think arbitrary rule was most safe for the world, but now since most Countries have found out an Art and peaceable Order for Publique Assemblies, whereby the people may assume its owne power to do itselse right without disturbance to it selfe, or injury to Princes, he is very unjust that will oppose this Art and order.]

Henry Parker, Observations Upon Some of His Majesties Late Answers and Expresses 14-15 (1642), reprinted in facsimile in 2 Tracts on Liberty in the Puritan Revolution 1638-1647, at 180-81 (W. Haller ed. 1933) [hereinafter cited as 2 Tracts].
90. 2 Tracts, supra note 89, at 179.
91. Id. at 200. Of course there were contemporaries who theorized from the opposite perspective, for example, London’s Lord Mayor Isaac Penington: “A Parliament may far more easily err in governement than a King or ordinary Council, for they have, or should have their rule to act by, but a Parliament act by mere supremacy, by power paramount, and from their determinations, there is no orderly appeal.” Lord Mayor Isaac Penington, as quoted in Worrinuth, supra note 87, at 64.
tates, and that they are seduceable, and may abuse this power, nay they have abused it. . . . That there is an Arbitrary power in every State somewhere tis true, tis necessary, and no inconvenience follows upon it; every man has an absolute power over himself; but because no man can hate himself, this power is not dangerous, nor need to be restrayned: So every State has an Arbitrary power over it self, and there is no danger in it for the same reason.\footnote{92}{Tracts, supra note 89, at 199-200.}

"To have then," Parker concluded, "an arbitrary power placed in the Peers and Commons is naturall and expedient at all times, but the very use of this arbitrary power, according to reason of State, and warlick policy in times of generall dangers and distresse is absolutely necessary and inevitable."\footnote{93}{Judson, supra note 29, at 430 (quoting Parker, The Contra Replicant, His Complaint to His Majestie 30 (1647)).}

A century before the birth of Thomas Jefferson, Jeffersonian logic, based on legislative supremacy, was propelling theorists to Jeffersonian conclusions. Parliament was the supreme court of England, and as "every supreme court must have the supreme power,"\footnote{94}{R. Filmer, The Freeholder's Grand Inquest Touching Our Sovereign Lord the King and His Parliament (1648), reprinted in Patriarcha and Other Political Works of Sir Robert Filmer 133, 157 (P. Laslett ed. 1949) [hereinafter cited as Laslett]. "It would be further inquired how it is possible for any government at all to be in the world without an arbitrary power; it is not power except it be arbitrary: a legislative power cannot without being absolvd for humane laws, it cannot be shown how a King can have any power at all but an arbitrary power." R. Filmer, Observations Concerning the Original of Government: Upon Mr. Milton Against Salmasius (1652), supra at 251, 254-55.} and "supreme power . . . being in its nature so arbitrary,"\footnote{95}{J. Gough, Fundamental Law in English Constitutional History 112 n.2 (1955) [hereinafter cited as Gough] (quoting Cromwell's son-in-law, Henry Ireton, A Representation of the Army (1647)).} it followed that "the true meaning of the Parliament was, that not the King, but they themselves, should have the arbitrary government . . . ."\footnote{96}{T. Hobbes, Behemoth: The History of the Causes of the Civil Wars of England...} The explanation of Robert Filmer,
a monarchist and not a parliamentarian, was that "[t]he last appeal in all government, must still be to an arbitrary power, or else appeals will be in infinitum, never at an end. The legislative power is an arbitrary power, for they are *termini convertibiles*." Will and pleasure, therefore, were vested in Parliament or, as Henry Parker asserted, "all the right of King and people, depends upon their [the two houses'] pleasure."

The future had become visible. The doctrine of parliamentary supremacy, one day to be the English and later the British constitution, was receiving form and substance. There were, to be sure, those who resisted, among them some who fought for Parliament against the King. More interesting, many at that time, especially among Levellers, anticipated American Whigs by realizing that Parliament as much as the crown had to be curbed. The first of the twenty-eight fundamental articles they drafted was a repudiation of arbitrary government, and in the preamble of *An Agreement of the Free People of England*, the Levellers agreed "to ascertain our Government, to abolish all arbitrary Power, and to set bounds and limits both to our Supreme, and all Subordinate Authority."

The problem was how to curb the uncurbable. There were many who, while wishing the task could be accomplished, thought it impossible. Among those unwilling to concede the inevitable, various solutions were proposed. One was to combine

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97. [If all sorts of popular government that can be invented, cannot be one minute, without an arbitrary power freed from all humane laws: what reason can be given why a royal government should not have the like freedom? if it be tyranny for one man to govern arbitrarily, why should it not be far greater tyranny for a multitude of men to govern without being accountable or bound by laws?

Laslett, supra note 94, at 254.

98. *Id.* at 157.

99. 2 Tracts, supra note 89, at 211.

100. Judson, supra note 29, at 431; Pease, supra note 85, at 28-29.

101. Pease, supra note 85, at 27.

102. *Id.* at 193-94.

103. Gough, supra note 95, at 124.


105. In 1643 an anonymous pamphlet argued that Parliament would be "guilty of exercising an arbitrary power, if their proceedings be not regulated by written laws, but by *sulus populi.*" Nonetheless, the writer rejected the possibility of parliament being limited by written law "as both destructive and absurd." Gough, supra note 95, at 101.
frequent elections with short sessions. It was even suggested that these safeguards against arbitrary parliamentary independence could be guaranteed by "a law paramount" that, once enacted, would "be unalterable by Parliaments." Indeed, at least twice, Parliament was urged to make arbitrary government a "capitall offence." It was, however, difficult, if not impossible, for a generation that believed legislative power, unchecked by royal veto and arbitrary by its very nature, to conceive the possibility that a mere enactment could be a restraint upon the enacting party. Even the Levellers knew more was needed than Parliament's word. That may be why John Lilburne returned to the first principle of opposition in English constitutionalism: fundamental law. And although it taxes the imagination to link Lilburne with him, so did Charles I.

As the fortunes of war swung Parliament from fundamental law to arbitrary power, so the same fortunes swung the King from an emphasis on prerogative right to a reliance on the very ground Parliament had abandoned: fundamental law. In fact, Charles asserted that his troubles with Parliament began "because we will allow no Judge of that [the people's] Liberty but the known Law of the Land." The prime example of the King stating his case on fundamental law is the famous militia controversy of 1642, the constitutional argument that Charles claimed

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106. Anon., The Case of the Army Truly Stated (1647), reprinted in Leveller Manifestoes, supra note 17, at 198, 212.
107. See text accompanying notes 31 & 83 supra.
108. But if any shall enquire why we should desire to joyn in an Agreement with the people, to declare these to be our native Rights, & not rather petition to the Parliament for them; the reason is evident: No Act of Parliament is or can be unalterable, and so cannot be sufficient security to save your or us harmless, from what another Parliament may determine, if it should be corrupted.
109. "The Fundamental Law of the Land," Lilburne defined as the Perfection of Reason, consisting of Lawfull and Reasonable Customs, received and approved of by the people: and of the old Constitutions, and modern Acts of Parliament, made by the Estates of the Kingdome. But such only as are agreeable to the Law Eternall and Naturall, and not contrary to the word of God: For whatsoever lawes, usages, and customes, not thus qualified; are not the law of the land; nor are to be observed and obeyed by the people, being contrary to their Birth-rights and Freedomes, which by the Law of God, and the great Charter of Priviledges, they ought not to be.
110. His Majesties Declaration Concerning Leavies (1642).
precipitated the civil war.\textsuperscript{111} During 1642, freeholders in various sections of the nation petitioned Parliament to frame an especiall Law for the Regulating of the Militia of this Kingdome, so that the Subject may know how at once to obey both his Majesty and both Houses of Parliament, a Law whereby may be left to the discretion of Governours, as little as may be, but that the number of Armes and what measure of punishment shall be inflicted upon the offenders, may be expressly set down in the Act, and not left to any Arbitrary power.\textsuperscript{112}

When the King refused his royal assent to Parliament's militia ordinance, the Lords and Commons claimed that necessity gave them power to proceed alone. They could do so, the two houses voted, "in discharge of the trust reposed in them [Parliament] as the representative body of the Kingdome, to make an Ordinance by authority of both Houses, to settle the Militia, warranted thereunto by the fundamentall Laws of the Land."\textsuperscript{113}

Charles I denied both the necessity and the power. Far from being authorized by fundamental law, he asserted, Parliament, by enacting the militia ordinance, violated fundamental law in a most audacious manner:

Neither can the vote of either, or both houses, make a greater alteration in the Laws of this Kingdom (so solemnly made by the advice of their Predecessours, with the concurrence of Us and Our Ancestours) either by commanding or inhibiting any

\textsuperscript{111} In his death speech as he faced the executioner, Charles asserted "that I never did intend for to encroach upon their [Parliament's] Priviledges; they began upon me; it is the Militia they began upon; they confest that the Militia was mine, but they thought it fit for to have it from me." A TRUE COPY OF THE JOURNAL OF THE HIGH COURT OF JUSTICE FOR THE TRYAL OF K. CHARLES I. AS IT WAS READ IN THE HOUSE OF COMMONS, AND ATTESTED UNDER THE HAND OF PHELPS, CLERK TO THAT INFAMOUS COURT 113-14 (J. Nalson ed. 1684) [hereinafter cited as JOURNAL OF THE HIGH COURT]. The militia ordinance is considered the first statute enacted by an interregnum Parliament. 1 ACTS AND ORDINANCES OF THE INTERREGNUM 1642-1660, at 1-6 (C. Firth & R. Rait eds. 1911).

\textsuperscript{112} Prayer \#11, of THE PETITION OF THE GENTRY, MINISTERS, AND COMMONALTY OF THE COUNTY OF KENT: AGREED UPON AT THE GENERAL ASSIZES LAST HOLDEN FOR THAT COUNTY (1642). Martial governance was a constance grievance. Five years later it was prayed that power given to committees or to deputy-lieutenants "may be speedily taken into consideration and made void, and that such powers of that nature as shall appear necessary to be continued, may be put into a regulated way, and left to as little arbitrariness as the statute and necessity of things . . . may bear." The Heads of the Proposals offered by the Army, Aug. 1, 1647, reprinted in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1628-1660, at 241 (S. Gardiner ed. 1889).

\textsuperscript{113} THE DECLARATION OF THE LORDS AND COMMONS IN PARLIAMENT ASSEMBLES, CONCERNING HIS MAJESTIES SEVERALL MESSAGES ABOUT THE MILITIA 2 (1642).
thing (besides the known Rule of Law) then Our single Direction or Mandate can do.\textsuperscript{114}

Parliament protested that it did not claim authority to make law without the King’s concurrence. Rather, because of the need to put the militia under proper command, it declared

that if his Majesty should refuse to joyne with us therein, the two Houses of Parliament being the supreme Court and highest councell of the Kingdome, were enabled by their owne authority to provide for the repulsing of such imminent, and evident danger, not by any new Law of their owne making as hath been untruly suggested to his Majesty, but by the most antient Law of this Kingdom, even that which is fundamentall and essentiall to the constitution and subsistence of it.\textsuperscript{115}

If Parliament was right, Charles replied, then fundamental law meant no law at all for “law” would be whatever the lords and commons declared. “Where is every mans Property, every mans Liberty,” he asked, “[i]f a major part of both Houses declare what the Law is?\textsuperscript{116}” Parliament also had a question. “If,” it wondered, “he hath said he will make the Law the Rule of his Power, and if the question be whether that bee Law which the Lords and Commons have once declared to be so, who shall be the Judge?\textsuperscript{117}” Not the Parliament, Charles answered, certainly not as long as it was unable to distinguish between its judicial and legislative capacities:

We deny not but they may have a Power to declare in a particular doubtfull case regularly brought before them, what Law is; but to make a generall Declaration, whereby the known Rule of the Law may be crossed or altered, they have no Power, nor can exercise any, without bringing the Life & Liberty of the Subject to a lawlesse and arbitrary subjection.\textsuperscript{118}

For his authority Charles I turned full circle. He praised and quoted John Pym’s speech on Stafford’s impeachment, a speech Lilburne thought an exposition of “the end and foundation of

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114. His Majesties Answer to a Book Entituled the Declaration, or Remonstrance of the Lords and Commons of the 19th of May, 1642, at 5 (1642) [hereinafter cited as His Majesties Answer].

115. The Declaration or Remonstrance of the Lords and Commons, in Parliament Assembled 3 (1642) [hereinafter cited as A Declaration].

116. His Majesties Answer, supra note 114, at 21.

117. A Declaration, supra note 115, at 13-14.

118. His Majesties Answer, supra note 114, at 23.
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government" and delivered by a man whom Charles was attempting to impeach for "traitorously" endeavoring "to subvert the Fundamental Laws" and "to place . . . an arbitrary and tyrannical power over the lives, liberties and estates of his Majesty's liege people."

Now Charles cited Pym with approval to argue that the Parliament of which Pym was a member had violated fundamental law when it unilaterally enacted the militia ordinance.

The Law is that which puts a difference betwixt Good and Evil, betwixt Just and Unjust: If you take away the Law, all things will fall into a Confusion, every man will become a Law unto himself, which in the depraved condition of humane nature, must needs produce many great enormities: Lust will become a Law, and Envie will become a Law, Covetousnesse and Ambition will become Laws, and what Dictates, what Decisions such Laws will produce, may easily be discerned.

To which Charles himself added, "So said that Gentleman, and much more very well in defence of the Law, and against Arbitrary Power."

The fortunes of civil war were destined to convince Charles I that he had been wise to associate violation of fundamental law with the threat of arbitrary government. When placed on trial for high treason, the King was to claim that "I never took up Arms against the People, but for the Laws."

The House of Commons, in the act of attainder indicting Charles, had also used the constitutional concept of customary or fundamental laws as the opposite of arbitrary power, charging that the King, "not content with those many Encroachments which his Predecessors had made upon the People in their Rights and Freedoms, hath had a wicked

119. W. SCHENK, THE CONCERN FOR SOCIAL JUSTICE IN THE PURITAN REVOLUTION 31 (1948) (quoting J. LILBURN, INNOCENCY AND TRUTH JUSTIFIED 52 (1645)).
120. C. WADE, JOHN PYM 276 (1912).
121. The Militia Ordinance, reprinted in part in CROWN AND PARLIAMENT, supra note 76, at 215-16.
122. THE HUMBLE PETITION OF THE LORDS AND COMMONS TO THE KING, FOR LEAVE TO REMOVE THE MAGAZINE AT HULL TO THE TOWER OF LONDON . . . TOGETHER WITH HIS MAJESTIES ANSWER THEREUNTO 5 (1642) [hereinafter cited as THE HUMBLE PETITION]. Charles also quoted different sections of the same speech by Pym in HIS MAJESTIES ANSWER OF MAY 4, 1642, IN THE DECLARATION, VOTES, AND ORDER OF ASSISTANCE OF BOTH HOUSES OF PARLIAMENT, CONCERNING THE MAGAZINE AT HULL, AND SIR JOHN HOTHAM GOVERNOR THEREOF 6, 12 (1642).
123. THE HUMBLE PETITION, supra note 122, at 5.
Design totally to Subvert the Ancient and Fundamental Laws and Liberties of this Nation, and in their place to introduce an Arbitrary and Tyrannical Government.” 126 Put another way (as it was in the court’s sentence condemning the King to death) Charles had sought to introduce will and pleasure “for the Advancement and Upholding of the Personal Interest of Will, Power and pretended Prerogative to himself and his Family.” 126

Charles remained stubbornly consistent. He offered only one defense, premised on the constitutional theory that once arbitrary power was conceded, fundamental liberties were destroyed. The Commons, the King was told, had authority to try him “according to the Debt they did owe to God, to Justice, the Kingdom, and themselves, and according to that Fundamental Power that rested, and Trust reposed in them by the People.” 127 The court that tried him, however, had been created by the Commons alone, without concurrence of the House of Lords and approval of the crown, an usurpation of authority Charles called arbitrary, for it was contrary to constitutional practice, customary usage, and fundamental law. The King stated:

For the Charge, I value it not a rush. It is the Liberty of the People of England that I stand for. For Me to acknowledge a New Court that I never heard of before, I that am your King, that should be an example to all the People of England, for to uphold Justice, to maintain the Old Laws, indeed I know not how to do it.” 128

Sergeant John Bradshaw, lord president of the tribunal, replied that Charles was being tried under the “law of Old” or fundamental law. 129 While insisting the Commons had constitutional power, Bradshaw could not deny that creation of a criminal court by one house of Parliament was unprecedented. Under the English constitution what was unprecedented was contrary to custom and, therefore, though constitutional, still might be what

125. Id. at 1.

126. Id. at 91. The “Charge of High Treason” read to the King at the start of the trial alleged that Charles had been “trusted with a limited Power to govern by, and according to the Laws of the Land, and not otherwise,” had breached that trust “out of a wicked Design to erect and uphold in himself an unlimited and tyrannical Power to rule according to his Will.” Id. at 29.

127. Lord President John Bradshaw, as quoted in id., at 28.

128. Id. at 57.

129. C. Wedgwood, The Trial of Charles I, at 181 (Fontana ed. 1964). Charles was reminded he was being tried for breach of trust. “This is not the law of yesterday, Sir (since the time of division betwixt you and your people), but it is law of old.” Id.
English lawyers called arbitrary. As well as any member of the Inns of Court, Charles I appreciated how far the issue could be carried. He employed—and in truth he needed—no other argument to defend himself, his constitutional conduct, and (or so he believed) the liberties of his subjects. “For,” the King told the Commons-created court, “if power (without law) may make law, may alter the fundamental laws of the kingdom—I do not know what subject he is in England can be assured of his life or anything he can call his own.”

Charles I conceded the power, but not the legality of Parliament to place him on trial. He went to his grave insisting that the House of Commons, by assuming constitutional supremacy, substituted arbitrary power for lawful authority. “If,” he told the crowd gathered at his execution, “I would have given way to an Arbitrary way, for to have all Laws changed according to the power of the Sword, I needed not to have come here.”

V. THE GLORIOUS REVOLUTION

The crown’s potential of rule by will and pleasure did not die with Charles I. Checked in England, the royal prerogative was exported to the colonies. In fact, even future loyalists would recall the times of James II, together with that of Charles I, as “the most arbitrary reigns.”

One of the articles of treason exhibited in Parliament against Edward Hyde, Earl of Clarendon, accused him of introducing “an arbitrary government in his maj-

130. Bradshaw conceded that from Charles’s perspective the king had ruled according to law.

[Bl]ut, Sir, the difference hath been, who shall be the expositors of this law:
Sir, whether you and your party, out of courts of justice, shall expound law, or the courts of justice, who are the expounders: nay, the sovereign and the high court of justice, the parliament of England, that are not only the highest expounders, but the sole makers of the law.

The Trials of Charles the First, and of Some of the Regicides: With Biographies of Bradshaw, Ireton, Harrison, and Others 80 (1832). Bradshaw ignored the fact that under the traditional constitution the Commons alone was not Parliament. He did, however, insist that there was a higher law than fundamental, customary, or constitutional law. “Sir, as the law is your superior, so truly, Sir, there is something that is superior to the law, and that is indeed the parent or author of the law, the people of England.” Id.

131. J. Muddiman, Trial of King Charles the First 90 (1928).

132. Journal of the High Court, supra note 111, at 116-16.

133. During the crisis over seizure of Massachusetts’ charter in 1683, one anonymous writer warned that “the people in New England, being Non-Conformists, have no reason to believe that their religion and the Court’s pleasure will consist together.” Arguments Against Relinquishing the Charter, 2 Coll. Mass. Hist. Soc’y 74, 75 (3d series 1825).

134. Anon. [Joseph Galloway], A Letter to the People of Pennsylvania 20 (1760), reprinted in 1 Pamphlets, supra note 15, at 264. See also Peter Oliver’s Origin & Prog-
Even historians of our day agree that the “chief characteristic” of the colonial policy under Charles II and James II “was arbitrary government with little respect for assemblies.”

Not all constitutional grievances alleging arbitrary govern-ment related to America. The Glorious Revolution drove James II from the thrones of England and Scotland. When the Prince of Orange and his Stuart wife were elected in James’s place, Parliament hailed William as the “instrument of delivering this kingdom from popery and arbitrary power.” These were stirring times in London, yet what happened simultaneously in the colonies left a stronger impression on the prerevolutionary generation, for the events of their own era—parliamentary taxation, the admiralty jurisdiction, crown salaries for the judiciary—seemed a repetition of the arbitrary power their ancestors had fought in 1689.

Charles II had revoked several colonial charters and James II had consolidated a number of provinces into the Dominion of New England under the governorship of Sir Edmund Andros. “It would,” Cotton Mather exclaimed, “take a long summer’s day to relate the miseries which come . . . in upon poor New England by reason of the arbitrary government then imposed on them.” His father agreed. The colonists, Increase Mather wrote, received no new rights as a result of the Glorious Revolution, but they did have old ones reconfirmed—customary rights almost snatched away by “an arbitrary government.” Andros’s administration, the New England-born, London barrister Jeremiah Dummer maintained, had been “Arbitrary and Oppressive.”

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137. 1 Will. & Mary (2d Sess.), cap. 2, § 12 (1688), 9 STATUTES AT LARGE 68.
140. Increase Mather, as quoted in Lovejoy, supra note 136, at 229.
141. DUMMER, supra note 20, at 24.
New Englanders rebelled against Governor Andros even before receiving word that James II had been overthrown. He was made prisoner, to be transported home to England, his life spared despite the fact that the “Arbitrary and Despotick power” he had exercised entitled him to no mercy. Every aspect of Andros’s administration was labelled “arbitrary.” Even the commission the governor had received from the King was renounced as “Absolute and Arbitrary.” From the perspective of the decrees Andros promulgated, there is little doubt that his rule was “arbitrary” by any Whig definition, especially as he suspended some of the most fundamental parts of the customary constitution by executive fiat. Town meetings were restricted; exorbitant fees charged; arrests ordered on slight pretext; and trials, often held beyond the venue, resulted in “Illegal and Arbitrary Judgments”: Persons who did but peaceably object against the raising of Taxes without an Assembly, have been for it fined, some twenty, some thirty, and others fifty Pounds. Packt and pickt Juries have been very common things among us, when, under a pretended form of Law, the trouble of some honest and worthy Men has been aimed at: but when some of this Gang have been brought upon the Stage, for the most detestable Enormities that ever the Sun beheld, all Men have with Admiration seen what methods have been taken that they might not be treated according to their Crimes.

A few colonists claimed Andros had not introduced arbitrary government. Rather, they said, he replaced it. It was a minority point of view which, as with Charles I and Parliament, turned on how the observer evaluated the need for certainty in the constitution, defined “rule of law,” and shared in the exercise of will and pleasure. “We will not say that nothing was arbitrary or amiss in Sir E. A[ndros]’s time,” argued Connecticut clergyman

142. Lovenjoy, supra note 136, at 289.
143. Id. at 288-89.
144. The Declaration of the Gentlemen, Merchants, and Inhabitants of Boston, and the Country Adjacent, Apr. 18, 1689 [hereinafter cited as The Declaration], in 1 Andros Tracts 11, 13 (1971) (reprint of 5 Prince Soc’y Pub. (1868)) [hereinafter cited as Andros Tracts].
145. Wertenbaker, supra note 139, at 334.
Gershom Bulkeley, "but now all is arbitrary, and we have nothing but Will and Doom."\textsuperscript{148}

Bulkeley contended that Andros's government had not been based on "arbitrary power."\textsuperscript{149} In fact, Americans, or at least those in Connecticut, "had never known the liberties of free and natural subjects"\textsuperscript{150} until Andros came. "Hereby the laws and liberties of free subjects were restored to us . . . in greater measures than ever we enjoy'd them before."\textsuperscript{151} The reason, as New York lawyer John Palmer explained, was legal certainty, for that, too, was the opposite of arbitrary:

And 'tis as plain that the King's Subjects, which for many years had groaned under the severity of a Tyrannical and Arbitrary Constitution, deprived of the Laws and Liberties of Englishmen, forced in their Consciences, suffered death for Religion, and denied Appeals to the King, were eased of those intollerable Burthens [by Andros's government], and allowed the free Exercise of their Religion, and the benefit of the Laws of England, which were duly and truly administered unto them.\textsuperscript{152}

Of critical importance for Palmer and Bulkeley was not popular participation or constitutional limitations, but certainty. The men who overthrew Andros, Bulkeley believed, "do not understand what arbitrary power is, but put darkness for light, and miscall a legal power by the name of an arbitrary power, because they do not love the law."\textsuperscript{153} Law stood opposed to will because law was certain. As a result of being misled by Andros's opponents, the people of Connecticut would now have to "give up liberty, property and our very lives to the arbitrary dispose of those who have no better either title or rule than their own will, and are both fitted and designed to destroy the laws."\textsuperscript{154}

Few Americans agreed with Bulkeley. The colonial majority thought the Glorious Revolution in England and restoration of the charters and customary government in the colonies ended,

\textsuperscript{148} [Gershom Bulkeley], \textit{Will and Doom, or the Miseries of Connecticut By and Under an Usurped and Arbitrary (1692), reprinted in 3 Coll. Conn. Hist. Soc'y 79, 192 (1895).}
\textsuperscript{149} 3 Coll. Conn. Hist. Soc'y 172 (1895).
\textsuperscript{150} Id. at 146-47.
\textsuperscript{151} Id.
\textsuperscript{152} J. Palmer, \textit{An Impartial Account of the State of New England (1690), reprinted in Andros Tracts, supra note 144, at 23, 42.}
\textsuperscript{153} 3 Coll. Conn. Hist. Soc'y 173 (1895).
\textsuperscript{154} Id. at 89.
rather than perpetuated, arbitrary power. Surely we can ask for no more convincing evidence of this fact than popular political reaction during the 1760's, when the ministry in London decided that Parliament might succeed where James and Andros had failed. Whigs from New Hampshire to Georgia saw the connection and knew that it had two aspects, one historical, the other legal. The constitution Americans would fight to preserve in 1776 was the same constitution their ancestors had struggled to restore in 1689.

VI. THE AMERICAN REVOLUTION

During the prerevolutionary controversy, only uneducated Whigs could have been unaware of historical parallels. It was natural, indeed automatic, to recall "the unlimited Prerogative, contended for by those arbitrary & misguided Princes, Charles the First & James the Second," or to remind one another that their ancestors had "fled into the wilderness to avoid the intolerable oppression and arbitrary power of the faithless Stuarts." Catholic though he may have been, Charles Carroll could boast that "James the second, by endeavouring to introduce arbitrary power, and to subvert the established church, justly deserved to be deposed and banished." And more on point, considering that taxation lay at the heart of the controversy, John Hampden, who went to prison rather than pay a forced loan and led the opposition to ship money, "has been deservedly celebrated for his spirited opposition to an arbitrary, and illegal tax."

The analogy was not precisely accurate, as American Whigs well knew. The precedents of the 1640's and of 1688-89, like Magna Carta and its many confirmations, were viewed in Great Britain as constitutional barriers protecting liberty "against the arbitrary power" of a prince, not the arbitrary power of Parliament. In fact, at a time when the King had little chance to be

155. Lovejoy, supra note 136, at 288-93.
158. Carroll, First Citizen, in Maryland, supra note 60, at 88. James's attempt "to subvert the establishment of church and state, and to introduce arbitrary power, occasioned the general insurrection of the nation in vindication of his liberties." Id. at 130.
159. Id. at 149.
160. Extract of a letter from Virginia [to London], The Boston Post-Boy and Advertiser, Dec. 12, 1768, at 1, col. 3.
arbitrary, and what power he retained was diminishing with each
reign, it was even argued that Americans, to guarantee that the
crown never again became arbitrary, should voluntarily accept
parliamentary rule. George Grenville’s scheme of taxing the colo-

dies, it was contended, would

unite every Member of these Dominions under one Authority for
the Good of the Whole, and to rescue each Individual from the
Power of any future arbitrary Prince, by collecting and assem-
ibling them all into one Body under the happiest of all Govern-
ments, and to redeem the Property of the Subject. . . . from any
other Controul but that of King, Lords and Commons, in one
great Parliament assembled.161

Spurious logic could not persuade Americans, certainly not
to reject centuries of English customary constitutionalism. Colo-
nial Whigs appreciated the true thrust of the message from Lon-
don: that a new arbitrary power was being flaunted as a barrier
against one that no longer existed. When Parliament adopted a
proposal granting the power to suspend the New York legislature
for refusing to obey the quartering act,162 a South Carolinian
asked “what essential difference could be perceived by the inhab-
itants of New York, if they had been arbitrarily stripped of their
legislative power, by the single exertion of royal prerogative, and
not by the solemn formality of one oppressive act, subscribed by
the whole British parliament.”163 Returning to the royalist
perspective of Filmer and Hobbes, Americans appreciated that
Parliament was becoming an instrument of arbitrary power. Also
referring to the act permitting suspension of New York’s assem-

bly, Thomas Jefferson, who believed that the navigation acts164
had made the colonies “a victim to arbitrary power,”165 claimed
that Americans were being asked to “hold their political existence
at the will of a British parliament.”166 If Parliament persisted in
taxing them without their consent to obtain revenue, Thomas

161. From the London Public Advertisers, Nov. 2, 1768, as quoted in Mass. Gazette,
Feb. 13, 1769, at 1, col. 2.
163. The Farmer, supra note 21, at 1, col. 4.
164. 12 Charles II, cap. 18 (1680); 14 Charles II, cap. 11 (1662); 25 Charles II, cap. 7
(1673); 7 & 8 Will. & Mary, cap. 22 (1696).
165. [T. JEFFERSON], A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774),
reprinted in 1 THE PAPERS OF THOMAS JEFFERSON 121, 124 (J. Boyd ed. 1950) [hereinafter
cited as JEFFERSON].
166. Id. at 126.
Pownall, former governor of Massachusetts and a member of the House of Commons, warned that Americans "had reason to fear some danger of arbitrary rule over them." Although they attempted to soften the implications by using the word "sovereignty," British lawyers did not deny that the colonies were being told to submit to arbitrary power. "[E]very government can arbitrarily impose laws on all its subjects," Lord Chancellor Northington told Chief Justice Lord Camden during the Stamp Act Debates. The fact not understood in London was that American Whigs saw a danger to liberty where British Whigs saw none. Colonists who might otherwise have missed the fact that the institution protecting liberty in the home islands threatened it in the new world, had the issue spelled out in unambiguous terms by James Wilson. "Kings are not the only tyrants," he explained, "the conduct of the long parliament will justify me in adding, that kings are not the severest tyrants." Alexander Hamilton concurred:

You are mistaken, when you confine arbitrary government to a monarchy. It is not the supreme power being placed in one, instead of many, that discriminates an arbitrary from a free government. When any people are ruled by laws, in framing which, they have no part, that are to bind them, to all intents and purposes, without, in the same manner, binding the legislators themselves, they are in the strictest sense slaves, and the government with respect to them, is despotic.

The reason, while perhaps surprising, was certainly pertinent to the prerevolutionary controversy—that there was no check on the self-interest of legislators. A monarch, who rules for life, might

168. GOUGH, supra note 95, at 207. In a sense, during his great debate with the two houses of the Massachusetts general court in 1773, Governor Thomas Hutchinson said much the same. See discussion in Bailyn, Introduction in 1 PAMPHLETS, supra note 16, at 131-32.
171. James Wilson, who seems to have used the word "arbitrary" as an antonym for "constitution," felt this was especially true once parliament could not be dissolved but
well be more accountable as he has no personal ambitions or economic goals. Jefferson, by way of contrast, believed one to be as bad as the other. "History," he wrote, "has informed us that bodies of men as well as individuals are susceptible of the spirit of tyranny." The British had an answer: No matter if Parliament's power was arbitrary, it was not dangerous. The constitution saw to that. The competing branches of monarchy, aristocracy, and democracy were too well balanced to threaten liberty. Parliament's composition, Henry Parker had claimed in 1642, "takes away all jealousies, for it is so equally, and geometrically proportionable, and all the States doe so orderly contribute their due parts therein, that no one can be of any extreme predominance."

American Tories and British officials stationed in the colonies had a second answer, one more difficult for Whigs to deal with: No matter how arbitrary Parliament might be, the Whig substitute would be worse. Parliament might not be restrained by enforceable legal principles, but it was limited by tradition, history, custom, precedent, and centuries of evolving practice and experience. What, on the other hand, restrained the American Whig congresses and committees that undertook to control the lives and affairs of individual citizens? Thomas Gage was not alone in saying they exercised "Arbitrary Power." "[They are arbitrary," a "converted Whig" wrote, because "they allow not to others who differ from them the same liberty of thinking and acting that they claim themselves . . . ." In fact, even constitutional legislatures were so dominated by Whiggery they had to be watched or would soon be arbitrary. New York's Lieutenant Governor Cadwallader Colden, for instance, justified rejection of colonial demands for judicial tenure quandiu se bene gesserint in

by its own consent. The members were "independent," no longer accountable. Wilson, supra note 54, at 728.

172. I will go farther, and assert, that the authority of the British Parliament over America, would, in all probability be a more intolerable and excessive species of despotism than an absolute monarchy. The power of an absolute prince is not temporary, but perpetual. He is under no temptation to purchase the favour of one part of his dominions, at the expence of another. Hamilton, supra note 170, at 100.


174. 2 Tracts, supra note 89, at 185.


order to "guard against the arbitrary Proceedings and undue Influence of an Assembly."77 Other American Tories and imperial officials called the actions of legislatures or extralegal committees "arbitrary," either because they did not agree with specific measures78 or objected to the implementation of uncontrolled popular sentiment.79

American Whigs disagreed and General Gage thought he knew why. "No People," he wrote the Secretary for the colonies, "were ever governed more absolutely than those of the American Provinces are now, and no Reason can be given for the People's Submission, but that it is a Tyranny they have erected themselves, as they believe, to avoid greater Evils."80 They controlled these committees and congresses, but had no check on Parliament and that was the distinction. Blackstone implied the difference did not matter. Great Britain, he claimed, avoided arbitrary government because its lawmaking and law-enforcing functions were separate, one vested in Parliament, the other in the king.81 As with much of his constitutional commentary, Blackstone was idealizing a law contemporary lawyers would not have recognized.82 Yet, even had Blackstone's constitution been a reality,


178. Referring to the controversial vote of the Massachusetts assembly to tax the imperial customs officials, the colonial secretary called the action "as unjust in its principle as it must necessarily be arbitrary in the assessment." Letter from the Earl of Hillsborough to Governor Thomas Hutchinson (Dec. 4, 1771), reprinted in 3 Documents of the American Revolution 1770-1783, at 246-47 (K. Davies ed. 1973). A merchant in New Ipswick, New Hampshire, accused of profiteering by the local committee of inspection, replied that "the Committee have proceeded in a most arbitrary and obstinate manner." David Hills to the Publick, Aug. 30, 1775, reprinted in 2 Archives, supra note 176, at 1712.

179. See the pointed, well-reasoned argument that legislation is "arbitrary and unjust" when enacted by an assembly unguided by custom. "There is a line of Jurisdiction for every order of men in a civilized state, beyond which they cannot pass; and it is that Public Bodies should have boundaries, restraints, and limitations, since they are equally liable with Individuals to be misled by passion, fancy, or caprice." It is "an Arbitrary Act," therefore, to use public revenue to support a nongovernmental group prompting the political program favored by the majority. E. Leigh. Considerations on Certain Political Transactions of the Province of South Carolina (1774), reprinted in The Nature of Colony Constitutions: Two Pamphlets on the Wilkes Fund Controversy in South Carolina by Sir Egerton Leigh and Arthur Lee 63, 75, 77 (J. Greene ed. 1970).

180. Letter from Governor Thomas Gage to the Earl of Dartmouth (June 25, 1775), reprinted in 1 The Correspondence of General Thomas Gage With the Secretaries of State 1763-1775, at 408 (C. Carter ed. 1931). 181. 1 Blackstone, Commentaries 142-43 (1765).

182. See E. Barker, Essays on Government 121-54 (1945).
few Americans could see how it protected those without a voice in either body.

Blackstone did not wish to "be considered as an advocate for arbitrary power," and perhaps for that reason was reluctant to face up to parliamentary supremacy. True he could not avoid recognizing it, but he could deprecate it. Parliament might be sovereign and therefore potentially arbitrary, Blackstone admitted, but realistically the fact was immaterial as Parliament could be trusted to avoid arbitrary power.

American Tories had no alternative except to agree with Blackstone. "In truth," one told James Otis, "the freedom and happiness of every British subject depends not upon his share in elections but upon the sense and virtue of the British Parliament, and these depend reciprocally upon the sense and virtue of the whole nation." Oddly, Otis concurred. "Tho' most governments are de facto arbitrary," he believed, "none are de jure arbitrary." Put another way, "No legislative, supreme or subordinate, has a right to make itself arbitrary." Moreover, "[i]t would be a most manifest contradiction for a free legislature, like that of Great Britain, to make itself arbitrary." Otis, trapped in a mire of legalisms, saw no solution to the constitutional dilemma except to trust that Parliament would act in a judicial rather than political manner. It was a constitutional theory too farfetched for many Americans to accept. When the governor of Massachusetts urged submission to the Stamp Act as a condition for it being repealed or amended, the lower house protested that passive obedience legitimatizes "arbitrary power." In fact, before very long, Massachusetts representatives would be saying

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183. 1 BLACKSTONE, COMMENTARIES 243 (1765).
184. See GOUGH, supra note 95, at 190-91.
186. James Otis, as quoted in L. LEDER, LIBERTY AND AUTHORITY: EARLY AMERICAN IDEOLOGY 1689-1763, at 60 (1968).
188. Id.
190. The time would come when the judicial power would be able to restrain the legislative power because "while they recognize the power of the legislature to be supreme, do not admit it to be arbitrary." Concord R.R. v. Greely, 17 N.H.2d 47, 56 (1845).
191. See text accompanying note 5 supra.
that trust was not part of the British Constitution and would even hint that for the government to demand it might be unconstitutional.\(^{192}\)

Even if Members of Parliament could be trusted to act from the purest and most unselfish of motives, they might pass legislation arbitrarily due to mistaken interpretations of the constitution.\(^{193}\) That possibility, according to Dickinson, posed a substantial danger. Dickinson did not fear an arbitrary Parliament "for want of justice or of affection towards us in our mother country; but for want of proper attention . . . ."\(^{194}\) Trust in morals, history, or law was not enough. Rights were rights only if secured absolutely; subject to arbitrary power they were not absolute. "[W]hat is the difference to us," Dickinson asked, "whether arbitrary acts take their rise from ministers, or are permitted by them? Ought any point to be allowed to a good minister, that should be denied to a bad one? The morality of ministers, is a very frail morality."\(^{195}\) If the Stamp Act proved anything, it was that Dickinson’s warning applied as much to Parliament as to ministers.\(^{196}\) James Wilson took the argument to where it terminated. Trust was unsafe, he argued. Acts of Parliament "must depend upon the opinions and dispositions of the members."\(^{197}\)

In truth, Otis’s formula of secured liberty through trust, at least regarding the contemporary constitution, was anachronistic.

\(^{192}\) It is the glory of the British constitution that it is built on more solid foundations than the good intentions of men, the very consciousness of enjoying the most invaluable benefits only by the good will of a fellow-creature must be grating to every generous mind.

Letter from the Massachusetts House of Representatives to the Earl of Dartmouth (March 15, 1773), reprinted in 6 DOCUMENTS, supra note 13, at 97.

\(^{193}\) Cato in Conn. Gazette, reprinted in The Boston Post-Boy and Advertiser, Sept. 9, 1765, at 1, col. 3.

\(^{194}\) Dickinson, An Address to the Committee of Correspondence in Barbadoes (1766), reprinted in DICKINSON WRITINGS, supra note 38, at 251, 268.

\(^{195}\) Letter No. 12 From A Farmer in Pennsylvania to the Inhabitants of the British Colonies, reprinted in DICKINSON WRITINGS, supra note 38, at 397, 404.

\(^{196}\) If it be said we have English Parliaments, which if in some Instances they oppress us, can also gran us Redress; alas! What Comfort can we find in thinking ourselves at the Mercy of a Power, that has already de creed to strip us of every Thing that we hold most dear and sacred . . . .? What confidence can we have in the Mercy and Tenderness, that could pass such a cruel Decree, and write such bitter Things against us? Does the Lamb when he feels the Telons of the Lion in his Bowels, confide in his Mercy and Protection? Oh, no! unlimited Power, must ever be the Object of Terror.


\(^{197}\) WILSON, supra note 54, at 724.
The theory dates back to the old English worry of arbitrary prerogative power, to a time when people, seeking a barrier against the crown, had no other recourse than to place confidence in their representatives. For British subjects, living in eighteenth-century England, Scotland, or Wales, that constitution adequately shielded them from arbitrariness. John Dickinson underlined the difference to Americans when explaining that representation provided voters in the mother country a measure of control over legislation, at least to the extent that members of Parliament shared with their constituents the consequences of enacted statutes:

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

VII. THE CONSISTENCY OF HISTORY

It is time to sum up and to ask what American Whigs sought to accomplish when, following passage of the Stamp Act, they resurrected a shopworn antiprerogative argument against arbitrary power and turned it upon Parliament. As well as anyone, the voters of Westerly, Rhode Island, stated the argument when they listed some of their constitutional grievances and drew the constitutional conclusion

[that the granting of salaries to the Governors and Judges of the colonies; the enlarging the jurisdiction of the Court of Admiralty; the appointment of the Board of [Custom] Commissioners; the increase of the Custom House officers; the arbitrary power given to those officers to break into any man’s house (ever considered by law as a sacred retirement from all force and violence till now) . . . the introducing fleets and armies to supply those officers and enforce a submission to every act of oppression, are inconsistent with every idea of liberty, and will certainly, if not immediately checked, establish arbitrary power and slavery in America, with all their fatal consequences.

American Whigs were not confused; they knew that they

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198. Letter No. 7 From A Farmer in Pennsylvania to the Inhabitants of the British Colonies, reprinted in Dickinson Writings, supra note 38, at 350.

were defending a constitution. At the same time, and with more than a touch of irony, they understood that their constitution might not be defendable because the British no longer honored it. Their difficulty was not advocacy. There were arguments on the American side, more valid from the perspective of 1649 or 1688 than 1776 perhaps, but valid nonetheless; that direct parliamentary taxation violated their charters, their customary constitutions, their constitutional contract, and their rights as Englishmen. No matter the contention, American constitutional pretensions always encountered the same answer: Parliament was not supreme. Constitutional formulas devised in bygone days to restrain the King were now irrelevant. Parliament, British Whigs contended, could revoke charters, ignore custom, breach the constitutional contract, and set limits upon individual rights. Although the current British Constitution had been unforeseen by those who won the Glorious Revolution, the Americans were trapped by the very precedents to which they appealed. By ending the threat that monarchy might become arbitrary, Parliament had made itself arbitrary. The British—Blackstone, Glencoe, Lord Mansfield, and almost everyone of importance in London—could think of no other constitution than that of absolute parliamentary supremacy. For them, a supreme Parliament was a sovereign Parliament, not only over the home islands, but sovereign in the conquered as well as the settled colonies. For obvious reasons, the issue had lain dormant for 150 years and did not surface until the Sugar and Stamp Acts. Only then did the insoluble have to be solved. To formulate a solution, American

202. Reid, "In Our Contracted Sphere": The Constitutional Contract, the Stamp Act Crisis, and the Coming of the American Revolution, 76 Colum. L. Rev. 21 (1976).
204. The rise of parliamentary supremacy was “not foreseen by the men of 1689, whose intention was only to subject the kingly power to the bounds of law as defined by the parliamentary lawyers.” G. Trevelyan, *The English Revolution* 6-7 (1938).
206. The Americans’ right of self-government and self-taxation was not challenged until the 1760’s.

So long as most men are content with official actions, the insoluble question of sovereignty lies dormant. But as soon as government policy is challenged by influential groups of citizens, the question inevitably arises: to what extent are
Whigs turned back to an anachronistic constitutional maxim—that arbitrary power was unconstitutional—seeking to utilize an historical legal theory to transcend the constitutional reality that, after the Glorious Revolution, Parliament was supreme, Parliament was sovereign, and, by constitutional right, Parliament was arbitrary.

Although it had been more logical to complain of arbitrary power during the 1640's and 1680's than during the 1770's, that constitutional argument was still one of the strongest available to American Whigs. The reason was that the British Constitution rested on only one foundation, parliamentary supremacy, and if that sovereignty were compromised, so was British liberty. As a result, the doctrine of parliamentary supremacy proved to be an impregnable barrier for American Whigs to breach. Unable to remove it, they had to find a path by which it could be avoided or circled. One path, easy to utilize as well as obvious, would have been an appeal to natural law. A few laymen used that argument, but lawyers generally rejected natural law as authority in the constitutional controversy. A surprising number, however, turned to the King, calling upon him to revive the old balanced constitution and interpose his prerogative to protect the colonies from parliamentary arbitrariness. The contention was logical from a legal and historical perspective—the Glorious Revolution received validity from consent of the British people, Americans had never consented, and hence the King continued to stand in relation to them and to Parliament as he had stood before the overthrow of James II. Politically, of course, the argument could

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207. The fact that the eighteenth-century controversy was not like the earlier controversy, a contest between the prerogative and Parliament, but a controversy between the King in Parliament and the colonies, made the legal arguments somewhat unreal. . . . [S]ometime before the controversy began to grow acute, the sovereignty of the King in Parliament had become a universally accepted legal doctrine. But it was obviously very much more difficult to prove the legal incorrectness of the actions of an admittedly sovereign body, than to prove the legal incorrectness of the actions of a King whose prerogative powers were by no means clearly ascertained.


never wash.\textsuperscript{209} No British Tory, certainly not George III, was about to give the prerogative back to the Americans.\textsuperscript{210} The same was true for fundamental law. There were many American Whigs who hoped to revive fundamental law, converting it from a restraint on the crown to a restraint on Parliament.\textsuperscript{211} It was, however, too late for any in Great Britain except radical civil libertarians to comprehend how rights could be employed as a barrier to sovereignty. If liberty checked Parliament, Parliament was not supreme and without a supreme Parliament liberty could not be guaranteed.

It was no more ironic for future American republicans to plead for royal protection than it was for the heirs of English constitutionalism to argue that arbitrary power violated the British Constitution. Twice during England's history, people successfully employed that principle against the King, the second time guaranteeing that the crown would never become arbitrary by vesting arbitrary power in Parliament. Seeking to restrain parliamentary supremacy, yet being heirs of the same history that had made parliamentary supremacy a constitutional necessity, American Whigs sought to transcend that constitutional history by reanimating a constitutional principle that that history had obliterated. They were contending in a legitimate strain, while asking both history and law to bend before the illogical.

In truth, the concept of arbitrariness did more than unite the

\begin{thebibliography}{9}
\bibitem{BrPRL2} 209. Answering American pleas for prerogative protection, Britain said "that whatever those kings James I and Charles II who claimed high prerogatives, might think, or do, is now out of the question; for that all parts of the British dominions are now subject to the British legislature, as established at the revolution." A late London newspaper, \textit{as quoted in} The Boston Evening-Post, Apr. 11, 1774, at 1, col. 1.
\bibitem{BrPRL4} 211. GOUGH, \textit{supra} note 95, at 192-94.
\end{thebibliography}
American Whigs with earlier English revolutionary movements. Despite the inconsistency, the concept of arbitrariness gave to Whig history in 1776 a consistency denied it by the British insistence that Parliament was supreme and sovereignty indivisible. American Whigs had faced a dilemma when first they sought to make constitutionally legitimate their opposition to parliamentary supremacy. It was a dilemma because they were determined to find legal justification for their opposition yet, under the dynamics of English constitutional advocacy, they had to depend on doctrines, precedents, and slogans drawn from the pre-1688 English Constitution—from the traditions of royalist or prerogative constitutionalism.

The Americans placed their trust in history and law, and both history and law betrayed that trust. The argument against arbitrary power—and, therefore, against parliamentary supremacy—had validity only if the constitution that English Whigs of 1688-89 had used to neutralize the prerogative and to create parliamentary supremacy had a suprahistorical existence transcending history. If that constitution still existed—and American Whigs had no choice but claim it did—it would be authority for validating the constitutional claims of 1776 despite the constitutional resolutions of 1688-89. The issue was even more complicated: American Whigs were building part of their case against parliamentary supremacy and the Glorious Revolution on the foundations of historical royalist principles.

The factual contention of arbitrariness was more than an historical constitutional concept providing American Whigs an argument English lawyers (even though thinking it an anachronism) might recognize. More important, it furnished them a vehicle of advocacy with which to laicize an historical and constitutional dilemma. To oppose the arbitrary power that Parliament began to assert with passage of the Stamp Act, those colonists who called themselves “Whigs” did not have to abandon Whig traditions despite opposing the institution that Whig history had made supreme. They adapted seventeenth-century Whig arguments against the arbitrary nature of unrestrained prerogative by transposing them into eighteenth-century Whig arguments against the arbitrariness of parliamentary supremacy.

The centuries and, therefore, the constitutional challenges, may have been different, yet concepts flowed in a regular pattern. The Levellers also had asked for a return to “the just old Law of the Land,” and had attempted to transcend the realities of
history by ignoring the Norman conquest and reestablishing the "old Law and custome of the Land" as it had existed in Anglo-Saxon times. For them the common law, the product of the will and pleasure of an usurping conqueror, had, due to historical reasons, no constitutional validity.

Using history to deny history, American Whigs were repeating history. The Levellers of the 1640's had claimed that the yoke of arbitrary power had been imposed upon the English race by the Norman Conquest. Although they could never have brought themselves to say so—surely not openly—Whigs of the 1770's claimed that arbitrary government was a yoke imposed by the Glorious Revolution. An even more startling comparison may be drawn: The English Levellers of the 1640's and the American Whigs of the 1770's had in common the fact that both drew strength from the republican future and the royalist past. Like the Americans of a later day, the English radicals who lived under Cromwell discovered that Parliament could be arbitrary and turned to the people as the ultimate sovereign. Before reaching that position, however, those radicals, again like the Americans, turned to the past, to the royal prerogative, to furnish a constitutional restraint upon unlimited parliamentary supremacy.

VIII. Conclusion

Wrong conclusions must be avoided. It might be thought that American Whigs were not really consistent—that they were heirs not of the independents of 1649 or the Whigs of 1688, but heirs of the Levellers. There is truth in such thoughts, but that truth is not whole. American Whigs were also heirs of the first

212. R. Overton, Certain Articles for the Good of the Common Wealth (1647), reprinted in Leveller Manifestoes, supra note 17, at 190.

213. Id.

214. Id.

215. For an analysis of the historical-legal theory, see Pocock, supra note 57, at 125-27.

216. Pease, supra note 85, at 47. "[t]is a Badge of our Slavery to a Norman Conqueror, to have our Laws in the French Tongue." Petition to the Supreme Authority of England, the Commons Assembled in Parliament (1648), reprinted in Leveller Manifestoes, supra note 17, at 266.

217. "We for our preservation shall tread in the Parliament steps by appealing to the People against them, as they did against the King." John Lilburne & Richard Overton, as quoted in Leveller Manifestoes, supra note 17, at 19.

218. John Lilburne, who had attacked Charles I as a tyrant when he associated kingship with arbitrary power, would urge Cromwell to keep a good understanding with the King after realizing how arbitrarily an unrestrained House of Commons could act. Pease, supra note 85, at 182-83.
constitutional institution to protest against arbitrary parliamentary power, the English kingship as personified by Charles I. At his trial, he voiced what in time would be the American constitutional premise: that arbitrary power unrestrained by law is unconstitutional. In fact, due to its intrinsic nature, arbitrary power is an authority that any defender of liberty has a duty to ignore.219

Thus we might conclude that the American Whigs were not acting in a consistent pattern. Indeed, it could be said that borrowing from extremes on both sides of the historical constitutional controversy, from radicalism and from monarchism, they were less Whiggish than has been thought. Intellectually, however, if American Whigs owed something to the Levellers and to Charles I, they owed more to the Whigs of 1688. Those Whigs, in the name of the law, had rebelled against legitimate government to eliminate the threat of arbitrary power. They introduced in its place parliamentary supremacy, which did not seem arbitrary to them and was not to Americans until the 1760's. It was only then, when the parliamentary barrier against royal arbitrariness itself became arbitrary, that American Whigs had cause to borrow from contrary radical and monarchist traditions—traditions that had first condemned parliamentary supremacy as arbitrary. The pattern of historical development may have been inconsistent, but the constitutional strain was legitimate.

The English Whigs of 1688-89 had eliminated an arbitrary power affecting themselves only to introduce a second that affected other people. Sovereignty, they believed, had to be unrestrained or it was not sovereign. It would become the American constitutional mission to discover how power could be both legitimate and restrained.

219. Thus refusing to enter a plea to the charge of high treason, the King argued: But it is not my Case alone, it is the Freedom and the Liberty of the People of England: and do you pretend what you will, I stand more for their Liberties. For if Power without Law, may make Laws, may alter the Fundamental Laws of the Kingdom, I do not know what Subject he is in England that can be sure of his Life, or anything that he calls his own.

Journal of the High Court, supra note 111, at 43.