AMERICAN DECLARATIONS OF RIGHTS AND THE ANCIENT CONSTITUTION

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Man did not enter into society to become worse than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights.

Thomas Paine†

Abstract

This paper seeks to deepen our understanding of the liberties chartered in the Declarations of Rights of the newly independent states of British America in 1776 by grounding them in the "ancient constitution" of England that emerged from the High Middle Ages onward. The paper consists of three parts, tracing a line of continuity from Edward I to the English Republic, and from there to the new American republics. By chronicling the events behind the composition of the Declarations, and by analyzing the structural forms in which they are framed, it becomes possible to have clearer sight of the original 1776 plans of freedom. This approach reduces insofar as possible anachronism, parochialism, and myth. The ultimate goals of the paper are to preserve the relevance of the ancient principles to the modern present, and to enhance their responsiveness to current issues. A fresh understanding of the declarations could be an element in the political rejuvenation of America.

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† Thomas Paine, The Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution (London: J.S. Jordan, 1791).

CONTENTS

OVERVIEW **3**

I. THE ANCIENT CONSTITUTION **4**

A. EDWARD I 4

B. THE FIRST STUARTS 7
1. Ecclesiastical and Constitutional Forms after the Protestant Reformation 8
2. The Absolute Power of a King (1610) 9
3. Petition of Right (1628) 10
4. Answer to the Nineteen Propositions (1642) 11

II. REPUBLICAN GOVERNMENT IN ENGLAND **12**

A. CHARTERED LIBERTIES IN THE ENGLISH REPUBLIC 12

B. THE REVOLUTION OF 1688 16

III. DECLARATIONS OF RIGHTS IN 1776 ..... **18**

A. REPUBLICAN GOVERNMENT IN THE BRITISH ATLANTIC 18
1. The Continuation of English Republicanism in British America 18
2. Declaration of Rights of the Stamp Act Congress (1765) 19
3. The Ancient Constitution and the Second Continental Congress (1775) 20

B. CONTENT AND STRUCTURE 23
1. Structure of the Declarations of 1776 23
2. Popular Sovereignty 24
3. Liberty of Conscience, Person, and Property 26
4. Equality of Opportunity 27
5. Representative Government 28

C. APPLYING THE ORIGINAL BLUEPRINT IN THE PRESENT 29
1. Understanding the Historical Foundations of the Declarations 29
2. Declarations as Cohering Society 30
3. Declarations as Binding Law and Their Role in Constitutional Structure 30
4. Declarations and Judicial Review 31
5. Relationship between the Declarations and the Federal Bill of Rights 31

CONCLUSION **32**

OVERVIEW

The words and ideas expressed by the architects of the 1776 declarations did not materialize from the ether; they are the continuation of a 750-year-old English constitutional law tradition that safeguards individual liberties and representative government. By using specific phrasing in the declarations, the 1776 founders incorporated by reference the customs and political, religious, and commercial wisdom accumulated over two millennia by the institutions of America's legal heritage.

Part I opens with the chartered liberties of Magna Carta, the form of government developed in the 1275-1306 statutes and institutions of Edward I, and the judicial obligations established in the Articuli Super Cartas of 1300. These form the initial structure of the "Ancient Constitution." The second half of Part I focuses on the absolutist challenges of James I and Charles I, the ameliorative jurisprudence of Lord Coke, the 1628 Petition of Right, and the beginning of the end of this constitutional order with the outbreak of the English Civil War (or more accurately, the Wars of the Three Kingdoms).

Part II then analyzes the English Republic (1640-1660). This period is often overlooked by American constitutional historians as an inconsequential "interregnum" governed heavy-handedly by Oliver Cromwell. In fact, many of the features of the 1776 American constitutions trace their origins to this period. To the founding generation, the turbulent tenure of the Long Parliament served as a stark warning about the dangers of unchecked legislative power, illustrating that kings are not the only tyrants—legislators and party grandees also can become severe oppressors when they are no longer accountable. A written constitution which the Parliament itself would be incompetent to violate therefore was required both in the English Republic and later in the American Republics.

Three draft English constitutions are examined in this part: the Heads of the Proposals proposed in August 1647, the Agreement of the People debated by the army in the October 1647 Putney Debates, and another document also known as The Agreement of the People circulated by the Council of the Army on January 15, 1649. These are the early prototypes for the content and structure of the American constitutions of 1776. The three constitutional proposals are premised on the original and supreme power of the people. Their power is conditionally delegated to a representative body intended to reflect the composition of the country. The delegation of power did not extend to certain fundamental reserved powers—the forerunners of the American Declarations. In a sense, the shot heard round the world in 1775 was test-fired in 1647.

The period from the restoration of Charles II to the deposition of James II is treated in this article as an aberration in the development of representative government in England that ends with the Revolution of 1688. This intentionally inverts the traditional narrative, which usually treats the English Republic as the aberration. Focusing on the continuity from the proto-constitutions of the English Republic to the English Declaration of Rights of 1688, and then to the charters granted

to the colonial British Atlantic provinces, is a better frame within which to understand the 1776 Declarations.

Part III examines the text, meaning, and structure of the Declarations of Rights of 1776. Some of the issues that particularly vex modern courts—the deference to be given to the Declarations, the application of archaic language to modern disputes, and other challenges—are discussed. Declarations of Rights are the dividing line of allocated power between the people and the government. They are not to be confused with Forms of Government, which perform the different function of defining the allocation within branches of government, usually separating powers for the benefit of the people. Our ability to discern what the language meant to its drafters is recoverable through technique. By tracing the composition of the declarations—free insofar as possible from anachronism, parochialism, and myth—and analyzing the structural forms in which they are framed, it becomes possible to have sight the original plan of freedom. With a clear view of their meaning and structure, the ancient principles expressed in the declarations can remain vital in the modern present.

In sum, this article intends to follow a methodologically rigorous exposition of the origins of the 1776 Declarations. In this way, it seeks to not only guide Americans back to their original liberties but to serve as a helpful reference to those advocating and adjudicating rights by reconnecting the Declarations with their English constitutional law origins.

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I. THE ANCIENT CONSTITUTION

A. EDWARD I

Magna Carta[1] expresses a core set of liberties that carry unbroken to the 1776 Declarations:[2] liberty of persons,[3] sanctity of property,[4] autonomy of religion,[5] and economic opportunity.[6] Magna Carta is considered foundational in establishing the essential safeguard of these rights—the subordination of the king to law.[7] But it was Edward I who institutionalized these and other significant constitutional elements to form the primary structure of the "Ancient Constitution."[8]

Edward I laid the lasting foundations for political stability through consent and counsel of representatives of the people, and public welfare through responsive policymaking and constrained power.[9] Edward held hearings throughout England in the first two years of his reign to establish an effective governing partnership between the people and the sovereign.[10] The culmination of these hearings was the First Statute of Westminster ("First Westminster"), enacted in 1275 at

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[1] Magna Carta was first issued in 1215 and reissued many times after. The 1225 version can be regarded as the definitive text. All subsequent reconfirmations of Magna Carta—e.g. in 1297 and 1300—confirm the 1225 version. All citations herein are to the 1224 version. The 1225 version is transcribed by the National Archives at https://www.nationalarchives.gov.uk/education/resources/magna-carta/magna-carta-1225-westminster/.

[2] The notion of birthright liberties is traceable to chapter 1, which grants "all free men of our kingdom, for ourselves and our heirs for ever, all the liberties written below to be had and held by them and their heirs of us and our heirs for ever."

[3] The principle of "due process" is rooted in chapter 29: no "free man" was to suffer the loss of his liberty "except by the lawful judgment of his peers or by the law of the land (per legem terrae)" (c. 29). The guarantee of trial by jury also can be traced to chapter 29. The principle of "equal protection of the law" traces to another part of chapter 29 ("to no one will we refuse or delay right or justice.") Punishments had to be "in proportion to the measure of the offense" (c.14).

[4] Chapter 29 also extends the protections of law to private property. Chapter 21 requires that the government not take private property for public purposes without paying "just compensation."

[5] The Church "shall be free, and shall have her rights entire, and her liberties inviolate." (c.1) — "separation of church and state."

[6] For example, by providing liberties for ports and the City of London (c.9), removing obstacles to navigation on major waterways (c. 23), standardizing weights and measures (c. 25), and protecting merchants in time of war and prohibiting illegal tolls (c. 30).

[7] The king's asset to the charter is due in part to the efforts of the Archbishop of Canterbury, Stephen Langton. Langton profoundly believed in a king limited by written law and an independent church with chartered liberties. A critically important concession in 1215 Magna Carta was that feudal charges had to be determined by the "common counsel of the kingdom" (c. 14 of 1215, omitted in 1225), i.e. "no taxation without representation."

[8] The word "constitution" is used herein in its classical meaning as the aggregate of laws, institutions, customs, and public expectations that order society, not just the text of any particular written legal instrument. As will become clear, the idea of an "ancient constitution" so important in the American founding era is a collection of time-proven principles and practices for ordering and operating the present society.

[9] Consent of the governed through representation in government has long been the accepted basis for the legitimacy of laws. The maxim *quod omnes tangit ab omnibus approbetur*—what touches all must be consented to by all—is codified in Justinian. CODE JUST. 5.59.5.2 (Justinian 531).

[10] Helen Cam, *Studies in the Hundred Rolls*, *in* 6 OXFORD STUD. IN SOC. & LEGAL HIST. 9 (Paul Vinogradoff ed., Oxford Univ. Press 1921).

Edward's first great and general parliament, to check the misconduct of local government officials.[11]

In this statute, Edward chartered an individual right to an unhindered voice in elections of representatives.[12] Chapter Five of First Westminster ordains that "because Elections ought to be free, the King commandeth upon great Forfeiture, that no one—great Man or other—by Force of Arms, nor by Malice, or menacing, shall disturb any to make free Election."[13] Chapter Five is regarded as the oldest active provision in British constitutional history,[14] and carries into American law through 1776 declarations of the right to free elections.

Edward's Model Parliament of 1295 established the summons, procedure, and allocation of voting powers in the Commons to two knights per shire and two burgesses for cities and boroughs.[15] These and other actions during the reign of Edward I institutionalized the inclusion of elected representatives of the citizenry. He made them permanent by prescribing electoral processes and measures to safeguard the exercise of the elective franchise.[16]

Edward I also made England's judiciary independent and tasked them with defending the liberties of the realm.[17] Edward reconfirmed Magna Carta in 1297, declaring that any judgments given by royal justices which contradict it have no value. More fundamentally, Articuli Super Cartas of 1300 removed core constitutional questions from all political actors and entrusted them to an independent body.[18] In that instrument, Edward I established "a definite form and penalty"

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[11] *Id.* at 35. *See also,* Michael Prestwich, Edward I (1997)(noting Edward I's accolades as "The English Justinian" and attributing his effectiveness in part to the "strongly cosmopolitan character to his entourage.")

[12] It seems significant that Gregory X, Edward's friend and companion on crusade, similarly in 1273 sought the opinion and help of all Christian peoples in reforming the Church, https://archive.org/details/EcumenicalCouncilsOfTheCatholicChurch/page/n207/mode/2up, and in 1274 at the Second Council of Lyons, decreed that elections be free and unconstrained, "to seek purely and freely the public good." https://www.papalencyclicals.net/councils/ecum14.htm

[13] Statute of Westminster, The First 1275, 3 Edw. 1, c. 5. "Great man" would encompass barons with power to influence parliament to advance their special interests.

[14] *See, e.g.*, Miller v. Bull [2009] EWHC 2640 (QB). And by extension it is the oldest active provision of the North Carolina Constitution. Its text and meaning remains essentially unaltered.

[15] 2 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 97, 134 (1896). The writ of election uses the *quod omnes tangit* formulation from the Code of Justinian.

[16] F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 76 (1955).

[17] Edward established legal education supervised by judges at the Inns of Court and the tradition of appointing judges from the Bar. He formed a commission of inquiry into judicial corruption in 1289 that led to the removal of two out of the three judges of the Court of King's Bench and four out of the five on the Common Pleas. *See* Sir Henry Brooke, *The History of Judicial Independence in England and Wales*, HENRY BROOKE: MUSINGS, MEMORIES, MISCELLANEA (Nov. 3, 2015), https://sirhenrybrooke.me/2015/11/03/the-history-of-judicial-independence-in-england-and-wales/ [https://perma.cc/Z6EU-PDCB].

[18] *Articuli Super Cartas, 1300*, NAT'L ARCHIVE, https://www.nationalarchives.gov.uk/education/resources/magna-carta/articuli-super-cartas/ [ttps://perma.cc/TWB8-REFD]. This is an application of the ancient maxim that a person, even the king, cannot be the judge of his own trial.

under the common law for anyone contravening the points of the great charters.[19] Enforcement of the right was placed outside of the king in the hands of a three-judge panel—"one knight or other upright and two wise and prudent men, to be sworn as justices"—independently chosen by the community of a county.[20]

These rights and forms of government were animated by intertwined political and religious imperatives. As conceived in Christian Europe during the thirteenth century, God's will is expressed in all conscious souls equally.[21] The pious monarch in whom their care is entrusted was obligated to represent God on earth, and to remedy any wrong;[22] or else he violated the very reason for his institution.[23] While in certain matters the law bestowed upon the king a distinct position encapsulated in the term "prerogative," neither he nor his officers were above the law, and he was not empowered to expand the scope of his prerogative.[24] These concepts of inherent limitations on absolute power backlight the ancient constitution.

Thus, discernable in Edward I's constitution are some of the core principles of future declarations of rights—protection of persons and property through observance of the supremacy of the law of the land, and lawmaking (especially regarding taxation) by consent of the governed through free elections—as well as elements of future forms of government—power in the service of public welfare, diffused among executive monarch, lawmaking parliament, and judicial functions.

B. THE FIRST STUARTS

The ancient constitution was profoundly shaped by the constitutional and religious conflicts of the British archipelago in the 17th Century.[25] At the start of the 16th century, the three kingdoms on the British archipelago—England, Scotland, and Ireland—shared a common religion and were governed by similar constitutional forms. The common religion was Christianity in the Latin Rite prescribed by the Church of Rome.[26] The common constitutional form was a hereditary

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[19] Id.
[20] Id.
[21] 2 BRACTON 32 (folio 5b: "there is no distinction of persons before God").
[22] 4 HENRICI DE BRACTON DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 289 (Samuel E. Thorne trans., George E. Woodbine ed., 1968) (folio 414b: "for it belongs to the king to apply a competent remedy to balance any injury").
[23] Ludwik Ehrlich*, Proceedings Against the Crown (1216–1377)*, *in* 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY, at 52–53.
[24] *Id.* at 56.
[25] As 17th century unfolded, a new diversity of thought was imprinted on the ancient constitution, that made it more tolerant of diverse ideas of conscience and resistant against claims of supremacy and uniformity. These shifts culminated in the separation of church and state into distinct religious and civil constitutional orders and produced a framework more responsive to scientific progress and commercial innovation.
[26] John McCafferty, *Ireland and Scotland, 1534–1663*, in 1 THE OXFORD HISTORY OF ANGLICANISM 243 (2017) (noting that before 1530, Ireland, England, and Scotland were all "provinces of the Western [Catholic] Church divided into dioceses").

monarchy with an occasional parliament required to be convened for taxation or other important matters of state.

1. Ecclesiastical and Constitutional Forms after the Protestant Reformation

The unity of religious practice fractured during the Protestant Reformation. In 1534 Henry VIII broke from the Catholic Church and established the Church of England.[27] In substance, the core doctrines of the Church of England remained similar.[28] The more radical break occurred in Scotland in 1560 when John Knox successfully established the Church of Scotland as a Presbyterian polity.[29] Literacy and education were values of this movement that would carry to America.[30] Various dissident factions in England pressed for more extensive reforms of the Anglican Church, and some separatists advocated leaving the church altogether to form congregations more in harmony with their sense of New Testament practice.[31] Ireland largely remained Catholic.[32] Thus, at the close of the 16th century the ecclesiastical polities on the archipelago spanned episcopal, presbyterian, and congregational forms.[33]

The religious diversity of the 16th century seeded a corresponding range of constitutional ideas for the next century: absolute monarchy, republican forms of government, and parliamentary supremacy.[34] When in 1603 James VI of Scotland became James I of England, he was immediately pressed for religious reforms that had clear constitutional implications. In the 1604 Hampton Court Conference, James tied the ecclesiastical polity of an episcopal church to his preferred constitutional model, an absolute monarchy in which the king is superior to parliament and the law.[35] James rebuffed Puritan reformers by saying, "No bishop, no king."[36] James dismissed a presbyterian polity as too closely associated with representative government: a Scottish Presbytery

[27] Act of Supremacy of 1534, 26 Hen. VIII, c. 1 (Eng.) (act of Parliament confirming the English monarch to be supreme head of the Church of England).

[28] "Catholicism without the Pope" is the quip. See Anthony Milton, "Introduction" in 1 THE OXFORD HISTORY OF ANGLICANISM 2 (2017).

[29] *See* JOHN KNOX, HISTORY OF THE REFORMATION OF RELIGION IN SCOTLAND (establishing the principles of the Presbyterian Church).

[30] The Scottish Enlightenment shaped academics at Princeton University, the University of Pennsylvania, and the University of North Carolina. *See* DOUGLAS SLOAN, THE SCOTTISH ENLIGHTENMENT AND THE AMERICAN COLLEGE IDEAL 64 (1971).

[31] *See,* A. G. DICKENS, THE ENGLISH REFORMATION 313-321 (2005)(outlining various threads of Puritanism).

[32] *See* ALAN FORD, THE PROTESTANT REFORMATION IN IRELAND, 1590–1641 (1997).

[33] Episcopal polity centralizes authority in bishops, presbyterian polity delegates authority to elected elders in representative councils, and congregational polity vests authority in the local congregation. NORMAN DOE, CHRISTIAN LAW: CONTEMPORARY PRINCIPLES 118-121 (Cambridge University Press 2013) (providing an overview of the systems of church polity).

[34] A second force contributing to innovation in constitutional forms was the after-effects of the Enlightenment and the empiricism and scientific method typified by the works of Francis Bacon.

[35] 1 SAMUEL R. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 1603–1642, at 148-159 (1896) [hereinafter GARDINER, HISTORY OF ENGLAND].

[36] EDWARD CARDWELL, A HISTORY OF CONFERENCES AND OTHER PROCEEDINGS CONNECTED WITH THE REVISION OF THE BOOK OF COMMON PRAYER 203 (1841).

"as well agreeth with a monarchy as God and the Devil."[37] And he rejected congregationalist dissenting traditions and popular government as inherently destabilizing: "The common people fantasy to themselves a democratic form of government."[38]

2. The Absolute Power of a King (1610)

On his accession to the English throne, James I sought autocratic powers equal to his continental rivals, overriding traditional English constitutional limitations, especially the requirement that the Commons appropriate finances. James I assumed a prerogative to control key elements of free elections in Scotland, Ireland, and England. James I asserted a supremacy grounded in the notion that the liberties of the realm derive from the king rather than from law and custom.[39]

In an important speech seeking appropriations from Parliament on 21 March 1610, James I is uncompromising about the absolute power of kings: "the state of monarchy is the supremest thing upon earth."[40] But he stresses that a good king does not abuse his power, nor degenerates to a tyrant, but rules according to the laws of the land, respects the common law expectations of his subjects, and observes existing institutions of government. In essence, James' view is that the ancient constitution is no more than a strong covenant between king and people that obligates him to respect the traditional rights of the subjects and the advice of parliament, but that is within his power as the supreme authority only under God to break.

These ideas conflicted with understandings of the ancient constitution grounded in power being derived from the people, or perhaps more accurately, directly to the people from God, reason, and experience reflected in constitutional common law. In his *Reports*, Sir Edward Coke highlights the wisdom of experience, the stability of the common law, and ascribes it as a birthright protection of the lives and property of English subjects. The king doesn't make the law, the law makes the king. Another contemporary, Thomas Hedley, notably stressed the common law—the voice and experience of the people—as being above both the monarch *and* parliament: "the parliament hath his power and authority from the common law, and not the common law from the

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[37] *Id* at 202. The Presbyterian claim to a divine right of ecclesiastical power independent from the source of secular power is sometimes credited with influencing civil freedom. *See, e.g.,* HAROLD LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY 49 (1917). Jesuit doctrines likewise drove a separation of church and state. See Introduction, THE POLITICAL WORKS OF JAMES I xxiii (1965) (noting that the Jesuit theory of Church and State explain why "the staunchest upholders of an absolute Pope are numbered among the founders of modern republicanism.")

[38] KING JAMES VI & I, THE TRUE LAW OF FREE MONARCHIES AND BASILIKON DORON 51 (Daniel Fischlin & Mark Fortier eds., 1998). *See also,* 1 GARDINER, HISTORY OF ENGLAND, *supra* note 16, at 157 ("The doctrines and practices of the Bishops became connected in his [James I's] mind with the preservation of his own power. He was gratified by their submissiveness, and he looked upon the views of the opposite party as necessarily associated with rebellion.")

[39] *See* KING JAMES VI AND I, THE TRUE LAW OF FREE MONARCHIES AND BASILIKON DORON 51 (Fischlin & Fortier ed. 1998).

[40] THE POLITICAL WORKS OF JAMES I 307 (1965). James notes that kings, like gods, have the power of raising men to high stations or reducing them low, a power that 1776 declarations will claim rests in the people. *Id.* at 308.

parliament."[41] Also in 1610, John Selden published *Jani Anglorum Facies Altera*, the first extended and carefully researched history of the English constitution. Selden portrayed the ancient constitution as a mixed government in which kings, clergy, nobles, and freemen share sovereignty. Its core principle is balance between royal prerogative and the liberties of the subject.[42] The doctrine of the divine right of kings threatened this balance by placing the Crown beyond the ordinary limits of the law.

3. Petition of Right (1628)

These conflicting religious and constitutional ideas became kinetic shortly after 1625, when James I died and Charles I assumed the thrones of the three kingdoms. Anticipating challenges to absolutist rule, Charles I nevertheless reluctantly called Parliament in 1628 because he needed money for wars. His prior funding scheme of forced loans was of dubious constitutionality because it was a form of taxation not initiated by Parliament, and its means of enforcement—exemplified by the imprisonment of five knights denied *habeas corpus*—likewise was illegal unless he in fact had the powers of an absolute ruler. Charles I stood accused of violating three central tenets of the ancient constitution: the liberties of person, sanctity of property, and freedom of election.[43]

To ease the mounting constitutional pressures, Thomas Wentworth conceived of a statutory instrument defining the liberties of subjects that would be legally binding on the King.[44] Lord Coke, the most respected jurist of his day, and a long advocate of the supremacy of law, was a drafter of the ultimate instrument, the Petition of Right of 1628.[45] Charles I's assent to the Petition of Right was an early setback to his aim of an absolute monarchy. It was a concession that the king could not tax (however dressed) without consent of parliament, nor circumvent due process

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[41] Quoted in Paul Christianson, Ancient Constitutions in the Age of Sir Edward Coke and John Selden, in THE ROOTS OF LIBERTY: MAGNA CARTA AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW (Reid, John and Christianson, Paul and Brooks, Christopher and Holt, James and Weston, Corinne eds)

[42] In July 1620 he was recruited by Sir Edwin Sandys to help codify the legal and governmental framework of the colony in Virginia. *Recs. of Virg. Co*. i. 395.

[43] See William Prynne, A Summary Collection of the Principal Fundamental Rights, Liberties, Proprieties of All English Freemen; both in their Persons, Estates, and Elections (1656) http://name.umdl.umich.edu/A91291.0001.001

[44] 6 GARDINER, HISTORY OF ENGLAND, *supra* note 16, at 251 ("Not a humble petition to the King, not a legal argument to accompany the four resolutions when they were laid before the peers, but a law to provide for the future, was his solution to the difficulty.")

[45] STEPHEN D. WHITE, SIR EDWARD COKE AND THE GRIEVANCES OF THE COMMONWEALTH (University of North Carolina Press, 1979).

of law under the pretext of martial law.[46] More fundamentally, the Petition of Right reaffirmed the subordination of the king to law, and a boundary between prerogative and liberty.

4. Answer to the Nineteen Propositions (1642)

Tensions between Charles I and Parliament continued to deepen. Charles I ruled from 1629 to 1640 without calling a Parliament. Charles I suffered a defeat in the Bishops' Wars of 1639-40 when he unsuccessfully sought to impose the Anglican book of Common Prayer on the Church of Scotland, only solidifying the presbyterian church in Scotland.[47] Then in 1640, emboldened by events in Scotland, Irish Catholics rebelled against the Protestant establishment to reverse the oppressive structures that had marginalized them for generations.[48] The English Parliament, concerned (among other fears) that Charles I would ally with Irish Catholics and raise an army against them, intervened and prevailed in the Irish Confederate Wars.[49]

In 1642 Charles I removed from London to York to prepare for war against the English Parliament. Parliament demanded the transfer of key state functions, such as the power to appoint the king's council, control of war and diplomacy, and the supremacy of the Protestant religion. Charles' answer contends that conceding to such demands would strip the crown of essential powers and empower radical forces, dissolve church and state order, concentrate power in unstable committees, and culminate in democratic anarchy—"a dark equal chaos of confusion"—rather than liberty or peace.

Significantly, Charles abandons the theory of the divine right of kings, and accedes to a balanced constitution of separated powers that check one another in the service of the public good:

> There being three kinds of government amongst men, absolute monarchy, aristocracy and democracy, and all these having their particular conveniences and inconveniences. The experience and wisdom of your ancestors hath so molded this out of a mixture of these, as to give to this

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[46] 6 GARDINER, HISTORY OF ENGLAND, *supra* note 16, at 285 ("... their petition contained within it the germs of a revolution. As a matter of fact, no man then living could remember the time when the discretionary power which Charles claimed had not been exercised by the Crown."). Charles pledged to Parliament to "confirm all your liberties; knowing, according to your own protestations, that you neither mean nor can hurt my prerogative. And I assure you that my maxim is, that the people's liberties strengthen the King's prerogative, and that the King's prerogative is to defend the people's liberties." *Id.* at 309. *See* Petition of Right, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at 66 (Samuel Rawson Gardiner ed., 3d ed. 1906) [hereinafter CONSTITUTIONAL DOCUMENTS].

[47] See Julian Goodare, *The Rise of the Covenanters, 1637-1644*, in THE OXFORD HANDBOOK OF THE ENGLISH REVOLUTION 42 (Michael J. Braddick, ed. 2015).

[48] Joseph Cope, *The Irish Rising*, in THE OXFORD HANDBOOK OF THE ENGLISH REVOLUTION 77 (Michael J. Braddick, ed. 2015).

[49] NICHOLAS CANNY, MAKING IRELAND BRITISH, 1580–1650 461–559 (2001). S.J. CONNOLLY, DIVIDED KINGDOM, 11630–1800 24-119 (2008).

> Kingdom (as far as human prudence can provide) the conveniences of all three, without the inconveniences of any one, as long as the balance hangs even between the three estates, and they run jointly on in their proper channel (begetting verdure and fertility in the meadows on both sides) and the overflowing of either on either side raise no deluge or inundation. The ill of absolute monarchy is tyranny, the ill of aristocracy is faction and division, the ills of democracy are tumults, violence and licentiousness. The good of monarchy is the uniting a nation under one head to resist invasion from abroad, and insurrection at home. The good of aristocracy is the conjunction of counsel in the ablest persons of a State for the public benefit. The good of democracy is liberty, and the courage and industry which liberty begets.[50]

This reasonable conception of the ancient constitution did not bear fruit before Charles I declared war on his own Parliament in August 1642 to start the English Civil Wars. Parliament conclusively subjugated his forces in 1646 and beheaded him in 1649.[51] Parliament's forces went on to conquer Ireland in 1649[52] and Scotland in 1651.[53] At the midpoint of the 17th century, the three kingdoms of the British archipelago were under the control of a single political body, the English Parliament.

II. REPUBLICAN GOVERNMENT IN ENGLAND

A. CHARTERED LIBERTIES IN THE ENGLISH REPUBLIC

The English Republic is source of some important ideas associated with the "ancient constitution": chartered liberty, the distinction between fundamental and administrative rights, a line between liberty and prerogative, bi-cameral and separation of powers in the form of government. Having dissolved the monarchy,[54] the House of Lords,[55] and the Anglican Church,[56] Parliament ruled England from 1648 to 1658 under republican forms of government. But without

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[50] Charles I's Answer to the Nineteen Propositions (June 18, 1642), *reprinted in* 1 THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH-CENTURY ENGLISH POLITICAL TRACTS (Joyce Lee Malcolm, ed. 1999). *See also,* J.G.A. POCOCK, 1 THE POLITICAL WORKS OF JAMES HARRINGTON 21 (1977) (highlighting the *Answer's* invocation of the Ancient Constitution, conceived as an ambulatory framework of functioning government shaped by experience).
[51] AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION 1625-1660 (2002).
[52] *See* Patrick J. Corish, *The Cromwellian Conquest, 1649–53*, A NEW HISTORY OF IRELAND: EARLY MODERN IRELAND 1534-1691 (Oxford, 2009) (discussing the Cromwellian conquest of Ireland in 1649).
[53] *See* AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION: 1625–1660 484–501 (2002) (covering the invasion of Scotland and defeat of the Scottish Royalist forces at Worcester in 1651).
[54] *Act abolishing the office of the King,* 1649*,* CONSTITUTIONAL DOCUMENTS, *supra* note 19, at 384.
[55] *Act for abolishing the House of Lords*, 1649, CONSTITUTIONAL DOCUMENTS, *supra* note 19, at 384.
[56] CHURCH AND PEOPLE IN INTERREGNUM BRITAIN (Fiona McCall, ed. 2021).

checks Parliament went from reformist to despotic—passing bills of attainder to order the death of political enemies[57] and hardening in favor of religious conformity to a presbyterian form.[58] This turbulent tenure, which lasted until 1660, was remembered in America as the "Long Parliament"[59] and served as a stark warning about the dangers of unchecked legislative power, illustrating that kings are not the only tyrants—legislators and party grandees also can become severe oppressors when they are no longer accountable to those they serve.[60]

A written constitution therefore was required. With the removal of the monarch, "[t]he despotism of Parliament was the chief danger to be feared, and there was no possibility of averting this by Acts of the Parliament itself. Naturally, therefore, arose the idea of a written Constitution, which the Parliament itself would be incompetent to violate."[61]

Three written constitutional documents were developed by the army, who in many respects were more representative of the people than the Long Parliament. The army included ordinary men from a broad range of religious traditions who had earned their position of power by venturing their lives for their "birthright and privileges as Englishmen."[62] In the Putney Debates of 1647, the soldier Thomas Rainsborough declared:

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[57] A bill of attainder is an act of Parliament, not a judicial verdict after a criminal trial—essentially an execution by legislative fiat. The Long Parliament ordered the execution of King Charles I; Thomas Wentworth, Earl of Strafford; William Laud, Archbishop of Canterbury; and James Hamilton, 1st Duke of Hamilton.

[58] Cromwell himself found strict conformity unworkable and was uninterested in furthering the work of the Parliamentary theologians in the 1643-1653 Westminster Assembly. ROBERT S. PAUL, THE ASSEMBLY OF THE LORD: POLITICS AND RELIGION IN THE WESTMINSTER ASSEMBLY AND THE "GRAND DEBATE" (1985) (discussing the Grand Debate between rival Presbyterian and Congregational forms of government which gave rise to the Westminster Assembly). Cromwell settled for a policy of limited toleration for Protestant groups he considered sufficiently conformist (shared belief in the Trinity; shared rejection of Roman Catholic doctrine). WILLIAM M LAMONT, GODLY RULE: POLITICS AND RELIGION 1603-1660 (MacMillan, 1969) (examining the impact of millennial thought on Puritan politics and religion).

[59] Although not strictly correct, notable American pamphlets regarded the period from 1640 to 1660 as the Long Parliament. *See* James Wilson, *Considerations of Nature and Extent of the Legislative Authority of British Parliament*, *reprinted in* N.C. GAZETTE, Dec. 16, 1774, at 1 [hereinafter Wilson, *Legislative Authority of British Parliament*]. This article will use the term for ease of exposition.

[60] Wilson, *Legislative Authority of British Parliament*, *supra* note __, at 2 (tracing how initially the Long Parliament secured the liberties of the people and curbed the royal prerogative, but once they could not be removed, they were unaccountable to either the king or the people and ruled oppressively).

[61] THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660, at l (Samuel Rawson Gardiner ed., 3d ed. 1906) [hereinafter CONSTITUTIONAL DOCUMENTS].

[62] 3 SAMUEL R. GARDINER, HISTORY OF THE GREAT CIVIL WAR 1642–1649, at 389 (1905) [hereinafter GARDINER, HISTORY OF THE GREAT CIVIL WAR].

> I think that the poorest He that is in England hath a life to live, as the greatest He; and therefore truly, Sir, I think it's clear, that every man that is to live under a government ought first by his own consent to put himself under that government.[63]

Vesting political power in electors whose consent would legitimize laws is core to the 1776 Declarations. This explicit rationale for universal suffrage anticipates the eventual removal of voting qualifications based on property, race, and gender, and contradicts vote dilution based on party affiliation.

The three draft constitutions are *The Heads of the Proposals* proposed in August 1647,[64] the *Agreement of the People* debated by the army in the October 1647 Putney Debates,[65] and another document also known as the *Agreement of the People* circulated by the Council of the Army on January 15, 1649.[66] Their goal was not to "establish a Parliamentary despotism upon the ruins of the despotism of the King . . . but to lessen the power of Parliament by making it more amenable to the constituencies, and by restricting the powers of the State over the liberty of individuals."[67]

These are the early prototypes for the content and structure of the American state constitutions of 1776.[68] The English constitutional proposals are premised on the original and supreme power of the people.[69] Their power is conditionally delegated to a representative body

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[63] Putney Debates of the General Council of the Army (1647), reprinted in SOURCES AND DEBATES IN ENGLISH HISTORY, 1485–1714, at 208, 208 (Newton Key & Robert Bucholz eds., 2004) (statement of Thomas Rainsborough). Rainsborough's regiment was officered by returning North Americans schooled in its independent religious beliefs. REES, supra note __, at 199.

[64] John Rushworth, *The Heads of the Proposals Offered by the Army* (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 316, 316–26 (noting that John Rushworth is the historian who recorded the proceeding at which they were proposed).

[65] The Agreement of the People, as Presented to the Council of the Army (1647), reprinted in CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 333, 333–35.

[66] This document, also known as The Agreement of the People, was a modified edition of the document by the same name debated at the Putney Debates. John Rushworth, *The Agreement of the People*, *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 359, 359–71.

[67] CONSTITUTIONAL DOCUMENTS, *supra* note 90, at ix, xlvi; *Accord* Sarah Mortimer, *Henry Ireton and the Limits of Radicalism, 1647–9*, *in* REVOLUTIONARY ENGLAND, *supra* note 86, at 55, 70 (noting that Henry Ireton, a leading thinker and Cromwell's son-in-law, "hoped to alleviate the potential for parliamentarian tyranny through regular elections, a fairer franchise system and, perhaps, through an Agreement of the People sponsored by Parliament itself").

[68] American founders read these in compilations such as JOHN RUSHWORTH, HISTORICAL COLLECTIONS (1659–1701). Rushworth had been the secretary to the New Model Army. Jefferson writes that he rummaged over Rushworth "for the revolutionary precedents and forms of the Puritans of that day." AUTOBIOGRAPHY, 1 WRITINGS OF JEFFERSON 10 (Ford, ed. 1904).

[69] JOHN REES, THE LEVELLER REVOLUTION 285 (2016). Scotland had been carrying out similar reforms during the Covenanting Revolution of 1640–41. TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720, at 395 (2007) [hereinafter HARRIS, REVOLUTION].

intended to reflect the composition of the country.[70] The delegation of power did not extend to certain fundamental reserved powers.[71] The legislature was to act as an agent, implementing the people's counsel.[72] Judges were to adjudicate the laws in favor of liberty.[73]

In structure, the *Agreement of the People* debated in October 1647 is a close ancestor of the first American state constitutions.[74] The *Agreement of the People* is definitively in the form of a new written constitution, above the power of the legislature to alter, to be ratified directly by the people.[75] It establishes popular sovereignty with equal representation,[76] limits the delegated powers of its legislative agents,[77] and reserves inviolably the expressed and implied rights of the people.[78] Its extended version distinguishes "fundamental" rights from matters of convenience.[79] It expresses as a fundamental right: "the equal or proportionable distribution of the number of the representers to be elected."[80] And it declares "freedom in elections . . . to be fundamental to our common right, liberty, and safety."[81]

However as the Long Parliament became more entrenched, the idea of a supreme legislature became even more unpopular than an absolute monarchy, and a functioning constitutional republic in England became less likely. With the backing of the army, Oliver Cromwell replaced the parliament, and assumed the title of "Lord Protector" under a written

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[70] A core objective is representation "according to some rule of equality or proportion . . . to render the House of Commons (as near as may be) an equal representative of the whole." *The Heads of the Proposals Offered by the Army* (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 317.
[71] These ideas were expressed by Henry Parker in 1642 in response to Charles I's defense of his powers near the end of his reign. *See* HENRY PARKER, OBSERVATIONS UPON SOME OF HIS MAJESTIES LATE ANSWERS AND EXPRESSES 4 (1642).
[72] *See id.* at 9.
[73] *Id.*
[74] *See* 3 GARDINER, HISTORY OF THE GREAT CIVIL WAR, *supra* note 91, at 387 ("The Agreement of the People was the first example of that system which now universally prevails in the State Governments of the American Republic."). See generally Elliot Vernon & Philip Baker, *What was the First* Agreement of the People?, 53 HIST. J. 39 (2010) for a discussion of the origins of the 1647 *Agreement of the People*.
[75] *See The Agreement of the People, as Presented to the Council of the Army* (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 333, 333–35.
[76] *Id.* at 333 ("[T]he people of England, being at this day very unequally distributed . . . ought to be more indifferently proportioned according to the number of inhabitants.").
[77] *See id.* at 334 (declaring that the power of the legislature "is inferior only to those who choose them").
[78] *Id.* at 334–35 (protecting the rights of conscience and ensuring equal protection by declaring "[t]hat in all laws made or to be made every person may be bound alike" and "[t]hat all the laws ought to be equal, so they must be good").
[79] John Rushworth, *Agreement of the People*, *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 359, 371. This document, also known as *Agreement of the People*, was a modified edition of the document by the same name debated at the Putney Debates.
[80] *Id.* at 370–71.
[81] *Id.* at 371; *Accord*, John Rushworth, *The Heads of the Proposals Offered by the Army* (1647), *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 90, at 316, 317 ("effectual provision be made for future freedom of elections.").

instrument that established a commonwealth in 1653.[82] When he summoned a parliament at all, he dealt with them much like his authoritarian predecessors.[83] As the country neared anarchy, its efforts to tether a powerful legislature to republican forms of government was ended. But the core ideas would be revived and perfected in the American state constitutions of 1776.

B. THE REVOLUTION OF 1688

In 1660, Charles II, son of the executed king, was restored with popular support. A second constitutional model then operated from 1660 to 1688 under which—to check one another against tyranny—the monarch shared power with Parliament. This was essentially the model proposed by Charles I in 1642 before his execution.[84] In this period political parties emerged, the Tory party (aligned with the monarchy, the Anglican church, and landholding interests), opposed by the Whig party (aligned with representative government, religious toleration, and mercantile interests). However, partisanship caused this constitutional model also to became authoritarian when James II (Charles II's successor) allied with Tories to disable free elections to Parliament.[85] But when James II abandoned his Tory allies to promote Catholic toleration, the Tory and Whig parties momentary united to depose him by inviting a Dutch invasion in 1688 by William of Orange and Mary II. Parliament required that William and Mary uphold the inviolable liberties expressed in the 1688 Declaration of Rights. A third constitutional model was thereby established that lasts to the present: parliamentary supremacy.[86]

At the center of this new order was the Declaration of Rights of 1688.[87] This document updates the list of liberties of the subject to negate the authoritarian claims and tactics of the four prior Stuart kings, so that the people's "religion, laws, and liberties might not again be in danger of being subverted."[88] The bipartisan Convention Parliament reasserted the old right that elections

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[82] AUSTIN WOOLRYCH, BRITAIN IN REVOLUTION, 1625–1660, at 563 (2002). The inability of the Long Parliament to reform itself to be more representative was a driver. *See* MARK KISHLANSKY, A MONARCHY TRANSFORMED: BRITAIN 1603–1714, at 187–88 (1996). The army suspected the Long Parliament of wanting to perpetuate themselves forever. A "parliamentary supremacy [proved] even more unpopular than Charles's rule, and the restoration or recreation of a 'monarchical principle' was being canvassed by Cromwell." Sarah Mortimer, *Henry Ireton and the Limits of Radicalism, 1647–9*, *in* REVOLUTIONARY ENGLAND, *supra* note 86, at 55, 70.
[83] *See* KISHLANSKY*, supra* note 110, at 211 ("To avoid a repetition of the fiasco in 1654, when members had had to be expelled, the Council used its power of judging elections to exclude republicans and other opponents of the regime at the beginning.").
[84] See discussion above on Charles I's Answer to the Nineteen Propositions (June 18, 1642).
[85] Largely though the equivalents of gerrymandering, known then as "garbling corporations" and "remodeling charters."
[86] The Anglican Church moderated to take on the inclusiveness of Parliament.
[87] Issued on February 13, 1689, later enacted into law by the Bill of Rights of 1688. Bill of Rights 1688, 1 W. & M. c. 2.
[88] 1 W. & M. c. 2.

"ought to be free."[89] They supplemented it with a requirement that elections be frequent.[90] Prerogatives that had the effect of circumventing parliamentary controls were abolished. These included the power to suspend or dispense with laws, and the power to raise revenues indirectly.[91]

Direct coercion or encroachments on the liberties of subjects were also reasserted and expanded. Ecclesiastical courts were banned, the right to petition the government was reasserted, the raising or keeping a standing army in peacetime without consent of Parliament was prohibited, and Protestants were entitled to bear arms "for their defense suitable to their conditions and as allowed by Law." Excessive bail, fines, or forfeitures, or cruel or unusual punishments, were prohibited. Freedom of speech in Parliament was protected. Judicial independence (especially the appointment and tenure of judges) was central.[92]

The bipartisan Convention Parliament offered the throne to William and Mary on the condition that they countersign the Declaration of Rights.[93] However, the unity of purpose between Tories and Whigs that enabled the Revolution of 1688 proved short-lived. By the mid-1690s, partisan conflicts in Parliament raged again, and they continued throughout the reigns of William and Mary, and later, Queen Anne.[94]

As Parliament became an institution with unchecked power capable of falling under the control of extreme partisans to the detriment of the public good, the judiciary provided counterbalances.[95] Building on Lord Coke's foundation, jurists (such as Lord Holt),[96] administrators (such as John Locke), and statesmen (such as Lord Bolingbroke)[97] emphasized that Parliament necessarily was subordinate to the constitution. Just as readily as the Crown, Parliament could abuse the trust reposed in them by the people. Parliament must, therefore, be bound by the

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[89] 1 W. & M. c. 2. The specific language "elections ought to be free" was intended to eliminate electoral districting as an instrument of arbitrary power. See LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 79 (1981) [hereinafter "SCHWOERER"] (recounting the districting and other elections abuses behind the clause, discussing their prominence in the Convention debates and contemporaneous pamphlets, and noting a companion clause prohibiting quo warranto writs).

[90] The king had the prerogative to not call a parliament at all, as Charles I had done during the Personal Rule.

[91] As with Ship Money.

[92] A contemporary puppet show depicted twelve dancing red robes saying anything they were told. SCHWOERER. at 166.

[93] See SCHWOERER at 282–83. Although the condition was not necessarily an ultimatum, the political pressure was nonetheless strong enough for William and Mary to concur.

[94] TIM HARRIS, REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720, at 313 (2007).

[95] PAUL D. HALLIDAY, DISMEMBERING THE BODY POLITIC: PARTISAN POLITICS IN ENGLAND'S TOWNS, 1650–1730, at 291–303 (1998) (discussing how the Revolution of 1688 transformed the judiciary as well as the legislature and executive, and how in the subsequent decades the King's Bench partnered with Parliament to remedy and ameliorate the worst of the constitutional impacts of acute partisan politics).

[96] See especially his opinion in *Ashby v. White* (1703) 90 Eng. Rep. 1188, which invalidated partisan election interference.

[97] HENRY ST. JOHN, LORD VISCOUNT BOLINGBROKE, A DISSERTATION UPON PARTIES; IN SEVERAL LETTERS TO CALEB D'ANVERS 5 (1735).

constitutional protections expressed in the common law right to free elections and the Bill of Rights.[145]

The British constitution thenceforth was understood to guarantee the rights of Englishmen—birthrights of freeborn citizens that are protected from all government intrusion, king or parliament. These include liberty of persons, protection of property, and to varying extent, freedom of conscience. The form of government was centered on Parliament as the supreme lawmaker, above the king; the representative of the people, enacting laws legitimized by their consent in free and frequent elections. The fundamental structure of the British constitution was an organic adaptation to the complex religious, political, and economic forces that ramified throughout the archipelago during the long seventeenth century.

But within that constitution's flexible and pragmatic framework, many underlying disputes continued to rage in the three kingdoms past the close of the century. These are reflected in analogous divisions in North America throughout in the 18th century.

III. DECLARATIONS OF RIGHTS IN 1776

A. REPUBLICAN GOVERNMENT IN THE BRITISH ATLANTIC

1. The Continuation of English Republicanism in British America

In the British Atlantic, the largest tenure by area was chartered in the twilight between the English Republic and the restoration of the Stuart kings. In 1663, Charles II, newly installed as king of England, granted a palatinate—the highest entitlement available under English feudal law apart from a kingdom—to eight Lords Proprietors over a vast tract of land named Carolina. This tenure largely shielded the Lords Proprietors and, in turn, their freeholders in Carolina, from interference by the king or parliament. It also empowered them to grant Carolinians expanded liberties and rights, including religious freedom, self-government through elected representation in local assemblies and judicial review over "the true sense or understanding" of the founding charter.[98] The constitution of Carolina effectively embodied a form of popular sovereignty that resembles a continuation in new soil of the English Republic—the sanctity of birthright liberties protected by a self-elected form of government with constrained powers.

The same continuity with the values of the English Revolution was present in the other colonies on the British Atlantic. Until the aftermath of the Seven Years War forced the question, an important segment of the population regarded the provinces as broadly autonomous members

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[98] The Palatine Lords had little philosophical inclination, economic incentive, or practical means to abridge fundamental rights or to depart significantly from the will of the people.

of confederation of trading states on the British Atlantic. The king and parliament created and maintained the overarching military and commercial framework of this confederation, but each province, perhaps to varying degrees depending on the precise terms of their charter, were constitutionally autonomous.[99] The great heterodoxy of the polity in religion, commerce, and cultural traditions required the flexible version experimented with during the English Revolution. In the same way that the common law transplanted to American soil adapted to local conditions, so too did each province operate under varying organic forms of the "ancient constitution."[100]

2. Declaration of Rights of the Stamp Act Congress (1765)

Even before the Seven Years War (1756-1763), mercantilist trade policies effectively subordinated the provinces economically. The actions of Georgian Parliaments (1763-1782) after the war—especially Stamp Act (1765)—intensified the imperial burdens on the provinces and unified sentiment against Parliament. Taxation without representation was an unmistakable violation of the ancient constitution—a Magna Carta right expanded and conclusively vindicated against the Stuart kings, but now the threat originated from Parliament itself.

In response, the Declaration of Rights of the Stamp Act Congress (1765) asserted that American colonists, as British subjects loyal to the Crown, possess the same inherent rights and liberties as those born within Great Britain, including the protections of the British constitution.[101] Central among these rights is the principle that taxation requires consent, which may be given only personally or through representatives chosen by the colonists themselves. But because the colonies lack representation in Parliament, Parliament may not constitutionally impose taxes upon them. The Declaration further affirmed the exclusive authority of colonial legislatures over internal taxation, as well as the time-honored liberties of subjects: the right to trial by jury (under threat from expanded admiralty jurisdiction), the right to petition the Crown and Parliament for redress, and the protection of property. Significantly, it cast restrictive trade regulations as equivalent to taxation, and therefore a violation of the British constitution.

Although Parliament withdrew the Stamp Act, it did not withdraw its claim to power over the colonies. The Declaratory Act of 1766 passed in the ministry of Lord Rockingham "for the first time assumed a power of unbounded legislation over the colonies of America."[102] For the next decade, Parliament continued to tighten its grip.

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[99] Constitutional questions of the day carefully considered whether the charter was derived from royal delegation or proprietary franchise, among other factors.

[100] It is important to underscore the primary impact of the realities of British legal history on the Declarations, and to regard Locke, Pufendorf, Montesquieu, Rousseau and other analysts of that history and secondary contributors.

[101] "Declaration of Rights issued in 1765 by the Stamp Act Congress, which enunciated the cardinal doctrine of the Revolution, viz., that the colonists were entitled to the common law rights." https://archive.csac.history.wisc.edu/8_THE_DECLARATION_OF_RIGHTS_OF_THE_STAMP_ACT_CONGRESS.pdf

[102] Jefferson draft of the Declaration of Taking Arms.

3. The Ancient Constitution and the Second Continental Congress (1775)

In one of the first deliberate steps of state formation, delegates of the provinces to the Second Continental Congress in Philadelphia in May and June of 1775 drafted several declarations articulating their common cause: to vindicate the constitutional rights and liberties of British America. The animating logic of the revolution was not a rejection of the British constitution, nor a revolt against the monarchy. On the contrary, the Congress appealed to the king to uphold his constitutional obligation to defend their rights as Englishmen.[103] Their grievance lay with Parliament,[104] whose actions they saw as exceeding the constitutional prerogative of that legislative branch—not initially in traditional civil liberties like trial by jury,[105] but on the principles of popular representation and responsive government, and the nascent idea in a mercantilist superstructure of a right to equity in economic life.

The *Declaration of the Causes and Necessity of Taking Up Arms*[106] asserted that Parliament had violated the British constitution in two fundamental respects. First, by asserting absolute supremacy over local legislatures, contrary to a basic precept of the British constitution: representative government. The Declaration questioned whether "the Divine Author of our existence" could have intended that one part of the human race—namely, Britons represented in Parliament—should possess "an absolute property in, and an unbounded power over others." It recalled that when the forefathers of Americans left their native lands to pursue civil and religious freedom,[107] their various constitutions[108] did not recognize the parliament of Great Britain,[109] but retained in themselves "powers of full and perfect legislation."[110] Second, the Declaration condemned Parliament for repurposing the machinery of government to exploit rather than to serve. The basic principle of the British constitution being violated was that "Government was

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[103] Appeal to King George III.
[104] John Phillip Reid, "In Legitimate Stirps: The Concept of 'Arbitrary,' the Supremacy of Parliament, and the Coming of the American Revolution," 5 HOFSTRA LAW REVIEW 459–99 (Spring 1977).
[105] Although as the conflict intensified and the King allied against America, admiralty court trials and other violations detailed in the 1776 Declaration of Rights compounded the grievances.
[106] A document adopted by the Second Continental Congress on Thursday, July 6, 1775. 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 177–79 (Worthington Chauncey Ford ed., 1905) [hereinafter CONTINENTAL CONGRESS], https://tile.loc.gov/storage-services/service/ll/llscd/lljc002/lljc002.pdf. The document is a collaboration between Thomas Jefferson and John Dickinson.
[107] Declaration of the Causes and Necessity of Taking Up Arms, Final Form. CONTINENTAL CONGRESS, *supra* note 103.
[108] A paraphrase of Jefferson's draft of the Declaration of the Causes and Necessity of Taking Up Arms.
[109] Declaration of the Causes and Necessity of Taking Up Arms, Jefferson Draft, CONTINENTAL CONGRESS, *supra* note 103, at 130.
[110] Declaration of the Causes and Necessity of Taking Up Arms, Final Form. CONTINENTAL CONGRESS, *supra* note 103.

instituted to promote the welfare of mankind, and ought to be administered for the attainment of that end."[111]

At bottom, the dispute with Parliament turned on two competing constitutional models of empire: a federated structure with the King as the unifying sovereign, versus a centralized model with Parliament at the hub as the supreme authority. The Declaration argued that the former prevailed until the Seven Years War, after which Parliament claimed unbounded legislative authority across the empire.[112] The states of British America did not mean to dissolve the union, only to restore the pre-war constitutional order. They regretted that before them was the choice of "an unconditional submission to the tyranny of irritated ministers, or resistance by force."[113] But they felt compelled to vindicate their constitutional rights by taking up arms, and "resolved to die Freemen rather than to live Slaves."[114]

Their rejection of a Parliament-centric model is evident in their response to Lord North's Conciliatory Resolution of February 1775.[115] North's proposal to restore tranquility essentially was a tax rebate: American colonies would submit to pay taxes to Parliament but would be rebated any portion in excess of their allocable share of imperial expenses. The Continental Congress rejected the proposal in July 1775, on the basis that the power of taxation rests solely with the colonies themselves.[116] The response expanded the principle of "no taxation without representation" to encompass restraints on trade, equating monopolies as another form of unfair taxes.[117] The Continental Congress fundamentally rejected North's proposal because to agree to it would be to agree to recognize the supreme authority of the British Parliament.[118] The constitutional principle again asserted was freely representative government chosen by the people themselves with autonomy to decide, among other matters, economic policy.

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[111] The American forefathers built new constitutionally distinct societies precisely to escape the "evils of misrule." Declaration, Jefferson Draft, CONTINENTAL CONGRESS, *supra* note 103, at 130.

[112] Declaration of the Causes and Necessity of Taking Up Arms, Final Form. CONTINENTAL CONGRESS, *supra* note 103. Threats of Parliamentary interreference with colonial charters predate the close of the war. Jack P.Greene, The Seven Years' War and the American Revolution: The Causal Relationship Reconsidered, 93 THE BRITISH ATLANTIC EMPIRE ("in 1757 the House of Commons, in an important precedent, intervened in the purely domestic affairs of a colony for the first time since 1733 when it censured the Jamaica Assembly for making extravagant constitutional claims while resisting instructions from London.")

[113] Declaration of the Causes and Necessity of Taking Up Arms, Final Form. CONTINENTAL CONGRESS, *supra* note 103.

[114] Declaration of the Causes and Necessity of Taking Up Arms, Final Form. CONTINENTAL CONGRESS, *supra* note 103. This is a repudiation of the doctrine of passive obedience. It also underscores the importance in a constitution to have judicial vindication of rights individuals against legislature.

[115]15 PARL. HIST. ENG. (1775) 311, 311–14 (Feb. 20, 1775) (Lord North's Conciliatory Resolution).

[116] 2 CONTINENTAL CONGRESS, *supra* note 103, at 224 (Resolution of July 31, 1775). Legislatures had a corresponding obligation to assure that public funds are "not wasted among the venal and corrupt for the purpose of undermining the civil rights of the [taxpayers]."

[117] CONTINENTAL CONGRESS, *supra* note 103, at 229-230

[118] See CONTINENTAL CONGRESS, *supra* note 103, at 231

Another foundational text drafted by the Continental Congress was an address to the people of Ireland.[119] This might seem incongruous, but it was resonant because Ireland was England's first colony. Ireland was conquered not solely through arms, but through legally implemented economic control. The "Irish Precedent"[120] illustrated how a population, nominally possessing the same "birthrights of Englishmen" and under the fiduciary care of the English Parliament, could be made Parliament's economic vassal through monopolistic regulation of trade, manufacturing, and education. Expressing America's solidarity with Ireland, the letter described both peoples as denied the right to enjoy "the fruits of their labor." Like the prior document, the address underscored for the delegates of the principle that stability depends on a balanced economic order—and that such balance, framed as a constitutional right to economic fairness, was now absent.

Such rights are also expressed in the Continental Congress' formal expression of gratitude in recognition of the Lord Mayor of London's remonstrance to the Crown against the coercive measures imposed on the American colonies.[121] The Lord Mayor of London was John Wilkes, a prominent advocate of parliamentary reform and press freedom. Compared to factions more aligned with traditional authority, London's political culture had long been more tolerant, republican, and commercial.[122] The Lord Mayor's provocative address expressed abhorrence to the parliamentary policies "big with all the consequences that can alarm a free and commercial people," asserting that their true aim was "to establish arbitrary power over all America."[123] The Continental Congress' letter of appreciation to the Lord Mayor reflected a deliberate effort to bypass both Parliament and the Crown and to appeal directly to the British public—especially its

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[119] Continental Congress's *Address to the People of Ireland*, adopted on July 28, 1775. The address to the people of Ireland had been adopted by the Second Continental Congress on Friday, July 28, 1775. CONTINENTAL CONGRESS, *supra* note 103, at 212. The drafting committee was James Duane, William Livingston, Samuel Adams, and John Adams. CONTINENTAL CONGRESS, *supra* note 103, at 80.

[120] "Affairs of Ireland, 20 November 1729," Founders Online, National Archives, https://founders.archives.gov/documents/Franklin/01-01-02-0045. [Original source: The Papers of Benjamin Franklin, vol. 1, January 6, 1706 through December 31, 1734, ed. Leonard W. Labaree. New Haven: Yale University Press, 1959, p. 162.] See especially the commentary. Ireland "has left…hardly any thing [sic] more than the Name of a free Constitution." W. V. WELLS, 1 LIFE OF SAMUEL ADAMS 383. Note that Adams's wording echoed the remarks of prominent Anglo-Irish leaders advocating for greater self-government (i.e., Molyneux, Swift, and others). Jonathan Swift et al., "'A Short View of the State of Ireland' ," essay, in THE CAMBRIDGE EDITION OF THE WORKS OF JONATHAN SWIFT: IRISH POLITICAL WRITINGS AFTER 1725 (A Modest Proposal and Other Works), vol. 14 (Cambridge, UK: Cambridge University Press, 2018), 20.

[121] Approved by the Continental Congress on Saturday, July 8, 1775. Letter from the Continental Congress to the Lord Mayor of London (July 8, 1775), in 2 CONTINENTAL CONGRESS, *supra* note 103, at 183–84. Also available at https://avalon.law.yale.edu/18th_century/contcong_07-08-75.asp.

[122] London was the epicenter of the English anti-authoritarian revolutions of the 17th century. London merchants had assisted in the effort to repeal the Stamp Act.

[123] *Cape Fear Mercury* (July 28, 1775), available at https://newspapers.digitalnc.org/lccn/sn83025834/1775-07-28/ed-1/seq-3/. King George III rebuffed the petition, expressing full confidence in the British Parliament. Dismissing the petition as an encouragement of rebellion he refused to receive future remonstrances from the Wilkes unless transmitted through the body corporate of the city. Wilkes responded by invoking legal custom and constitutional precedent in language that closely echoed American claims to inherited British liberties.

urban commercial base—in defense of a mutually obligating constitutional framework founded on common values.[124] As they had expressed consistently, the Second Congress framed their actions not as rebellion, but as fidelity to a constitutional tradition that had historically linked liberty, representative government, and trade throughout the British Atlantic world.

B. CONTENT AND STRUCTURE

The provincial congresses that met throughout 1775, brought to life functioning states unified by two core principles: individual liberty and representative government. Those congresses set the specifications for the 1776 state constitutions: keep the British constitution but improve it, establish a highly representative form of government, cohere many diverse traditions through tolerance for freedom of conscience, economic fairness, and education.

In July of 1776 the provinces declared their independence—stressing that George III, the constitutional paladin of the birthright liberties of Americans, had abandoned them[125]—and began work on replacement constitutions. Some states opted against distinct declarations of rights, implicitly incorporating earlier founding documents.[126] The state constitutions which enacted distinct declarations of rights were Virginia (June 1776),[127] Delaware (September 1776),[128] Pennsylvania (September 1776),[129] Maryland (November 1776),[130] and North Carolina (December 1776). Those Declaration of Rights build on historic protections of person and property under the British constitution but refine and expand them in important ways.

1. Structure of the Declarations of 1776

Three distinct structural features are common to the Declarations of 1776. First, the enumeration of rights is in a *written* constitution (in contrast to the largely unwritten British constitution). In the same way the as the Magna Carta of 1225, the English Declaration of 1688, and later the 1791 Federal Bill of Rights, the 1776 Declarations were enacted as enforceable law.[131]

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[124] Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire (2008).
[125] In various parts of the Declaration of Independence, Jefferson seems to strain to personify grievances against the king, more recognizable archetype as a tyrant, than Parliament.
[126] See, e.g., New Jersey Charter of Concessions (1676) https://teachingamericanhistory.org/document/new-jersey-concessions/
[127] VIRGINIA DECL. RIGHTS OF 1776 (June 12), VIRGINIA CONSTITUTION OF 1776 (June 29). https://www.archives.gov/founding-docs/virginia-declaration-of-rights
[128] CONST. OF DELAWARE OF 1776. https://avalon.law.yale.edu/18th_century/de02.asp#b1
[129] CONST. OF PENNSYLVANIA OF 1776.
[130] CONST. OF MARYLAND OF 1776. https://avalon.law.yale.edu/17th_century/ma02.asp
[131] See, e.g. North Carolina Constitution.

Second, they usually are separately stated—a declaration of rights followed by a form of government.[132] The architecture of *rights* then *form* is reflected in this line from the July 4, 1776, Declaration of Independence: "laying its foundation on such principles and organizing its powers in such form . . .."[133] As a textual matter, the Declarations are inviolable, expressed as structurally superior to the form of government.

Third, the Declarations serve to delineate the boundary between liberty and prerogative.[134] Writing later, Hamilton explained that

> It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right, assented to by Charles the First, in the beginning of his reign. Such also was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament, called the Bill of Rights.[135]

In constitutions founded on the power of the people, a Declaration of Rights functions as a reservation of power, never delegated to the government in the first place.[136] It serves a different function from the form of government, which arrays the branches of government in the service of the welfare of the people.

2. Popular Sovereignty

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[132] Indeed, in Virginia and North Carolina, they were passed on different days.

[133] Thomas Jefferson relied upon the English Bill of Rights of 1688 for his Summary View of the Rights of British America (July 1774), which in turn form the basis of the Declaration of Independence of 1776. https://avalon.law.yale.edu/18th_century/jeffsumm.asp. The prototype of the state Declarations of Rights, the Virginia Declaration of Rights (June 12, 1776), predates the national Declaration of Independence (July 4, 1776). The Declarations defined the birthrights of individuals, and the Declaration of Independence declared the invalidity of the British government to adequately supply them. They also served, in their similarity, as expressions of shared values that united the states in their war for independence.

[134] ASHE, *supra* note 2, at 565. *See generally* JOHN BAKER, SOURCES OF ENGLISH LEGAL HISTORY: PUBLIC LAW TO 1750, at 48–81 (1st ed. 2024) (providing examples of charters and confirmations of liberties that outlined the boundaries between individual rights and the English kings' prerogatives).

[135] Federalist, No. 84 (Hamilton). See also Thomas Jefferson, Letter to Madison, March 16, 1789, Jefferson's Works, Vol. III. p. 4. (noting the importance of declarations of rights, particularly to counter tyranny of the legislature).

[136] "[E]verything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void." Cooley on Constitutional Limitations 65 (1903). See also Cooley Chapter IX (Protection To Person And Property Under The Constitution Of The United States) p 366 ("during the long struggle for constitutional liberty in England, covering the whole of the seventeenth century, importance was justly attached to a distinct declaration and enumeration of individual rights on the part of the government").

The Declarations take as their starting point that the People are endowed with natural and inalienable birthrights.[137] The people are the source of all political power.[138] Government is instituted for their welfare,[139] and is their servant and trustee. It is established for the good of the whole, and may be resisted or reformed if it fails to perform.[140] Subsets of the population are not entitled to special privileges or emoluments.[141]

The Declarations guarantee representative government[142] through frequent elections, and the guarantee that "elections ought to be free."[143] A venerable English law phrase,[144] this clause requires both fair electoral procedures and judicial remedies for violations.[145]

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[137] VIRGINIA DECL. RIGHTS OF 1776, Art. I, Pennsylvania Declaration of Rights of 1776, art. I; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 1 (1789).

[138] VIRGINIA DECL. RIGHTS OF 1776, Art. II, Pennsylvania Declaration of Rights of 1776, art. IV; Maryland Declaration of Rights of 1776, art. I; Delaware Declaration of Rights of 1776, § 1; North Carolina Declaration of Rights of 1776, art. I; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 2 (1789)

[139] N.C. Const. Arts. I, II, XXI.

[140] Virginia Declaration of Rights of 1776, art. III, Pennsylvania Declaration of Rights of 1776, art. V; Maryland Declaration of Rights of 1776, art. IV; Delaware Declaration of Rights of 1776, § 5; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 3 (1789).

[141] VIRGINIA DECL. RIGHTS OF 1776, Art. IV; North Carolina Declaration of Rights of 1776, arts. III & XXII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 4 (1789).

[142] Several declarations guarantee a right to participate in the legislature. Maryland Declaration of Rights of 1776, art. V; Delaware Declaration of Rights of 1776, § 6; Virginia Declaration of Rights of 1776, art. VI; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 6 (1789).

[143] VIRGINIA DECL. RIGHTS OF 1776, Arts. V-VI. Pennsylvania Declaration of Rights of 1776, art. VII; Maryland Declaration of Rights of 1776, art. V; Delaware Declaration of Rights of 1776, § 6; North Carolina Declaration of Rights of 1776, art. VI; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 6 (1789).

[144] As noted above, the constitutional phrase "elections ought to be free" dates to 1275, roughly contemporaneous with the dawn of representative government in England. In 1689 it was reasserted in the English Declaration of Rights, after James II and his Tory allies sought to control Parliament by the equivalent of gerrymandering. The landmark case of Ashby v. White (1701) established that the right to free elections had a judicially enforceable remedy.

[145] A judicial remedy was noted in Bayard (1787) and the Hillsborough Debates on the Federal Constitution (1788). the partisan composition of the state).

The Declarations block techniques that can circumvent the implementation of popularly ratified legislation, such as by suspension.[146] They also protect the safeguards of free press and speech,[147] assembly and petition,[148] bearing of arms,[149] and control of the military.[150]

3. Liberty of Conscience, Person, and Property

The provincial congresses of 1775 were often predicated on cohering a society with a diverse range of convictions through mutual toleration and coexistence. The 1776 Declarations of Rights codified a broadly conceived right of the people to pursue "the dictates of their own consciences" without government interference.[151]

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[146] VIRGINIA DECL. RIGHTS OF 1776, Art. VII. Maryland Declaration of Rights of 1776, art. VII; Delaware Declaration of Rights of 1776, § 7; North Carolina Declaration of Rights of 1776, art. V; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 7 (1789).

[147] Pennsylvania Declaration of Rights of 1776, art. XII; Maryland Declaration of Rights of 1776, arts. VIII & XXXVIII; North Carolina Declaration of Rights of 1776, art. XV; Virginia Declaration of Rights of 1776, art. XII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 16 (1789).

[148] Pennsylvania Declaration of Rights of 1776, art. XVI; Delaware Declaration of Rights of 1776, § 9; North Carolina Declaration of Rights of 1776, art. XVIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 15 (1789).

[149] Pennsylvania Declaration of Rights of 1776, arts. XIII & XXV; Delaware Declaration of Rights of 1776, § 18; North Carolina Declaration of Rights of 1776, art. XVII; Virginia Declaration of Rights of 1776, art. XIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 17 (1789).

[150] **Standing armies dangerous; civil supremacy over the military.** Pennsylvania Declaration of Rights of 1776, arts. XIII, XXVI & XXVII; Delaware Declaration of Rights of 1776, §§ 19–20; Virginia Declaration of Rights of 1776, art. XIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 17 (1789). **Quartering of soldiers.** Delaware Declaration of Rights of 1776, § 21; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 18 (1789).

[151] Pennsylvania Declaration of Rights of 1776, art. II; Delaware Declaration of Rights of 1776, § 2; North Carolina Declaration of Rights of 1776, art. XIX; Virginia Declaration of Rights of 1776, art. XVI; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 20 (1789).. The N.C. Declaration of Rights of 1776 provides: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences." Art. XIX, Decl. of Rights, 1776 N.C. Constitution. Accord VIRGINIA DECL. RIGHTS OF 1776, Art. XVI. See also, 9 The Works of John Adams 451 (John Adams expresses approval of North Carolina's "effort for the destruction of bigotry, which is very remarkable. They have abolished their establishments of episcopacy so far as to give complete liberty of conscience to dissenters, an acquisition in favor of the rights of mankind which is worth all the blood and treasure which has been or will be spent in this war.")

The Declarations restate the ancient protections[152] of process in criminal matters: trial by jury,[153] rights of the accused (notice, confrontation, counsel, self-incrimination),[154] prohibition on ex post facto laws,[155] unreasonable searches and seizures and general warrants,[156] no excessive bail, fines, or cruel and unusual punishment,[157] and habeas corpus.[158] Similarly the sanctity of property[159] and consent for taxation[160] are stipulated.

Rather than static or selective judicial recognition of individual rights, the ambulatory expression of this liberty advances the American Revolution's project to adapt the British constitutional tradition in ways that broaden freedom of conscience and safeguard evolving notions of liberty. Three of the Declarations admonish frequent recurrence to fundamental principles.[161] These ideas of liberty are expansively conceived to elevate individual moral autonomy over state-imposed orthodoxy and made to change with society, and so they implicitly protect unenumerated rights.[162]

4. Equality of Opportunity

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[152] Pennsylvania Declaration of Rights of 1776, arts. IX & XXI; North Carolina Declaration of Rights of 1776, art. XII; Virginia Declaration of Rights of 1776, art. VIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 9 (1789).

[153] Pennsylvania Declaration of Rights of 1776, art. IX; Maryland Declaration of Rights of 1776, art. III; Delaware Declaration of Rights of 1776, §§ 13–14; North Carolina Declaration of Rights of 1776, arts. IX & XIV; Virginia Declaration of Rights of 1776, art. VIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., arts. 8 & 11 (1789).

[154] Pennsylvania Declaration of Rights of 1776, arts. IX & XX; Delaware Declaration of Rights of 1776, §§ 14–15; North Carolina Declaration of Rights of 1776, art. VII; Virginia Declaration of Rights of 1776, art. VIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 8 (1789).

[155] Maryland Declaration of Rights of 1776, art. XV; Delaware Declaration of Rights of 1776, § 11; North Carolina Declaration of Rights of 1776, art. XXIV.

[156] Pennsylvania Declaration of Rights of 1776, arts. X & XXIII; Delaware Declaration of Rights of 1776, § 17; North Carolina Declaration of Rights of 1776, art. XI; Virginia Declaration of Rights of 1776, art. X; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 14 (1789).

[157]Pennsylvania Declaration of Rights of 1776, art. XXII; North Carolina Declaration of Rights of 1776, art. X; Delaware Declaration of Rights of 1776, § 16; Virginia Declaration of Rights of 1776, art. IX; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 13 (1789).

[158]North Carolina Declaration of Rights of 1776, art. XIII; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 10 (1789).

[159] VIRGINIA DECL. RIGHTS OF 1776, Art. XI.

[160] Pennsylvania Declaration of Rights of 1776, art. VIII; Maryland Declaration of Rights of 1776, art. XII; Delaware Declaration of Rights of 1776, § 10; North Carolina Declaration of Rights of 1776, art. XVI; Virginia Declaration of Rights of 1776, art. VI; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 6 (1789).

[161] Virginia Declaration of Rights of 1776, art. XV; Pennsylvania, art. XIV; North Carolina, Art. XXI;

[162] This was made explicit in the Federal Bill of Rights. U.S. Const. amend. IX. See also for example Sec. 37. 1868 N.C. Constitution (now Sec. 36)("This enumeration of rights shall not be construed to impair or deny others, retained by the people; and all powers, not herein delegated, remain with the people.").

The nascent conceptions of economic liberty that propelled the revolutions were also codified in the Declaration of Rights of 1776. The Declarations warrant equality of commercial opportunity in several provisions.[163]

Many provincial congresses of 1775 embodied the principle that self-government and public well-being must rest on an educated citizenry. The Declarations of 1776 repudiated the religious and class exclusions that limited access to education in both the British archipelago and the British Atlantic. For example, Article XLI of the North Carolina Form of Government directed the legislature to establish publicly funded schools and universities to ensure broad access to "all useful learning."[164] These provisions advance the founding vision of a government that equips its citizenry for self-rule and prosperity through knowledge.

5. Representative Government

The 1776 Constitutions made sacrosanct the principle that the people be governed by their own consent. They repudiated the concept of "virtual" representation. These principles were codified in a system of elected government whose representational quality was assured in the Declarations. The provincial congresses of 1775 were a constitutional revolt not against monarchal despotism but against unchecked legislative power.[165] The founders rejected legislative supremacy as incompatible with a free people and the protection of their birthright liberties.[166] The Declaration of Rights expressed as a fundamental individual right that "the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other."[167]

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[163] North Carolina, Art. XXIII (monopolies), Maryland, Art. XXXIX ("That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered.")

[164] The 1776 Constitution sought to offer universal education in North Carolina by providing in Article XLI of the Form of Government "That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities." John Adams had advised the founders to provide for the education of youth.

[165] The Congress was a reaction to late Georgian Parliaments (1763-1782), unchecked by king or judiciary, passed the Stamp Act, Declaratory Act, Coercive Acts in violation of the rights of Englishmen in the Americas. North Carolina's Assembly became despotic in suppressing the Quakers (1675-1710) and in the War of the Regulators (1771). The Long Parliament (1640-1660) executed key ministers and then king not by criminal conviction but simply by enacted legislation.

[166] The North Carolina Gazette (1775) warned that legislatures will destroy the very purpose for which they were created—the happiness of society—unless checked. Hamilton similarly said: "You are mistaken, when you confine arbitrary government to a monarchy. . . . When any people are ruled by laws, in framing which, they have no part . . . the government with respect to them, is despotic."

[167] Maryland Declaration of Rights of 1776, art. VI; North Carolina Declaration of Rights of 1776, art. IV; Virginia Declaration of Rights of 1776, art. V; James Madison, Proposed Amendments to the U.S. Constitution, 1st Cong., art. 5 (1789). These complement the popular sovereignty provisions, for example Virginia Const. V; N.C. Decl. Rights, N.C. Art. IV. Decl. Rights, Arts I, ("That all political power is vested in and derived from the people only.") and II ("That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.").

As noted above, the constitutions adopt a Form of Government to define the boundaries of the branches of government relative to each other, arraying them to counterbalance one another to accomplish the welfare goals of people without violating their liberty rights. The Form of Government fractured and diffused power among three separate co-equal branches, each with a superintending responsibility over the other. This was a very important improvement from the British constitution, which after 1688 vested supreme power in the legislature.[168] Critically, the design obligates the judiciary to check the legislature when it invades an individual right or otherwise exceeds its chartered authority.[169]

The final product embodies the ideals of the revolution: it sanctifies a clarified and expanded version of the birthright liberties of Englishmen, and it implements a progressive iteration of the British constitution that better arrays and balances the branches of government for their benefit.[170]

C. APPLYING THE ORIGINAL BLUEPRINT IN THE PRESENT

The ultimate goals of this paper are to reconnect the ancient principles with the modern present, and to enhance their responsiveness to current issues. This section distills some of the core ideas developed above that are especially important to revitalize in present jurisprudence.

1. Understanding the Historical Foundations of the Declarations

The 1776 Declarations evolved from ancient legal principles adapted to the conditions and values of British North America. Their framers were highly cognizant that the Declarations represented a break from the principle of parliamentary supremacy that was pilar of their education[171] and the basis of the British Constitution since 1688. The Declarations were restatements of the birthrights of Englishmen which even Parliament could not violate. As such, they are a clear break with parliamentary supremacy, as dramatic as the English Republic's break with monarchy, and with the same founding principle—popular sovereignty. But they are not a

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[168] To make it highly responsive, the Constitution required yearly elections of the legislature. To moderate the risk of mob rule, it split the legislature into upper and lower chambers. It set property requirements for both candidates and voters to further reduce this risk.

[169] This important principle was put into operation in Bayard v. Singleton (1787).

[170] See generally JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION; JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY (2005); Webster, William Clarence. "Comparative Study of the State Constitutions of the American Revolution." 9 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 64-104 (1897). http://www.jstor.org/stable/1009670.

[171] William Blackstone, widely read in the colonies, wrote that no law could constrain Parliament. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *109

break with historic practice.[172] Far from being innovations born in 1776 fully formed like Athena, they expressed the birthrights of American in historic legal terms, rooting their work in Magna Carta, the English Declaration of Rights of 1689, and the many other statutes and precedents that animated the "ancient constitution," but renewing and improving upon the constitutional order evolved in Britain to deal with the social values, economic conditions, and other realities of the newly forming polity.

A maxim applicable to modern jurisprudence is to illuminate the text of the Declarations by the long timeframe of logic and experience implicit in their words, and with a sensitivity to current values and adaptability to present conditions that is the essence of the common law tradition.

2. Declarations as Cohering Society

Many aspects of the Declarations were critical to cohere a diverse polity at the Founding and remain even more important today. But some of the expressed rights seem fainter. One is the ancient right of free election, a broad injunction preventing any action that dilutes or interferes with the individual's right to vote. For much of English constitutional history it was part of a fundamental triumvirate: liberty of person, sanctity of property, freedom of election. The founders cohered society with a covenant of representative government.

Another vital but subtle thread is equality of opportunity. At the Founding a mercantilist system slanted against many American activities produced a form of economic vassalage.[173] Government patronage and restrictions on education similarly subordinated segments of society.[174] The Declarations eschewed the effects of such stratification and cohered a new society premised on opportunity.

A third deep and important current relates to unenumerated rights, the recognition that the earth belongs to the living,[175] that values and conditions change, and that a constitution must not ossify the polity. The Declarations did not purport to be exhaustive lists of rights, nor a grant of certain enumerated rights. Instead, they are premised on the notion that people—*living* people—are endowed directly with reason, conscience, bodily autonomy, and the right and power to establish a limited and responsive government. This evergreen promise cohered a diverse polity.

3. Declarations as Binding Law and Their Role in Constitutional Structure

From inception, the Declarations were not simply aspirational or rhetorical flourishes. They were drafted and enacted as binding positive law, carrying actionable legal force over future

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[172] They align with, for example, Bolingbrook's conceptions of the inherent limitations of parliamentary power.
[173] See discussion above regarding the "Irish Precedent."
[174] As noted above, they were analogized to forms of taxation that required the explicit consent of the governed.
[175] Jefferson to James Madison, Sept. 6, 1789, Boyd et al., eds., Jefferson Papers, XV, 396.

legislatures. Their original function was and remains to define the boundaries between individual liberty and governmental prerogative. They are not to be confused with the form of government, which is structurally subordinate and serves the different purpose of separating and arraying the branches of government. The Declarations established explicit reservations of power retained by the people, never delegated to government in the first place. To use the property law "bundle of sticks" metaphor, the people, possessed in the first instance with all the sticks, granted their government part of the bundle, but retained the sticks expressed in the Declaration. Or perhaps a more accurate metaphor is a revocable limited power of attorney: the people as principal engage government as servant to act for their well-being, never in a manner that impairs the liberties expressed in the Declarations, or there is an actionable breach of trust.

The significance to modern jurisprudence is a directive to enforce the Declarations as positive law, to not regard them as mere aspirations because of their archaic expression, and to not parse the textual language—written in intentionally broad constitutional terms to endure—literally or narrowly in a way that shifts without a constitutional convention the boundary between liberty and prerogative.[176]

4. Declarations and Judicial Review

A related idea is the obligation of the judiciary to vindicate the Declarations. The decrees were, from the outset, coupled with government structures that separated powers, tasking the judiciary with defending the declared rights and their safeguards. Thus, judicial review should not be understood as an innovation but as a continuation of a common law tradition—assumed by the framers to take on new meaning in the context of written constitutions. It is designed to be exercised to realize chartered liberties.[177]

5. Relationship between the Declarations and the Federal Bill of Rights

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[176] James Iredell warned about arguments that empty the meaning of broadly worded chartered liberties by applying flawed originalism and specious textual compliance with peripheral provisions.

> If a right is thus invaded, what would be the plausible answer of the government to such a complaint? Would they not naturally say, "We live at a great distance from the time when this Constitution was established. We can judge of it much better by the ideas of it entertained at the time, than by any ideas of our own. The bill of rights passed at that time, shewed that the people did not think every power retained which was not given, else this bill of rights was not only useless, but absurd. But we are not at liberty to charge an absurdity upon our ancestors, who have given such strong proofs of their good sense, as well as their attachment to liberty. So long as the rights enumerated in the bill of rights remain unviolated, you have no reason to complain. This is not one of them."

PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CONVENED AT HILLSBOROUGH, ON MONDAY THE 21ST DAY OF JULY, 1788, AT 173 (1789).

[177] Judicial doctrines that restrict the vindication of declared rights merit scrutiny.

The Declarations are the direct parent to the Bill of Rights in the United States Federal Constitution, and they have the same English law pedigree. Madison drafted the Bill of Rights using direct commands and prohibitions to further ensure its legal enforceability.[178] The chief difference is in the scope of their operation: the Federal Bill of Rights applies to the collective federation of states, whereas each Declaration protect the citizens of its own state. Accordingly, the Declarations, consistent with the values of their polity, can provide greater protections.[179]

CONCLUSION

The 1776 Declarations of Rights should be understood today as living constitutional instruments—deeply rooted in English legal tradition, transformative in their embrace of popular sovereignty, and foundational to the development of American constitutional law. Their continued importance lies in their vision of rights as inalienable reservations of power for the people and in their establishment of enforceable limits on government authority—principles that remain vital to constitutional interpretation and the practice of judicial review in the modern present.

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[178] This approach made the rights clear legal guarantees that directly limited Federal power, rather than abstract ethical principles. Thomas B. McAffee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1522–23 (2007)

[179] *See, e.g.* Harry C. Martin, The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge, 70 N.C. L. REV. 1749, 1752 (1992) (noting the greater protection to individual liberties enshrined in the North Carolina Constitution). There is not *a priori* reason similar provisions should move in lockstep.