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The colonial charter of Massachusetts : flint for revolution

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THE COLONIAL CHARTER OF MASSACHUSETTS:
FLINT FOR REVOLUTION

A Thesis

Presented to

The Faculty of the Department of History

San Jose State University

In Partial Fulfillment

of the Requirements for the Degree

Master of Art

by

Isaac Derek Zorea

May, 1997

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ABSTRACT

THE COLONIAL CHARTER OF MASSACHUSETTS: FLINT FOR REVOLUTION

by Isaac D. Zorea

This thesis addresses the topic of England's Constitution, specifically how seventeenth-century constitutional changes altered the political status of colonists from Massachusetts Bay. It examines what England's Constitution was in the early 1600's, and the charter given to Massachusetts in 1629. It then examines what effect England's constitutional crisis between 1628 and 1689 had on the rights promised to Bay colonists, and whether this contributed to the American Revolution.

Research on this subject reveals that England's Constitution in 1629 promised immutable political rights to citizens and protection under preestablished laws. Under this Constitution, the Massachusetts charter ceded powers of self government to the colony's leadership. After 1629, England suffered a series of constitutional crises. By 1765, these constitutional changes altered drastically the political status guaranteed to the colonists in North America. Research revealed that this change in political status was a contributing cause of the American Revolution.

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Chapter One

Introduction: An Historiographical Overview

No man can have in his mind a conception of the future, for the future is not yet. But of our conception of the past we make our future.¹

Analyzing the relationship between colonial Massachusetts and England as it developed in the seventeenth-century clarifies the explosive issues that eventually sparked the American Revolution. These New Englanders rejected all attempts by England's leaders to derogate the political rights assured them by their colonial charter. Although the Massachusetts Charter of 1629 vested its settlers with all the legal powers necessary to establish and conduct government in America, Charles I, and later Parliament, frequently ignored these rights of judicature. Charles I first attempted to undermine the Charter of Massachusetts by creating the Royal Commission in 1636. This agency encountered stubborn resistance by the young colony's leadership. This bold resistance created the first legal crisis between England and her New England colony. Confusion regarding England's Constitution caused this initial strain between England and Massachusetts. As this confusion continued, it eventually became flint for the American Revolution.

Often misunderstood, the American Revolution represents a thoroughly English

¹Thomas Hobbes, *The Elements of Law, Natural and Politic*, World's Classics, (Oxford: Oxford University Press, 1994), 32.

event. It was not the product of greed or a desire for altruistic innovations away from England's traditional political system. In fact, remarkable similarity exists between the ideological motives for England's own civil war in the 1640s and the American Revolution. Similarly, most all of England's many rebellions dating from King Alfred the Great's reign in the ninth century occurred over these same ideological differences.² Political leaders in eighteenth-century British North America believed fervently that a balanced Constitution existed in England regulating the behavior of both King and Parliament. Although, the existence of such a Constitution is open for debate, ignoring the power this constitutional "myth" held for seventeenth- and eighteenth-century political thinkers is wrong.³

Natural law and legal rights were vital concepts to all the leaders within Colonial

²Constitutional theorists during the Stuart period believe King Alfred, reigning from 871 - 891, to be the Father of English Common Law. Despite the primitive realities of Saxon society during Alfred's reign, in the mind of the Stuart political theorists there existed a firmly realized balanced Constitution stretching back to this time period. To view with historical hindsight that the Saxon king's were frequently despotic is an error since the theorists pushing for the Petition of Rights held as real this elevated view of the Saxon period.

³Focusing on the often despotic behavior of England's past Kings many theorists have discounted the existence of an English Constitution. Despite documents, such as Magna Charta, The Petition of Rights, or the legion of legal precedents implying an Ancient Constitution, many historians claim these were meaningless tools used by manipulative Kings. See: Christopher Brooke, *From Alfred to Henry III, 871 - 1272* (London: W. W. Norton & Company, 1961); Ibid, *The Saxon and Norman Kings*, The British Monarchy Series, (Glasgow: William Collins Sons & Co. Ltd., 1963), 21 - 83; James Clarke Holt, *Magna Carta*, 2nd. ed., (Cambridge: Cambridge University Press, 1992).

America. Massachusetts became the model colony for the purposes of this study because it used many logical arguments against England throughout its long history. The arguments used by the Bay Colony against England prior to the American Revolution were not, however, region-specific; her sister colonies also shared these sentiments. The colonies that eventually became the United States were English, and they defended their perception of English legal traditions.

An exchange of fire at Lexington Green in 1775 ignited the American Revolution. Could a single crisis begin such a momentous occurrence without revolutionary tinder? Certainly, revolution, the ultimate challenge to social order, results only after a long precedent of resentment and unhappiness has fermented. This condition existed, at least regarding the American Revolution; persistent belief in political injustice and legal uncertainty date back to initial colonization.⁴ Further, could Colonial America have developed in any atmosphere other than political uncertainty? A cursory view of England's history, from 1606 to 1765, reveals a society replete with political turmoil. Royal prerogative between 1603 and 1640 served as England's only unwritten Constitution. Stuart absolutism vanquished the rule of law, particularly between 1629 and 1640 when Charles I refused to call a single Parliament.

This study will clarify the semantical confusions that provoked the American

⁴As will be shown in chapter two of this study, the implications of the 1636 Royal Commission were so abhorrent to Massachusetts colonists that they were willing to resort to the use of bloodshed in resisting Charles over its creation.

Revolution. It will distinguish real precedents from desired precedents, real Constitution from royal prerogative. Although an invisible force, legitimacy, yielded immense power throughout England's history. Its path defined the true issues that caused the American Revolution, highlighting the necessity of that painful event.

That a misconception over basic principles caused the American Revolution seems evident by the many contradictory studies done on this subject. Historical research on the American Revolution is immense, comprising many evolutionary stages. Constant throughout these several stages, however, are two distinct biases: Whig and Tory. In general, Whig-biased studies viewed the colonial rebellion from England favorably, focusing on the inevitability and beneficial quality associated with the event. Contrasting the Whig viewpoint, Tory theorists labeled colonial motives for rebelling from England as unreasonable. These two schools interpreted American history based on the way they interpreted England's history. This correlation provides perspective into the events leading to America's formation. Whig historians, like Lord Macaulay, believed that England possessed an ancient Constitution.⁵ Tory historians, like David Hume, believed that constitutions always change and that economic progress was more important a consideration than political liberty.⁶

⁵Thomas Babington Macaulay, *The History of England*, Penguin Classics, Hugh Trevor-Roper, ed., (New York: Penguin Books, 1968).

⁶David Hume, *The History of England; From the Invasion of Julius Caesar to the Revolution in 1688*, 6 vols., (Indianapolis: Liberty Classics, 1983, based on, London: T. Cadell, 1778, ed.).

Not surprisingly, historians closest to the American Revolution focused most narrowly on subjective-based judgments on the Revolution's causes. Focus on specific individuals as paramount protagonists, portrayed either in glowing light or vile infamy, characterized these early studies.⁷ Within this school were studies placing blame for the Revolution on Thomas Hutchinson's abrasive personality and on malcontents such as James Otis, Samuel Adams or Thomas Paine.⁸

Shifting from single personalities, the second generation historians of the Revolution focused on the role grand ideologies played in sparking the Revolution. For example, George Bancroft's *History of the United States* examined the impact that destiny and democracy had in prompting the colonies rebellion from England.⁹ David Ramsay's *History of the American Revolution*, in contrast, disagreed with Bancroft's negative view of the Navigation Acts and claimed that the general difficulties associated with managing the overseas dominions in America was the Revolution's true cause.¹⁰ Ramsay, a true

⁷As described in: Bernard Bailyn, *The Origins of American Politics*, (New York: Alfred A. Knopf, 1968), 4.

⁸See the following works for examples: Peter Oliver, *Origin and Progress of the American Rebellion: A Tory View*, [1781], Ed. Douglas Adair and John A. Schutz. (San Marino: Huntington Library, 1961); John J. Waters, Jr., *The Otis Family in Provincial and Revolutionary Massachusetts*, (Chapel Hill: IEAHC, University of North Carolina Press, 1968).

⁹George Bancroft, *History of the United States of America, from the Discovery of the Continent*, 6 vols., (Port Washington: Kennikat Press, 1967; originally published 1885).

¹⁰David Ramsay, *History of the American Revolution*, 2 vols., (Liberty Classics, 1990); Ibid, *History of the United States from Their First Settlement as English Colonies*,

Tory theorist, ignored all arguments of political injustice, believing economic need to be a more valid consideration.

The third historiographic phase focused on the structure of Britain's Empire, its inherent cumbersome flaws, as a major reason for America's revolt. This popular school produced such eminent proponents as Charles M. Andrews,¹¹ George Louis Beer,¹² Herbert L. Osgood¹³ and Sydney George Fisher.¹⁴ These scholars utilized statistical collections to illustrate the administrative problems that led to colonial discontent. Rather than addressing specific reasons why the Revolution occurred, these historians tried instead to prove that few substantive issues existed to warrant the colonies behavior.

In 1607, to the Year 1808, (Carey & Son, 1818, 2nd ed. revised and corrected).

¹¹Charles M. Andrews, *The Colonial Period of America History*, 4 vols, (New Haven: Yale University Press, 1934-38); Ibid, *The Colonial Background of the American Revolution: Four Essays in American Colonial History*, (New Haven: Yale University Press, 1931, rev.ed.).

¹²George Louis Beer, *British Colonial Policy, 1754 - 1765*, (Gloucester: Peter Smith, Inc., 1958; 1st. published, New York: Macmillan and Company, 1907); Ibid, *The Origins of the British Colonial System, 1578 - 1660*, (Peter Smith, Inc., 1959; 1st published, New York: Macmillan and Company, 1908); Ibid, *The Old Colonial System, 1660 - 1754*, 2 vols., (Gloucester: Peter Smith, Inc., 1958; 1st. published, New York: Macmillan and Company, 1913).

¹³Herbert Levi Osgood, *The American Colonies in the Eighteenth Century*, 6 vols., (Gloucester: Peter Smith, Inc., 1958, reprinted, Columbia University Press, 1924).

¹⁴Sydney George Fisher, *The Evolution of the Constitution of the United States: Showing that it is a Development of Progressive History and Not an Isolated Document Struck Off at a Given Time or an Imitation of English or Dutch Forms of Government*, (J.B. Lippincott, 1910; original Publ. 1897); Ibid, *Struggle for American Independence*, 2 vols. (J.B. Lippincott, 1908); Ibid, *The True History of the American Revolution*, (J.B. Lippincott, 1902).

The Navigation Acts, described by Beer, benefited the colonies; Lawrence A Harper¹⁵ refuted this position but Oliver M. Dickerson¹⁶ supported it.

While Beer and Osgood avoided political analysis, many studies focused specifically on political causes for the American Revolution. Following the Liberal-Whig tradition, George Otto Trevelyan's *The American Revolution* idealized the contrasting views prompting the Revolution.¹⁷ Trevelyan posited that George III dismissed England's traditional Constitution and that the Colonies resisted these innovations. Refuting this view, however, Sir Lewis Namier claimed that George III operated under the original Constitution but that opposition to these traditional prerogatives, leading to intrigue and corruption, eventually led to the Revolution.¹⁸

Through all these varying positions on the causes for the American Revolution the

¹⁵Lawrence Averell Harper, *The English Navigation Laws; A Seventeenth-Century Experiment in Social Engineering*, (New York: Octagon Books, A Division of Farrar, Straus, and Giroux, 1973, 2nd printing; copyright, 1939).

¹⁶Oliver Morton Dickerson, *The Navigation Acts and the American Revolution*, (Philadelphia: University of Pennsylvania Press, 1951); Ibid, *American Colonial Government, 1696 - 1765; A Study of the British Board of Trade in its Relation to the American Colonies, Political, Industrial, Administrative*, (Russell & Russell, Co., 1962; copyright, 1939).

¹⁷George Otto Trevelyan, *The American Revolution*, 14 vols., (New York: Longsmans, Green, & Co., 1898 - 1912); Ibid, *George the Third and Charles Fox, the Concluding Part of the American Revolution*, 2 vols., (New York: Longsman, Green & Co., 1912 - 1914).

¹⁸Lewis Bernstein Namier, *England in the Age of the American Revolution*, (New York: Macmillian and Company, 1961, 2nd ed.); Ibid, *The Structure of Politics at the Accession of George III*, 2 vols., (New York: Macmillian and Company, limited, 1929).

modern historian has emerged. Modern theorists from the Whig tradition have focused mostly on the ideology that led to the Revolution. These theorists include Edmund S. Morgan,¹⁹ Bernard Bailyn,²⁰ and Richard B. Morris.²¹ These three historians closely examined the causes claimed by the actual participants, pamphleteers and political theorists of the Revolution and analyzed the validity of such claims. From the Tory tradition, some recent historians have claimed an inclination toward revolt developed early in America's colonial history. Historians from this school include Lawrence H.

¹⁹Edmund Sears Morgan, *The American Revolution: A Review of Changing Interpretations*, (Service Center for Teachers of History, 1958); Ibid, *The Birth of the Republic, 1763 - 89*, (Chicago: University of Chicago Press, 1956); Ibid, *The Challenge of the American Revolution*, (New York: W. W. Norton & Company, Inc., 1976); Ibid, *Inventing the People: The Rise of Popular Sovereignty in England and America*, (New York: W. W. Norton & Company, 1988); Ibid, *Puritan Political Ideas, 1558 - 1794*, (New York: The Bobbs-Merrill Company, Inc., 1965); Ibid, *The Stamp Act Crisis: Prologue to Revolution*, Published for the Institute of Early American History and Culture, (Chapel Hill, University of North Carolina Press, 1953).

²⁰Bernard Bailyn, *The Ideological Origins of the American Revolution*, (Cambridge: Belknap Press of Harvard University Press, 1967); Ibid, *The Great Republic: A History of the American People*, (New York: Little, Brown, and Co., 1977); Ibid, *Massachusetts Shipping, 1697 - 1714; A Statistical Study*, (Cambridge: Belknap Press of Harvard University Press, 1959); Ibid, *The Origins of American Politics*, (New York: Alfred A. Knopf, 1968); Ibid, *Pamphlets of the American Revolution, 1750 - 1776*, (Cambridge: Belknap Press of Harvard University Press, 1965).

²¹Richard Brandon Morris, *The American Revolution Reconsidered*, (New York: Harper & Row, 1967); Ibid, *The Emerging Nations and the American Revolution*, (New York: Harper & Row, 1970); Ibid, *Studies in the History of American Law: with Special Reference to the Seventeenth and Eighteenth Centuries*, (New York: Octagon Books, 1964; copyright, 1958).

Gipson,²² Samuel Seabury,²³ and John C. Miller.²⁴ The latter school examined closely the part Massachusetts played in provoking the Revolution. Some historians from this school even claimed that the desire to rebel from England first emerged with the colonization of Massachusetts and that this dissent merely continued to mount until it succeeded in inciting its neighbors against the Mother Country.²⁵

A belief characteristic with Tory histories is that by the 1750's Britain had become an empire and maintaining this imperial status was requisite.²⁶ Under this assumption analyzing benefit versus costs associated with running a colonial empire is valid. Mercantilism, under the imperial theory, is a brilliant method for maintaining an empire: the colonies contribute raw resources to the mother country and exist solely as a market

²²Lawrence Henry Gipson, *The British Empire Before the American Revolution*, 15 vols., (New York: Alfred A. Knopf, 1958, compl. rev.).

²³Samuel Seabury, ed., *Letters of a Westchester Farmer, 1774 - 1775*, (New York: Da Capo Press, 1970; repr. from the Westchester County Historical Society, 1931.); Ibid, *A View of the Controversy Between Great Britain and Her Colonies: . . . In a Letter, to the Author of A Full Vindication of the Measures of the Congress, From the Calumnies of Thier Enemies . . . By A. W. Farmer*, (New York: Author of Free Thoughts & Co., 1776).

²⁴John Chester Miller, *The Colonial Image: Origins of American Culture*, (New York: George Braziller, 1962); Ibid, *Origins of the American Revolution*, (Stanford: Stanford University Press, 1943, repr. 1959); *Sam Adams; Pioneer in Propaganda*, (Stanford: Stanford University Press, 1936, repr. 1960).

²⁵Ibid., *Origins of the American Revolution*, 4.

²⁶Louis M. Hacker, "Economic and Social Origins of the American Revolution," from *The Causes of the American Revolution*, John C. Wahlke, ed., Problems in American Civilization, George Rogers Taylor, gen. ed., (Boston: D. C. Heath and Company, 1962, rev. ed.), 1-6.

for the manufactures resulting from these resources. When viewed through an imperial lens, the grievances listed in the Declaration of Independence appear petty and minuscule compared to the larger more important issues at hand.²⁷ This pro-empire-bias viewpoint held a prominent position in England during the years before the American Revolution. It presented the theory that colonies existed solely for England's sake and ignored the rights entitled to those living in these colonies. A London newspaper editorial written in 1775 stated: "If we allow France and Holland to supply them with fabric, we may just as well give up all ideas of having colonies at all."²⁸ Focusing too much on the London-based mercantile viewpoint, Tory-Empire histories have misconstrued the American colonists' true motives.

A major contributing factor causing the American Revolution was the confusion that existed in 1775 regarding the political status given colonists residing in British North America. No settlers to Massachusetts immigrated thinking they were ceding their privileges as English citizens. To the contrary, the Massachusetts Charter specifically guaranteed that these colonists would retain all their privileges and rights as if they had

²⁷John C. Miller, *Origins of the American Revolution*, xvi - xvii, 30 - 32; Soame Jenyns, "The Objections to the Taxations of our American Colonies by the Legislature of Great Britain, Breifly Consider'd," from *Great Issues in American History From the Revolution to the Civil War, 1765 - 1865*, Richard Hofstandter, ed., (New York: Vintage Books, 1958), 13.

²⁸Morning Post and Daily Advertiser, London [January 5, 1775], from John Miller, *Origins of the American Revolution*, 7.

never left England.²⁹ If John Winthrop believed he would lose his freedom by immigrating to Massachusetts, he clearly would not have left England.³⁰ Regarding the American Colonies, Edmund Burke noted wisely to Parliament in 1775: "Slavery they can have anywhere. It is a weed that grows in every soil. They may have it from Spain, they may have it from Prussia. But . . . freedom they can have from none but you."³¹ Burke further pointed out that freedom "is the true Act of Navigation, which binds to you the commerce of the colonies, and through them secures to you the wealth of the world."³² When Parliament discarded the freedoms enjoyed by the American colonists, the basis for colonial loyalty vanished.

Some historical studies have suggested that the American colonies benefited

²⁹"Charter of the Massachusetts Bay, March 4, 1628/29," from *Foundations of Colonial America: A Documental History*, vol. I., *Northeastern Colonies*, Keith Kavenaugh, ed., (New York: Chelsea House Publishers, 1973), 57.

³⁰The purpose of the Cambridge Agreement was in fact, to ensure that immigration to Massachusetts, with Charter in hand, was legally possible and that there would occur no loss of political privileges whatsoever. "The True Coppie of the Agreement at Cambridge, August 26, 1629," from *The Thomas Hutchinson Papers*, vol. I., edited by Thomas Hutchinson, (Boston: The Prince Society, vol. I, 1865, repri., New York: Burt Franklin, 1967), 28. See also: "The Agreement at Cambridge," from *Life and Letters of John Winthrop, Governor of the Massachusetts-Bay Company, At Their Emigration to New England, 1630*," vol. I., Robert C. Winthrop, ed., (Boston: Ticknor and Fields, 1864; repri., New York: Da Capo Press, 1971), 344 - 45. This whole issue is addressed thoroughly in Chapter One.

³¹Edmund Burke, "Speech on Moving Resolutions for Conciliation with the Colonies," from *Great Issues in American History From the Revolution to the Civil War, 1765 - 1865*, Richard Hofstandter, ed., 41.

³²Ibid.

economically under English rule. These past studies have argued that pure greed prompted the American Revolution. One such study noted that “the revolutionary period was an era of growth and prosperity for the colonies.”³³ This paper pointedly ignores such statistical analysis, cost versus benefits, regarding the colonial era. The issues that prompted the colonists to resist England were more important than mere financial considerations. As John Adams wrote in 1775, it was not a question of “whether the alteration is for the better or not, but whether Parliament has any right to make alterations at all. And it is the universal sense in America, that it has none.”³⁴ John Adams, referring to the “alterations” in England’s Constitution, also remarked that “the British government is not an empire,” but rather “a limited monarchy.”³⁵ For Adams, financial considerations were subservient to larger concepts such as constitutional rights and political traditions.

This study will illustrate colonial America’s consistent struggle to protect England’s sacred Constitution. Supporting this goal is the belief that by 1775 the guardians of England’s political traditions lived in America, not England. James I, crowned in 1603, altered the traditional political balance. As James dogmatized with royal proclamation divine right kingship,³⁶ England entered into a constitutional crisis that did not

³³John Miller, *Origins of The American Revolution*, 25.

³⁴John Adams, “Novanglus,” [Feb., 2, 1775] from *Great Issues in American History From the Revolution to the Civil War, 1765 - 1865*, Richard Hofstandter, ed., 39.

³⁵*Ibid.*, 37.

³⁶This concept is closely analyzed in Chapter 3 and presented most clearly by King James in these various works: King James I/VI, “Basilikon Doron. Or His Majesties

resolve until after 1776.³⁷

Those residing in America were spared, for the most part, the turbulence associated with England's constitutional crisis. Colonial charters gave these colonists political independence -- at least, in theory. While protected theoretically by charter, these colonists were physically protected by the expanse separating them from the constitutional battlefield. Development in America, as the Massachusetts example will show, progressed under the premise that in England law was sovereign.³⁸ This premise became the pronounced aim of the English Civil War and illustrates that the colonists' political beliefs were well founded.³⁹ Guaranteed all rights and privileges associated with English

Instrvctions to His Dearest Sonne, Henry the Prince," [1599] from *The Political Works of James I*, Charles Howard McIlwain, ed., Harvard Political Classics., vol. I., (Cambridge: Harvard University Press, 1918; reprint, from 1616 ed.); Ibid, "The Trew Law of Free Monarchies: or The Reciproock and Mutuall Duetie Betwixt a Free King, and His Naturall Subjects," [1598] from *Political Writings*, Johann P. Sommerville, ed., Cambridge Texts in the History of Political Thought, Raymond Geuss and Quentin Skinner, series editors, (Cambridge: Cambridge University Press, 1994).

³⁷Harold Stannard, *The Two Constitutions: A Comparative Study of British and American Constitutional Systems*, (New York: D. Van Norstrand Company, Inc., 1949), 64 - 79.

³⁸An extreme example of this notion was expressed by Thomas Paine: "But where, some say, is the King of America? . . . let a day be solemnly set apart for proclaiming the charter, let it be brought forth placed on the divine law, the Word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America, The Law is King." Thomas Paine, "Common Sense," [1776] from *Great Issues in American History From the Revolution to the Civil War, 1765 - 1865*, Richard Hofstandter, ed., 61.

³⁹Lawrence Stone, *The Causes of the English Revolution, 1529 - 1642*, Harper Torchbooks, (New York: Harper & Row, 1972), 98 - 117.

citizenship, any gains from the English Civil War were automatically gains for the American colonists as well -- regardless of their actual participation in this conflict.

This paper will further show that although absolutism suffered physical defeat with Charles's beheading in 1649, it continued to survive in England past the seventeenth-century. Reacting to Stuart absolutism, Cromwell, and later Parliament, acquired too great an authority over rights of judicature.⁴⁰ As the 1640s unfolded, Parliaments' powers gradually but dramatically increased.⁴¹ Parliamentary changes affected those residing in America more than those within the Mother Country, where Parliament more directly represented them. To those in Massachusetts, and elsewhere in British North America, Parliament's growing influence resembled closely the dangerous innovations of Charles I. In fact, after Charles II's restoration in 1660, colonists could see no real change regarding the abuses to charter privileges. Attacks on political liberty by one person felt exactly the same as attacks by many people. To American colonists slavery was slavery, independent the form of ownership.

Throughout the eighteenth-century, Massachusetts presented to Parliament the same political defense they used when Charles I encroached on their liberties. These

⁴⁰Despite Cromwell's constitutional experiment, he moved too closely toward despotism, becoming nearly as arbitrary as King Charles I. For information of Cromwell's *Instrument of Government*, see: Harold Stannard, *The Two Constitutions: A Comparative Study of British and American Constitutional Systems*, 36 - 39.

⁴¹Appendix A, provides a list of the explosive growth of navigation restrictions illustrative of Parliaments increased desire for increased control.

colonists persistently claimed that their charter privileges detailed specific rights and immunities. These privileges were founded on the understanding that prior to granting charters for America's colonization, English monarchs possessed all rights and liberties over the dominions claimed by right of discovery.⁴² Had any English king wanted to establish in America a trading outpost manned by adventurers willingly subject to arbitrary rules and policies, this would have been acceptable according to England's Constitution. In such a situation these "colonists"⁴³ would have departed England as servants in their monarch's direct employ. This employment would be conditional upon their willingness to accept whatever policies the king implemented. Such an example is similar to the way France and Spain established colonies. In these colonies, adventurers were freed from their mother country's laws and regulations.⁴⁴ As such, French and Spanish colonies did not extend their nation's legal boundaries, only the sphere of its financial influence. At one point, England had the opportunity to follow French and

⁴²The claim to right of conquest, or discovery, is based on the discoveries of John Cabot, of which more shall be discussed in chapter two.

⁴³The term "colonists" in such a hypothetical situation as the one described may not truly apply ("serf" or "servant" would be more correct), yet in this situation the term is used loosely and merely for illustrative purposes.

⁴⁴These colonists were bound by the policies of the trading company or leading adventurer, these regulations may or may not be in accordance with the agreed laws of the mother country. For more on the French colonial model and how it differed from the original model used by England see: Louise Phelps Kellogg, *The American Colonial Charter: A Study of English Administration in Relation Thereto, Chiefly After 1688*, (New York: Da Capo Press, 1971, reprint; 1st published 1904, Annual Report of the American Historical Association for the Year 1903, vol. I.), 38.

Spanish colonial policies.⁴⁵ Charles I, however, did not adopt this policy when he granted Massachusetts its colonial charter.

England's colonial policy extended its law and legal substructure to include newly established colonies in North America. The charter granted to the New England Company in 1620 proved this by clearly stating that those colonizing to New England would retain all "rights and immunities" possessed by "free" English citizens.⁴⁶ According to England's legal traditions, once James I granted the New England Charter he ceded his direct judicature rights to the New England Company. The following chapter will examine thoroughly the specifics of the Crown's rights of judicature transfer to the New England Company, and finally to the Massachusetts Bay Company in 1629.

After 1629, when King Charles I attempted to neutralize the prerogatives given Massachusetts he acted against the law. Although he was the King of England, Charles did not have the right to interfere arbitrarily in the government of Massachusetts; he had given away this prerogative. English kings once possessed supreme judicature rights over lands discovered in their name. However, these rights could be, and were, given up voluntarily through colonial charters. According to England's political traditions, a charter could not be arbitrarily revoked once granted nor could subsequent commissions

⁴⁵This is to speak completely theoretically, the English Crown lacked the wealth and power at the beginning of the seventeenth-century to finance risky overseas colonies using their own resources. David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, (London: Adam and Charles Black Ltd, 1938, 6th ed., 1961) 344.

⁴⁶Refer Supra fn 30.

or grants nullify its prerogatives, even if these came from the King.⁴⁷

Colonies given a Royal Charter possessed the same powers that a king yielded in his palace, both executively and legislatively.⁴⁸ Examples exist throughout England's history describing bodies politic possessing the same jurisdictional sovereignty Massachusetts gained from its charter of 1629. Called Counties Palatine, these provinces included the County of Durham, Province of Jersey, County of Chester, and Wales, to name just a few.⁴⁹ In these settlements, legislative duties and general executive control remained the prerogative of that province's chosen leadership. Parliament-legislated laws were not binding in such settlements.⁵⁰ Counties Palatine possessed jurisdictional sovereignty for pragmatic reasons: the expanse separating these provinces from England's political center made their participation in the legislature impractical and unwieldy. Considering the distance separating England from Massachusetts it is understandable that this colony received the same privileges as previous Counties Palatine, and this implied Stuart conformity to established political behavior.

⁴⁷Louise Phelps Kellogg, *The American Colonial Charter . . . 1688*, 23.

⁴⁸Thomas Pownall, *The Administration of The Colonies: Wherein Their Rights and Constitution are Discussed and Stated*, A Da Capo Press Reprint Series: The Era of the American Revolution, gen. ed., Leonard W. Levy, (New York: Da Capo Press, 1971, reprinted; 1st printed 1768), 56.

⁴⁹*Ibid.*, 63, 138, 144, 147. Related to these examples is Calais, which when conquered by King Edward II was declared to be a colony vested with all the rights inherent to English citizens and as a part of this act Calais receive representation in Parliament: *Ibid.*, 148.

⁵⁰*Ibid.*, 150.

England had established a precedent for managing Counties Palatine. When it became possible, due to technological advances, to manage these independent outposts directly, the King brought them under Parliament's control. The absorption of Counties Palatine never occurred without compensation. Upon absorption these areas always gained representation in Parliament and received the same means for redressing their particular concerns available to all England's provinces.⁵¹ Essentially, the problems that emerged directly before the American Revolution pertained to these type of County Palatine issues.

According to legal precedent, if Massachusetts by 1765 had ceased to be a County Palatine, then it ought to have had representation in England's Parliament. When Massachusetts lost its County Palatine privileges and received no compensatory privileges, a sense of helplessness and outrage developed that eventually erupted into bloodshed. As legal historian Harold Stannard wrote: "it is characteristic of English practice that every right claimed is alleged to have been exercised in the past. . . . The appeal to precedent meant not only that the King must conform to the actions of his predecessors but also that his own actions must be consistent."⁵² To New England's colonists, this rule applied equally to Parliament as to King.

By 1775 Parliament had heard frequently the claim that it had been ignoring legal

⁵¹Ibid., 144, 147, 175.

⁵²Harold Stannard, *The Two Constitutions: A Comparative Study of British and American Constitutional Systems*, 7.

precedents regarding Colonial Charters and constitutional privileges. Parliamentary leaders knew that colonists believed that Parliament's actions were inconsistent with past legal behavior. Edmund Burke, to name just one, is on record as having informed Parliament of the arguments presented by the American colonists. Serving as a Parliament member during this revolutionary period, Burke's views regarding the crisis deserves historical praise. Speaking to Parliament in 1775, he said: "the people of the Colonies are descendants of Englishmen. . . . They are not only devoted to liberty, but to liberty according to English ideas and on English principle."⁵³ Burke urged fuller analysis into the issues over which the colonies resisted Parliament. His advice failed to convince the majority in Parliament at eve of the Revolution, but the insights provided by Burke are not ignored in this study. Burke spoke correctly when he stated: "in order to prove that the Americans have no right to their liberties, we are everyday endeavoring to subvert the maxims which preserve the whole spirit of our own. To prove that the Americans are not free, we are obliged to depreciate the value of freedom itself."⁵⁴

This study's second chapter aims toward presenting the rights and liberties Massachusetts' colonists believed they received prior to settling in America. Toward this end it will detail the events that led to establishing the Massachusetts Bay Colony. The

⁵³Edmund Burke, *Burke's Politics: Selected Writings and Speeches of Edmund Burke on Reform, Revolution, and War*, Ross J.S. Hoffman & Paul Levack, ed.s., (New York: Alfred A. Knopf, Inc., 1949), 69.

⁵⁴*Ibid.*, 75.

rights of judicature transfer that occurred during the years prior to founding the Bay company are integral to Massachusetts colonial rights and necessitate analysis. Also, attention will focus on the particular wording of Massachusetts' colonial charter of 1629 - herein are found the source and extent of the colony's political rights. This chapter will conclude by discussing the creation of the Royal Commission in 1636, and its explosive reception in the Bay Colony.

Although in principle treason, resistance toward the Royal Commission by the Massachusetts colonists followed rich historical precedents. Civil unrest can occur over a myriad of issues; the historiography on the American Revolution confirmed this premise. While many previous studies have pointed to economic or self-interest motivators for the American Revolution, this study points toward constitutional confusion as the prime motivator. As such, the third chapter provides the intellectual backdrop fueling the colonial rebellion against arbitrary government. Acceptance of England's eighteenth-century constitution is commonplace; this ignores that a great shift occurred in England's Government with the accession of James I. The constitutional crisis that occurred during the early Stuart rule was so dramatic that eighteenth-century England still had not fully recovered from the disequilibrium. Being unwritten, England's Constitution relied strongly on accepted precedents to define political legitimacy. When the earliest Stuart monarchs dismissed the accepted notions of political legitimacy, the very foundations of English society fell under attack. To understand why Massachusetts felt confident in resisting the Royal Commission, examination of England's constitutional development up

to 1603 must occur.

This study's third chapter focuses on the two constitutional interpretations in England contemporaneous to Massachusetts' colonization: absolutism and constitutionalism. Within these two constitutional schools of thought can be found the prime motivators for the American Revolution. Before analyzing James's absolutist doctrines, a description of England's pre-1603 Constitution is necessary. Following this historical backdrop, the paper will focus on James's absolutism as described in *Trew Law*. Charles I embraced his fathers absolutist theories, when he became king in 1625, and toward the end of the seventeenth-century Parliament followed suit. In the concluding part of this chapter, analysis will focus on absolutism's affect on English subjects, ending with analysis on the Petition of Rights.

The second part of chapter three will describe the constitutional school of thought, as expressed primarily by Sir Roger Twysden. A seventeenth-century common law theorist, Twysden wrote a fine treatise opposing absolutism. This work will serve as the literary rebuttal to James's *Trew Law* and will represent the viewpoint adopted by colonial Massachusetts. Twysden relied on the precedents against absolutism found throughout England's constitutional history and his concepts are those used by American colonists to refute Parliament's absolutist legislation.

Chapter four, the concluding chapter, will describe mercantilism and how it affected the American colonies. As expressed through the Act of Trade and Navigation, mercantilism represented Parliament's movement toward absolutism. Discarding the

Charter of Massachusetts privileges, which guaranteed County Palatine sovereignty to the colony, Parliament's navigation acts incorporated the conceptual premise of the *Trew Law*. As such, colonial resistance to Parliament's mercantilism represented a consistency by colonial America, and a lack of consistency by Parliament. The constitutional schools of thought that existed in 1775 were the same that existed in 1629, however, Parliament had taken the King's place as the opponent to citizen rights. The specifics behind the Parliament's transition from the constitutionalist school to the absolutist school will occupy the paper's concluding segment.

The New England colonists' political status in the period after the Declaratory Act of 1765 differed radically from the position enjoyed at the commencement of colonization, over a hundred and forty years earlier. By 1765 England had adopted the French method of colonial administration and had denied those living in Massachusetts their status as free English Citizens. According to the Declaratory Act, Parliament possessed legal right to disenfranchise the two million subjects living in North America. The policies of Parliament in the years leading to America's Revolt mirror closely those of Charles I -- policies over which he eventually lost his head. As its constitutional history shows, England had often resisted arbitrary government. The resistance by Massachusetts and the rest of America against Parliament's arbitrary policies represents one battle in the lengthy history of struggles fought in England for constitutional rule and political liberty. To equate the American Revolution with the whims of a mercantile minority or to blame this event solely on an adaptation to the American environment, misses the primary cause

misses the primary cause and most important aspect of American culture -- its lengthy historical heritage.

Chapter Two

The Early Political History of Massachusetts

The Desires, and other Passions of man, are in themselves no Sin. No more are the Actions, that proceed from those Passions, till they know a Law that forbids them: which till Lawes be made they cannot know: nor can any Law be made, till they have agreed upon the Person that shall make it. ⁵⁵

For where no Covenant hath preceded, there hath no Right been transferred, and every man has right to every thing; and consequently, no action can be Unjust. But when a Covenant is made, then to break it is *Unjust*: And the definition of Injustice, is no other than *the not Performance of Covenant*. And whatsoever is not Unjust, is *Just*. ⁵⁶

Introduction: Legitimacy's Measuring Rod.

The colonial charter of Massachusetts provided the fuel for future constitutional struggles between this colony and England. The charter, and the rights and privileges it guaranteed, could have assumed a variety of shapes. James I and Charles I had complete freedom in constraining the powers given to the colonial settlements in America, since Parliament gave no legislative input. The charter given to Massachusetts in 1629, as such, represented a freely given contract between Charles I and his Puritan subjects. When the King decided to arbitrarily revoke Massachusetts' charter, he introduced a

⁵⁵Thomas Hobbes, *Leviathan*, Cambridge Text in the History of Political Thought, edited by Richard Tuck, (Cambridge: Cambridge University Press, 1991, reprinted 1992), 89.

⁵⁶*Ibid.*, 100.

constitutional argument that had wide implications. Could the king without cause invalidate a contract freely given? Or, was he bound, like all of his countrymen, to the Laws of Equity -- that is, the English Constitution?

This chapter will analyze the specific events that preceded the charter of Massachusetts and those particular rights and privileges guaranteed within this document. Further, it will examine the movement of the charter from England to the colony, discussing the legality of such an occurrence. It will conclude by analyzing the initial attack on judicature privileges in Massachusetts by the creation of the Royal Commission in 1636. Once established, the Royal Commission introduced issues regarding constitutional legitimacy.

Part One: The Movement Toward Colonization.

Whereas most colonial corporations were fiscal in essence, the Massachusetts settlers established one that was political by nature.⁵⁷ Led by John Winthrop, trained in the law, Puritans seeking refuge from religious persecution in England set their sails for New England. Winthrop's designs for colonization aimed toward political stability and not financial gain. He knew that the religious community he wanted to establish would

⁵⁷John Dickerson, "The Massachusetts Charter and the Bay Colony (1628-1660)," from *Commonwealth History of Massachusetts, Colony, Province and State*, vol. I. *Colony of Massachusetts Bay*, [1605-1689] ed., Albert Bushnell Hart. (New York: Russell & Russell, 1927, reissued, 1966.), 99 - 100.

never last if it lacked formal political foundations. A single underlying premise encouraged Winthrop's risky move to America: faith that law would protect all his hard work and effort in establishing the Massachusetts colony.⁵⁸

Many political attacks upon the Massachusetts colony occurred after 1629, questioning the legality of its charter. Several issues eventually raised against the early government of Massachusetts, however, related to the period before 1629. The colony legally obtained the privileges utilized in structuring its highly autonomous government from previously given charters.

English colonization in North America dates to 1497 with John Cabot's adventures, but large-scale colonization did not occur until the seventeenth-century. In 1606 a merchant group forming the Virginia Trading Company received from James I a patent land grant for most of North America. After gaining its charter, the Virginia Trading Company divided into two main groups, the London and the Plymouth Companies, based on geographic location. The charter authorized the London Company to establish a

⁵⁸The Stuart Kings, specifically James I and Charles I, were avid absolutists, still, they frequently proclaimed their respect for the rule of Law. They often stated that their highest duty lay in preserving common law, and maintaining the Sacredness of Law. Most of these proclamations were given before Massachusetts' colonists left for America, and therefore it may be possible that these affected their decisions regarding their departure from England. See: Earl of Salisbury, "The Earl of Salisbury," [8 March 1610] from *The Stuart Constitution, 1603 - 1688: Documents and Commentary*, edited by J. P. Kenyon, (Cambridge: Cambridge University Press, 1966), 12.; James I Regent, "James I on Monarchy: Speech to Parliament," [21 March 1610] from *The Stuart Constitution, 1603 - 1688*, J. P. Kenyon, ed., 12 - 14.; Charles I Regent, "Reply to Petition of Rights," [2 June 1628] from *The Parliamentary History of England, 1066 - 1803*, (London: R. Bagshaw Co., 1807, reprinted, New York: AMS Press, 1966), 551.

colony between the latitude of the 34th and the 41st degrees,⁵⁹ while the Plymouth Company gained the territory between the 38th and the 45th degrees.⁶⁰ Although, a slight territorial overlapping existed between the Virginia Company's two branches, the charter stipulated that neither company could settle within a hundred miles of the other.

While the London base for the Virginia Trading Company quickly utilized its patent privileges, settling Virginia in 1606, the Plymouth Company was less efficacious. The Virginia Colony's success, after an initial winter of famine, led the London merchants to request a separate patent governing their colony.⁶¹ By 1612 the Virginia Colony, having received its third charter, had developed into an independent company. After several failed attempts by the Plymouth Company to colonize their patent, these merchants, likewise, requested from James I a charter independent from the Virginia Trading Company.⁶² Successfully arguing that an independent charter would allow

⁵⁹Lyon Gardiner Thwaites, *The Colonies, 1492 - 1750*, (New York: Longmans, Green and Co., 1910. Twenty-fifth impression), 66.

⁶⁰Ibid., 67. Since the rights and privileges of the Plymouth company are eventually transferred to the Massachusetts Bay Company, there is much significance in these earlier trading companies. The specific means through which Massachusetts received the privileges possessed by the Plymouth Company is to be persistently called into question by opponents to the Puritan colony.

⁶¹The original patent for the Virginia Company gave to King James immensely broad legislative and executive powers over the company's colonizing efforts [See: George Bancroft, *History of the United States of America*, 86.]. Subsequent requests by the London Company for new Virginia charters aimed at gaining greater governing autonomy.

⁶²"Petition for a Charter of New England by the Northern Company of Adventurers, March 3, 1619/20," from *Foundations of Colonial America: A Documental*

greater efficiency, James granted the request.⁶³ On 3 November 1620, the Plymouth Company received an independent charter, creating the Council for New England.⁶⁴

The most serious charges levied against Massachusetts after 1629 accused the colony of acting too much like an independent commonwealth. While these specific charges are addressed later in this chapter, recognizing Virginia and New England as precedents for Massachusetts political innovations is critically important. The Virginia Trading Company represented King James's experiment with colonization. As the initial adventurers began their egress to Virginia, in 1606, they brought with them legal codes created by the King. It quickly became evident by as early as 1609 that an overseas colony's requirements, in time and money, were too great for James's direct control. Virginia's second charter, the 1609 charter, gave the London-based Company Council control over the financial and judicial matters of the colony. Still, not until 1619 when

History, vol. I., *Northeastern Colonies*, edited by Keith Kavenaugh, (New York: Chelsea House Publishers, 1973), 20 - 21.

⁶³King James I considered the Plymouth Company to be much more loyal than the London Company, the former's composition consisting of many nobles and other close relations to the King. Loyalty had become an important consideration since by 1620 King James had regretted ceding his Virginian prerogatives to the London Company. Virginia utilized its charter rights quite liberally. By 1619, the Fourth Virginia charter established representative government in North America; by 1621 the colony created a written Constitution. By 1623 King James began his attempt to regain his control over the colony, an effort that was incomplete when James died in 1625. George Bancroft, *History of the United States of America*, 111 - 135.

⁶⁴"Patent of New England Granted by James I, November 3, 1620," from *Foundations of Colonial America*, Kavenaugh, ed., 22 - 35.

Virginia obtained its fourth charter, did the colony achieve its needed stability.

Virginia's fourth letter-patent, referred to as the "Great Charter," established the legislative privileges Massachusetts later gained. Granted one year prior to the Council for New England's formation, the fourth charter transferred Virginia legislative control from the London Company to the colony. Governor George Yeardley, armed with the Great Charter and its new privilege grants, announced the impressive changes for the colony on his arrival to Virginia in 1619. In an announcement to those assembled, Yeardley repealed Virginia's "cruel lawes" of the past and promised the colony "those free laws, which his majesty's subjects lived under in England."⁶⁵ Toward this end, the Governor promised that a General Assembly, representing the several plantations, would meet each year to establish the laws necessary for the colony's "subsistence."⁶⁶ Virginia's newly formed General Assembly would hold sufficient power to disallow even orders emanating from the court of the London Company.⁶⁷ According to the charter, conformity to England's fundamental law served as the only limit to Assembly's prerogative.⁶⁸

The Plymouth Company naturally built upon the standards established by the Virginia colony. While James battled the restless Parliament of 1620, the Plymouth

⁶⁵Governor George Yeardley [1619], quoted from George Bancroft, *History of the United States of America*, 111.

⁶⁶*Ibid.*

⁶⁷*Ibid.*, 112.

⁶⁸*Ibid.*

Company gained the necessary tools to establish a powerful colony similar, structurally, to Virginia. The newly established Council for New England possessed their American lands in “absolute property, with unlimited powers of legislation and government.”⁶⁹ The specific privileges and grants the Council received are relevant to Massachusetts’ later development.

Massachusetts received most of its privileges and territory indirectly via legal transference from the Council for New England to other companies. The colony’s charter of 1629 included references to privileges transferred from the Council for New England but contained no specifics regarding these privileges. Although, the charter of 1620 included no ground breaking privileges for a trading company, since the Virginia colony had already received similar privileges, it did illustrate the extensive privileges given to these corporations. It is evident from their charters that by 1620 corporations needed to assume governmental burdens in order to succeed. The Virginia Company’s initial failure evidently taught James I to allow the private sector freedom in establishing overseas colonies. England only took an active role in her colonies after the risks associated with colonization had been taken.

In its introduction, the charter of the Council for New England clearly identified its underlying intent and purpose. The charter declared intent to transfer to the Plymouth Company, “such Estates, Liberties, Privileges,” and immunities necessary to establish a

⁶⁹Ibid., 215.

stable and ordered plantation in New England.⁷⁰ A key conditional phrase existed, however, stating that “there shall be for ever hereafter, in our Towne of Plymouth, . . . one Body politique and corporate, . . . for the . . . ruling, . . . and governing of New-England, in America.”⁷¹ The requirement that New England’s governing body must remain in England established a key limit on the Council’s power. Virginia’s first several patents contained this condition; Massachusetts’ charter of 1629 did not have any similar restrictions..⁷²

Despite designating where New England’s government seat would be located, the charter of 1620 ceded immense privileges to the Company’s leadership. For example, the charter granted to the Company a “Common Seale, to be engraven according to their Discretions.”⁷³ It further allowed the Company to appoint, at will, seals for the corporate body in England and as for public ministers in New England.⁷⁴ The privilege to a common seal entitled authority to make all “Orders, Laws, Directions, . . . and Ceremonies of Government and Magistracy fitt and necessary” concerning the New England

⁷⁰Ibid., 24.

⁷¹Ibid.

⁷²The omission of a specific site for the conducting of the company government in the Massachusetts charter is the single reason why Winthrop and the other founding colonists believed they could legally transfer the government to America. It is odd that the King would allow such an omission to remain in the charter he granted, this seems almost an implicit invitation for the Puritans to remove to America.

⁷³George Bancroft, *History of the United States of America*, 27.

⁷⁴Ibid.

colony.⁷⁵ Again, the single exemption to these broad privileges specified: “so always as the same be not contrary to the Laws and Statutes of this our Realme of England.”⁷⁶

Further judicature privileges given the Plymouth Council held broad implications regarding the Colony’s governmental controls. For example, the charter stipulated that governmental appointees by the Council would have “full and absolute Power and Authority to correct, punish, pardon, governe, and rule all such . . . Subjects . . . as shall from time to time adventure” to the new colony.⁷⁷ Additionally, the charter specified that English subjects in the colony were accountable to all laws, ordinances and restrictions as established by the Council for New England.⁷⁸ The charter’s wording, “full and absolute Power,” gave no mention of King or Parliament as a final arbitrator for justice in America. Like previous Counties Palatine, the colony internally possessed all judicature powers needed for maintaining government. The charter’s broad wording implied a calculated decision by James I to shed the demanding responsibilities of governing the New England plantations.

A final important stipulation in New England’s charter guaranteed that the colonists would retain fully their English citizenship. Although, colonists from other European states did not transfer with their persons the privileges associated with their

⁷⁵Ibid., 27.

⁷⁶Ibid.

⁷⁷Ibid., 28.

⁷⁸Ibid.

citizenship, the English colonists did.⁷⁹ The charter stated, everyone of “our Subjects, which shall goe and inhabitt within the said Colony . . . and . . . their Children and Posterity, . . . born [there] shall have and injoy all Liberties, . . . and Immunities of free Denizens and naturall Subjects within our other Dominions.”⁸⁰ This provision, inserted in all previous colonial charters, possessed important implications.⁸¹

Despite possessing a powerful charter, the Council for New England still lacked the success enjoyed by its sister company in Virginia. Several attempts by Plymouth-based merchants to colonize their patent took place but these were small scale and poorly planned.⁸² Land grants seemed the only revenue source available to the Council for New England, and they made several. In 1623, the Dorchester Company obtained one such

⁷⁹Gilman Ostrander, *The Rights of Man in America, 1606 - 1861*, (Columbia, MO: University of Missouri Press, 1960), 2. All colonies of the other European nations were not given the privileges of rights of citizens, they were under charter rule, which could be quite varied.

⁸⁰George Bancroft, *History of the United States of America*, 34.

⁸¹As shall be shown later in this chapter, the guarantee to “all rights of English citizenship” opened a whole historical analysis regarding what exactly these rights entailed. To King James I, an absolutist, little resulted from such a promise since, as King, he alone dictated right and wrong. To the Massachusetts colonists, however, following Roger Twysden, Edward Coke, and other constitutionalist thinkers, English citizenship secured a myriad of immutable privileges. These colonists believed that the above guarantee provided for the rule of law, the same rule and privileges that existed in England since before William I’s reign.

⁸²Thomas Hutchinson, *The History of the Colony of Massachusetts-Bay from the First Settlement Thereof in 1628. Until Its Incorporation with the Colony of Plimouth, Province of Main, &c. By the Charter of King William and Queen Mary*, vol. I., Research Library of Colonial Americana, Richard C. Robey, gen. ed., (Boston: Thomas & John Fleet, 1764; reprint, New York: Arno Press, A New York Times Company, 1972.), 5 - 8.

land grant and settled in New England's Cape Ann region. After several mishaps and difficulties this settlement also, failed. Some company members, however, seeking to reorganize under a new land grant relocated to Salem in 1626.⁸³

After the Dorchester Company reorganized in Salem, many members went back to England to recruit new settlers. Some of these promoters encountered John Endicott. A Puritan gentleman with connections to the powerful Earl of Warwick, Endicott became interested in the venture. Aided by Warwick's influence, Endicott asked and received from the Council for New England a charter in 1628 for all "the land along the coast from three miles north of the Merrimac River to three miles south of the Charles River and from sea to sea."⁸⁴ Utilizing his charter, Endicott established himself as Governor to the new Salem-based colony in September 1628.⁸⁵ Only fifty to sixty people lived in Salem at the time Endicott arrived at the colony.⁸⁶

Associating themselves with Endicott's grant, Puritans in England appealed directly to King Charles I for a new charter with greater political autonomy.⁸⁷ On March

⁸³Kavanaugh, ed., *Foundations of Colonial America*, 14-15.

⁸⁴*Ibid.*

⁸⁵John White, "The Planters Plea," from *Chronicles of the First Planters of the Colony of Massachusetts Bay, from 1623 to 1636*, Alexander Young, ed., (New York: Dacapo Press, 1970. unabridged reprod. of 1st ed., Boston, 1846.), 13.

⁸⁶*Ibid.*

⁸⁷Dickerson, "The Massachusetts Charter and the Bay Colony," 98.

4, 1629, this request passed the seal under the title “Charter of the Massachusetts Bay.”⁸⁸

The charter’s initial words read: “the . . . Councill established at Plymouth, . . . have by theire Deede, indented under their Common Seale, . . . given . . . to Sir Henry Rosewell, Sir John Young, Knightes, Thomas Southcott, John Humphrey, John Endecott, . . . their Heirs and Assignes, . . . for ever, all that Parte of Newe England” designated.⁸⁹ The “deed” referred to was that given to John Endecott and associates in 1628.⁹⁰

The beginning words of the charter of Massachusetts confirmed and promoted the Endicott land grant. The “promotion” was one of legal status. The Company became a direct grantee from the King rather than an indirect grantee through the Plymouth Council’s authority. This change was vital, since the colonists to Massachusetts wanted to establish a settlement overseas with as few constraints as possible. Lacking an independent charter from Charles I, the Bay Colony might have faced the same inept management difficulties that plagued Virginia under its initial charters. Since Massachusetts gained all of the Plymouth Company’s judicature privileges over New England, the new colony avoided these potential hurdles.

Further analysis into the charter’s pertinent points, makes more clear the impor-

⁸⁸“Charter of the Massachusetts Bay, March 4, 1628/29,” from *Foundations of Colonial America*, Kavanaugh, ed., 45-68.

⁸⁹*Ibid.*, 46.

⁹⁰For the specifics of this Deed, see: William Hubbard, “William Hubbard’s Narrative of the Discovery and First Planting of the Massachusetts,” from *Chronicles of the First Planters of the Colony of Massachusetts Bay*, Young, ed., 28 - 29.

tant privileges transferred to the Bay Colony. For example, the charter declared that the Massachusetts Company would assume “all Jurisdictions, Rights, . . . and Commodities” the Plymouth Council “then had, or might use, exercise, or enjoy, in” New England, “or in or within any Parte or Parcell thereof.”⁹¹ Accordingly, the Massachusetts Company gained every privilege held by the Plymouth Council; a direct progression and immutable authority transfer occurred between these two companies.

The charter specifically clarified the Company’s change in status from a Plymouth Company grantee to a direct grantee of King Charles. The Massachusetts Bay Company, the charter declared, shall be “one Body corporate and politique in Fact and Name.”⁹² It further vested to the Bay Company’s appointees “one common Seale, to be used in all Causes and Occassions.”⁹³ As a “Body corporate and politique” the charter also vested the privilege to create and hold “a Courte or Assemblie of themselves, for the better ordering and directing of their Affairs.”⁹⁴ Additionally, the charter authorized holding a great General Assembly. The charter authorized that the General Assembly would legislate laws “for the Government and ordering of the” colony “and the People

⁹¹Hubbard, “William Hubbard’s Narrative of the Discovery and First Planting of the Massachusetts,” 47.

⁹²Ibid., 51.

⁹³Ibid.

⁹⁴Ibid.

inhabiting” there.⁹⁵ The charter attached only one condition to Assembly judicature privileges, the same clause included in the 1620 charter for New England: “soe as such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Statutes of this our Realme of England.”⁹⁶

Two final clauses in the Massachusetts charter promised rights of citizenship and jurisdiction to the colony’s settlers. First, restating almost word for word the assurances found in New England’s 1620 charter, it specified: “all and every the Subjects of Us, our Heirs or Successors, which shall goe to and inhabite” the Massachusetts colony, “and every of their Children . . . born there, or on the Seas in going thither, . . . shall have and enjoy liberties and Immunities of free and naturall Subiects . . . as if they were borne within the Realme of England.”⁹⁷ The second clause vested Massachusetts’ General Assembly “full and Absolute Power and Authoritie to correct, punishe, pardon, and rule all such the Subjects of Us, our Heirs and Successors, as shall from tyme to tyme adventure themselves in any Voyage” to the colony.⁹⁸ Providing its laws were not “repugnant to the Lawes and Statutes of our Realme of England,”⁹⁹ Massachusetts Bay gained via legal transfer all self-government privileges needed.

⁹⁵Ibid., 52 - 53.

⁹⁶Ibid., 53.

⁹⁷Ibid., 56.

⁹⁸Ibid., 57.

⁹⁹Ibid.

In many respects, the charter of Massachusetts closely resembled those received by Virginia in 1619 and by New England in 1620. On one critical level, however, the charter Massachusetts received was very different and more powerful. Through their respective charters, Virginia and New England gained vast governmental privileges. They obtained a governmental seal and the authority to make laws, to construct punitive facilities, and to regulate the conduct of all entering their respective colonies. Despite important privileges, both Virginia and New England Courts needed to reside at a specific locale. New England's charter required its Court to reside at Plymouth in Devon; Virginia's Company seat was to remain in London. The charter of Massachusetts, like Virginia's and New England's, empowered the corporate body to decide what liberties immigrants would enjoy. Massachusetts enjoyed all the powers of a commonwealth but the charter did not specify where the Company should hold its court.

Since the charter of Massachusetts lacked any specified location for its governmental seat, a tremendous freedom remained with the Company's leadership. This "blank-check" aspect of the Massachusetts charter eventually became the main source for fiction between the colony and the powers in England. All prior English charters required the Company's court to remain in England. This provision undoubtedly aimed toward preventing overseas rebellions from fermenting; it was polemic that the Massachusetts charter lacked such a provision. On the one hand the charter's docket, which accompanied the patent, stated that it empowered "elections of governors," and officers, powers

usual “to Corporations here in England.”¹⁰⁰ As such, the docket seemed to require the Massachusetts Company to remain in England: this at least was the interpretation later made by the Privy Council.

A twofold problem existed with the charter docket, creating ambiguity concerning where to hold Massachusetts’ General Court. First, the docket had no legal binding authority, and it could not be considered a legal addition to the charter. Second, it was unclear whether the docket contained a declarative statement or merely an assumption based upon past charter provisions. The form used by previous corporations operating from England, did not necessarily establish a norm for all future corporations; political innovations of this kind, broke no established laws. Patent holders accepted the latter interpretation. This decision caused much controversy.

The proposal to remove the General Court for the Massachusetts Company to America produced much debate between the company members in England. The first discussion regarding this governmental transfer occurred on 28 July 1629. Governor Matthew Cradock made the proposal at the Company’s General Court session held at Deputy Governor Thomas Goffe’s London home.¹⁰¹ During this meeting Governor Cradock read the following suggestion: “That for the advancement of the Plantation, the

¹⁰⁰Dickerson, “The Massachusetts Charter and the Bay Colony,” 99 - 100.

¹⁰¹“Records of the Governor and Company of Massachusetts Bay in New-England,” “A General Court holden for the Company of the Massachusetts Bay, in New England, at Mr. Deputy’s house, on Tuesday the 28th of July, 1629,” from *Chronicles of the First Planters of the Colony of Massachusetts Bay*, Young, ed., 82 - 86.

inducing and encouraging persons of worth and quality to transplant themselves and families, thither, and for other weighty reasons therein contained, to transfer the government of the Plantation to those that shall inhabit there, and not to continue the same subordination to the Company here, as now it is.”¹⁰² According to the record Cradock’s proposition occasioned some debate but they reached no conclusions.¹⁰³ The members decided to consider the resolution, putting their thoughts in writing to be used in the next General Court meeting on 28 August 1629.

On 26 August 1629, at Cambridge, another important meeting took place regarding the Puritan migration to Massachusetts. This meeting, attended by Sir Richard Saltonstall, John Winthrop, and ten others,¹⁰⁴ took place two days before the General Court Assembly that would decide the government move to Massachusetts. The Cambridge Agreement may have done much toward affecting the decision made two days later. The meeting resolved an agreement to “embarke” for New England by March of

¹⁰²Ibid., 85.

¹⁰³Ibid.

¹⁰⁴The names of the other attendants at the Cambridge Meeting, and who signed the Cambridge Agreement are: Thomas Dudley, William Vassall, Nicholas West, Isaac Johnson, John Humfrey, Thomas Sharpe, Increase Nowell, William Pinchon, Kellam Browne, and William Colbron. On more specifics regarding the Cambridge Agreement see: John Winthrop, “The Agreement at Cambridge,” in *Life and Letters of John Winthrop*, vol. I., Robert C. Winthrop, ed., (New York: Da Capo Press, 1971; reprint of, Boston: Ticknor and Fields., 1864), 344 - 45.

the following year.¹⁰⁵ Immigration, however, would occur only if before September 1630 “the whole government together with the patent . . . be first by an order of court legally transferred and established to remain with us and others which shall inhabite upon the said plantation.”¹⁰⁶ The provision requiring the whole government’s legal transfer to Massachusetts Bay certainly gave the Company a lot to consider.

At a General Court meeting held on 28 August 1629 the Cambridge Agreement’s implied ultimatum was hotly debated. Deputy Governor Goffe read the Cambridge Agreement to the General Court, stressing that to activate the Agreement the charter must relocate to the colony.¹⁰⁷ Discussion ensued. The Court heard arguments presented both for and against transferring the Company’s government to Massachusetts. No immediate decision resulted. Goffe recessed the Court, stipulating the two Committee’s “for” and “against” to meet separately at seven the next morning.¹⁰⁸ On the following day, after a long discussion the transfer finally went to a vote of the General Court. “As many of you as desire to have the patent and the government of the Plantation to be transferred to

¹⁰⁵“The True Coppie of the Agreement at Cambridge, August 26, 1629,” from *The Thomas Hutchinson Papers*, vol. I., edited by Thomas Hutchinson, (Boston: The Prince Society, vol. I, 1865, repr., New York: Burt Franklin, 1967), 28.

¹⁰⁶*Ibid.*

¹⁰⁷John Winthrop, *Life and Letters of John Winthrop*, Vol. I., 346.

¹⁰⁸“The Original Records of the Governor and Company of the Massachusetts Bay, in New England,” “A General Court holden at Mr. Deputy’s house, the 28th of August, 1629,” from, *Chronicles of the First Planters of the Colony of Massachusetts*, Young, ed., 86 - 87.

New-England,” Goffe announced, “so as it may be done legally, hold up your hands. So many as will not, hold up your hands.”¹⁰⁹ A favorable show of hands set the legal process for the transfer in motion; Massachusetts gained its independent identity.¹¹⁰

Subsequent General Court deliberations focused on decisions necessary for the government’s transfer. In one such meeting, on 29 September 1629, the Company formed five important committees: 1) “To prepare the business;” 2) “To take advice of learned counsel whether the same may be legally done or no;” 3) “By what way or means the same may be done, to correspond with and not to prejudice the government here;” 4) “To consider of the time when it will be fit to do it;” 5) “To resolve on whom to confer the government; and divers other circumstances material to be resolved on, &c.”¹¹¹ These committees met privately, each working out suitable solutions to the problems assigned to them. On 16 October 1629 these conclusions were presented to a Court of Assistants. The complexity of thought shown at this meeting illustrates the caution by which the Massachusetts Company proceeded toward its objective.

¹⁰⁹“The Original Records of the Governor and Company of the Massachusetts Bay, in New England,” “A General Court at Mr. Deputy’s house, the 29th of August, 1629,” from *Chronicles of the First Planters of the Colony of Massachusetts*, Young, ed., 88.

¹¹⁰John Winthrop, *Life and Letters of John Winthrop*, 347. All future colonial charters, after Massachusetts, allowed the Company General Court to be held in the colony, after the fashion Massachusetts established.

¹¹¹“The Original Records of the Governor and Company of the Massachusetts Bay, in New England,” “A General Court holden at Mr. Deputy’s house, on Tuesday, the 29th of Sept. 1629.” from *Chronicles of the First Planters of the Colony of Massachusetts*, Young, ed., 91.

The 16 October meeting addressed the company's concern for their charter's specific limitations. Regarding the transfer, the Court declared their intent that "the future care of the joint stock may be cherished and preserved; and the body politic of the Company remain and increase."¹¹² Toward this goal the Assistants addressed the transfer to New England, deciding "that the government of persons be held there, the government of trade and merchandise to be here."¹¹³ To satisfy the trade portion, they created a ten-person board headed by John Winthrop to assume the Company's assets and liabilities.¹¹⁴ Freeing the Company's trade portion from all financial claims or debts removed potential foreclosure threats, or like actions that could have weakened its political portion.

Having established the unique mode for legitimizing the governmental transfer to Massachusetts, the process then proceeded very smoothly. A General Court meeting of 20 October elected John Winthrop as Governor of the transferring government.¹¹⁵ His

¹¹²"The Original Records of the Governor and Company of the Massachusetts Bay, in New England," "A Court of Assistants at the Deputy's house, on Friday, the 16th of October, 1629," from *Chronicles of the First Planters of the Colony of Massachusetts*, Young, ed., 98.

¹¹³*Ibid.*

¹¹⁴Dickerson, "The Massachusetts Charter and the Bay Colony," 99 - 100.

¹¹⁵"The Original Records of the Governor and Company of the Massachusetts Bay, in New England," "A General Court holden at Mr. Goff, the deputy's house, on Tuesday, the 20th of October, 1629," from *Chronicles of the First Planters of the Colony of Massachusetts*, Young, ed., 104. John Winthrop, the major figure in early Massachusetts history, made his appearance at General Court meeting for the Bay Company quickly after the 28 August meeting to remove the government to New England. On 19 September 1629 Winthrop is listed in the Court Records as a Committee Member chosen to investigate a colony related disagreement. [John Winthrop, *Life and Letters of John*

selection as Governor evidently took Winthrop by surprise. In a letter to his wife, also dated that day, the new Governor wrote: "So it is that it hath pleased the Lorde to call me to a further trust in this businesse of the Plantation, then either I expected or finde myselfe fitt for (being chosen by the Company to be their Governor)."¹¹⁶ Once elected, however, he took responsibility for the remaining details regarding the transfer, finally landing in the colony in the middle of June 1630.¹¹⁷ By the time Winthrop arrived, with the colonial charter, Massachusetts had grown to over two thousand persons.

Part Two: Attacks on Legitimacy.

Attacks against the transfer occurred shortly after Winthrop arrived at the colony. Despite the careful, quite methodical, steps taken to legitimize the charter's transfer to Massachusetts, this event became a major issue for opponents to the colony. Arguing that the Massachusetts charter provided governmental powers identical to previously given charters, opponents often challenged the legality of Winthrop's independent government.

Winthrop, Vol. I., 347.] After the 19 September reference, Winthrop is inseparable from any major Company decision.

¹¹⁶John Winthrop, "John Winthrop to his Wife," [20 October 1629] from *Life and Letters of John Winthrop*, Vol. I., 339 - 340.

¹¹⁷John Winthrop, *Winthrop's Journal: The History of New England, 1630 - 1649*, vol. I., Original Narratives of Early American History, edited by James Kendall Hosmer, (New York: Charles Scribner's Sons, 1908, repri., New York: Barnes & Noble, Inc., 1966.), 50.

To the colonists in Massachusetts these attacks did not represent a sincere desire to enforce justice; to the contrary, they represented mere acts of arbitrary oppression.

Chronicling the Bay colony's struggle against England's arbitrary policies without first settling the legal questions related to the charter's transfer is difficult. If the charter's movement to New England invalidated the patent's integrity, England's attacks against the colony would not be arbitrary but justified. Close analysis into several key issues, however, indicate that Puritan leaders considered sound legal precautions and precedents before transferring their charter. This transfer, although unique, violated no specific laws and occurred as a natural adaptation to needs associated with successful colonization. Once this fact is established, England's actions toward Massachusetts appear arbitrary and constitutional arguments then become appropriate.

The initial legal argument to consider relates to the precedents established by previous attempts to colonize North America. As already mentioned, the Virginia Colony originated under James I's direct control. Operating a colony directly through the king ensured inefficiency. James could not effectively decide colony management based on mere paper reports and personal narration. Additionally, great uncertainty existed when England provided food, clothing, and other supplies necessary for the colonists' survival. If the Company leaders in England improperly provided for the colony, while affecting those in England only minimally, it could mean starvation for the colonists. The more removed from physical risk the decision makers for a colony were, the more inefficient the colony. The first Virginia Colony, settled as James's personal enterprise, failed after

its initial winter. Subsequent Virginia charters slowly brought more authority to the colonists -- those who were risking the most, those whose very lives were at stake. Virginia did not begin to succeed as a colony until they received the Great Charter in 1619. Under this charter, the General Court prerogatives for the Company were bifurcated from their London base and transported to the Virginia Colony. The charter remained in London but the primary decision making organ for the colony became the colony-based General Court.

Very little difference existed between Virginia's colonial government after 1619 and the government established in Massachusetts after 1630. In both colonies, management related decisions and controls over the settlement originated in the colony and not in England. The decision by Massachusetts General Court to hold future meetings in the colony built upon the innovations already made by Virginia. Massachusetts merely discarded the empty facade that Virginia retained; after the charter of 1619, Virginia's London-based General Court still presided, but its legislative options were emasculated. By retaining the General Court but moving it to the colony, the Massachusetts Colony became a more efficient settlement, which benefited King Charles as much as it did the Puritan colonists.

Charles I's reaction toward this event is a second important consideration relevant to the transfer of the charter. That the Bay Company's membership rolls included prominent Puritan leaders could scarcely have escaped his attention, especially considering the Earl of Warwick's links, through Endicott, to the new colony. Additionally, in a

letter dated 2 February 1630, Forth Winthrop informed his father John, that the Custom Office queried regarding the Company's move to New England, asking for "custome" and a "warrant."¹¹⁸ In response to his son's letter, John Winthrop wrote to his wife three days later, instructing her to send an enclosed "warrant" to the Colchester office.¹¹⁹ Based on these two letters, the Custom Office knew that the Bay Company intended to remove to New England. Further, since John Winthrop, and the Company charter, did not begin travel to Massachusetts until 22 March 1630, sufficient time existed to stop this movement had Winthrop's warrant been inadequate.¹²⁰

Even if Charles lacked specific knowledge regarding the Bay Company's intent to remove its charter, he implied his support for such an event. On one level, Charles, like his father, greatly disliked and distrusted Puritans. The link between Church hierarchy and regal absolutism did not elude him. He realized that Puritan willingness to question Church doctrine and practices preceded a willingness to question royal prerogatives--an act considered by Charles to be treason. It is no jump in reason to presume that Charles, plagued by a very aggressive Puritan Parliament in 1628, would readily allow a Puritan

¹¹⁸Forth Winthrop, "Forth Winthrop to his Father," [2 February 1630] from *Life and Letters of John Winthrop*, 372.

¹¹⁹John Winthrop, "John Winthrop to his Wife," [5 February 1630] from *Life and Letters of John Winthrop*, 373. Forth's letter identified Mr. Borrowes as the inquiring Custom Officer.

¹²⁰John Winthrop, "John Winthrop to His Son [John]," [22 March 1630] from *Life and Letters of John Winthrop*, 386 - 87; John Winthrop, "John Winthrop to his Wife," [22 March 1630] from *Ibid.*, 387.

Company to immigrate to a distant colony. That the Company charter left with the immigrants, may not have been an issue until after the colony succeeded.

Charles's behavior toward the Virginia colony also hinted at his favorable support for Massachusetts' charter movement. Although Virginia formulated a written Constitution in 1621, which incorporated the prerogative guaranteed by the Great Charter, the colony came under attack from the Crown in 1623. James I, tempted by the Virginia colony's success, decided to reclaim the privileges in his charter of 1606, which gave him direct control over the colony.¹²¹ Toward his arbitrary goal, James instructed the Attorney-General to give a favorable ruling.¹²² Using the forced ruling by the Attorney General, the King required Virginia's government to revert to the earlier charter or lose their patent rights. When the colony resisted, James issued a *Quo Warranto* against the Virginia Company on 10 November 1623.

The Virginia Company's struggle to retain its charter prerogatives is an interesting episode in colonial American history and one pertinent to Massachusetts' development. By the early date of 10 November 1623, the constitutional question regarding monarchical absolutism already had emerged in North America. James's *Quo Warranto* issued against the Virginia colony required these colonists to assess their opinions regarding legal justice. Legally, could the King without just cause revoke rights and privileges

¹²¹George Bancroft, *History of the United States of America*, 130 - 135.

¹²²*Ibid.*, 130.

given by charter? A colonial settlement is property, property belonging to all colony members. If the Stuart monarch could revoke the privileges guaranteed in Virginia's charter, he could essentially revoke all property privileges.

Despite the *Quo Warranto* issued against the Virginia Company, its members decided to ignore the King's arbitrary demands. In a General Court meeting all the colonists, except seven, voted to confirm a refusal to surrender the 1619 charter. The Company chose to defend their charter interests, asserting that James acted contrary to their interests and good name.¹²³ In their defense statement the colonists claimed that property rights were strictly "maintained against arbitrary taxation,"¹²⁴ and that the Crown's actions violated the civil trust. Virginia Company leaders did not use unique or innovative arguments to plead their case; to the contrary they addressed the same irksome issues presented in each of James's Parliaments. By the 1620's, protection against arbitrary taxation had become a major issue between Crown and Commons; the resentment over arbitrary taxation eventually led to the Petition of Rights in 1628, a guarantee against such tyranny.

The Virginia Company argued in vain against James's forceful will. On 16 June 1624 judgment against the 1619 charter canceled the Company's patents. James had little time to savor his victory over the Virginia Company. On 27 March 1625 he died and his

¹²³Ibid., 131.

¹²⁴Ibid., 132.

twenty five year old son Charles ascended England's throne. If James had survived a few years longer, perhaps colonization in America would have developed differently.

Successfully revoking Virginia's charter had established a precedent favoring monarchical absolutism in colonial domains. The young King Charles, freshly seated on his father's empty throne, reversed the condemnation against Virginia with one declaration; he reestablished the 1619 charter and reaffirming protection against arbitrary taxation. Although Charles I would later follow his father's arbitrary disposition, his support for Virginia's charter prerogatives established a precedent later used against him.

The leadership in Massachusetts knew the substance behind Virginia's struggles against James I; they also knew that Charles I protected the colony's charter rights. In the years before joining the Massachusetts Bay Company, John Winthrop had invested money with the Virginia Colony. Undoubtedly, when considering the form of government Massachusetts would adopt, John Winthrop considered the prerogatives enjoyed by the Virginians. The fact that Charles protected Virginia's self-government prerogatives surely affected Winthrop's legal analysis.

It is possible that Charles I knew Massachusetts' governmental plans and decided not to stop the charter's transfer. His positional support for Virginia suggested that Charles, early in his reign, lacked the interest in colonial acquisition that tempted his father. Yet, the new King realized the need for colonies; their value exceeded mere financial profits. Every colony that England established in North America meant one less colony her European competitors could establish. After twenty-seven years, colonization

had not yet succeeded north of Virginia. Charles I undoubtedly considered this reality when he allowed Massachusetts to move its government to the colony. Massachusetts benefited England merely by becoming a successful block to European colonization. If its charter had to remain in England, the Bay Colony would not have recruited the eminent men whose financing ensured the colony's success. Without the charter's transfer, King Charles would have had a weaker colony and a less effective block to European encroachments on English land claims.

Another legal consideration regarding the charter's transfer relates to the membership of those involved with the Bay Company. When discussion regarding the charter's transfer occurred in the Bay Company's General Court, those people supporting the transfer knew England's laws. Many prominent legal minds comprised Massachusetts' Company membership. The Bay Company's General Court Records cited that John White, a prominent London attorney and Company member, researched the transfer's legality. John Cotton, who played a prominent role in Massachusetts governmental formation had served as justice of the peace while in England. Governor Winthrop, similarly, served as a Justice at the Court of Wards. As a lawyer, John Winthrop knew English constitutional principles. Winthrop also possessed a first hand knowledge regarding Parliamentary legislation. John Winthrop had probably even written legislation for the 1628 Parliament; his membership to the legal community overall is without doubt. Many others linked with the Bay Company had connections to the leading figures within England. John Endicott, as previously mentioned, knew the Earl of Warwick, and must

have discussed the legal issues related to the transfer with many other eminent theorists. Considering the great financial cost undertaken by the prominent, educated persons comprising Massachusetts' leadership, they had clearly addressed legal issues before departing England.

A final issue pertinent to Massachusetts' charter transfer relates to the document itself. Discounting the charter's docket as insignificant, because of its generality and its non-binding nature, Massachusetts' charter did not anywhere disallow its removal from England. Since the charter lacked any designated site for the Company Court, it became necessary to address this issue at some future date. The 28 July 1629 meeting, where Governor Cradock first proposed moving the charter to Massachusetts, represented merely a meeting to decide where to hold future General Courts. His suggestion that the General Court move to New England was not necessarily sinister; the Virginia example had already proven that successful colonization needed direct colony-based leadership. Considering Virginia's example, Governor Cradock's alternatives regarding an efficient site for a seat of government were very limited. On the one hand, the Plymouth Company's many failed attempts to colonize New England stood as example. To contrast Plymouth's failures, Virginia's successes pushed Endicott toward a more active role in governing the Massachusetts colony.

The decision to transfer the whole government to New England was unique and creative but not illegal. King Charles knew that Massachusetts' General Court had moved to New England. Thus sufficient time also existed for Charles to halt the Com-

pany's movement had it been illegal. The Company consulted many legal minds well before they departed. Finally, their decision made sense based on past colony experiences with English General Courts.

Colonial charters existed in seventeenth-century England to ensure that English justice prevailed throughout all parts of the Kingdom. Essentially, the charter defined all rights and privileges immutably possessed by those persons immigrating to a colony. It served as a protective device, guaranteeing clearly identifiable rules for determining acceptable or unacceptable behavior. Colonial charters did not, however, provide the same privileges or benefits to all colonies, they only made knowable what privileges each colony did possess. These charters incorporated the basic premise behind English constitutional principles. All citizens were entitled to know the rules restricting their conduct. England's Constitution represented the same protective function to colonial governments that the charter represented for colony members. If a colonial government took personal property without just cause, one could rightly label the action illicit. In such a situation, appeal concerning this injustice would progress down a prescribed path aimed at providing justice. Similarly, since the colony represented the property sum of all its investors, revoking its charter prerogatives would be illicit for King, Parliament, or a neighboring colony. The recourse for colonies denied their property rights, however, lacked the assurances afforded colonial citizens in similar situations. A crisis resulted when encroachments to colony property rights occurred.

Attacks against Massachusetts' charter-prerogatives occurred only after the

Puritans successfully settled New England. Massachusetts' governmental transfer became the most popular issue used to discredit the Bay Colony. Petitioners to the Privy Council who asserted that Massachusetts illegally established its government in the colony argued incorrectly. These arguments should be placed on the same level as James's *Quo Warranto* against the Virginia Company.

The relevant issue regarding the case made against Massachusetts is that these attacks eventually succeeded in depriving, at least on paper, the colony its charter prerogatives. Although Massachusetts, like Virginia, maintained its charter even after its patent's revocation, the fact that revocation occurred necessitates analysis into England's general constitutional framework. Describing the initial attacks against Massachusetts provides an introduction into the larger constitutional issues defying arbitrary government that existed in seventeenth-century England. The failure to resolve the initial problems between England and Massachusetts led eventually to the complete break occurring in 1776.

The Privy Council received its first complaint regarding the Massachusetts Colony on 19 December 1632. Based more on vengeance than on substance, this initial attack had little chance for success.¹²⁵ Each petitioner, Sir Christopher Gardiner, Thomas Morton, and Dixie Bull, suffered punishment and expulsion from Massachusetts for

¹²⁵Great Britain, Public Record Office, *Acts of the Privy Council of England, Colonial Series, vol. I, 1613-1680*, edited by W. L. Grant and James Munro, (London: Her Majesty's Stationery Office, 1908., repri., Nendeln, Liechtenstein: Kraus Reprint Ltd., 1966), 183.

disrupting the peace.¹²⁶ Angered by their treatment, these men combined forces with Sir Ferdinando Gorges, a disgruntled Plymouth Council member. The Dorchester land grant came from Gorges' patent and he resented its subsequent conversion into the Massachusetts charter.¹²⁷ Following King James's example, Gorges wanted his ceded authority returned.¹²⁸ This initial petition to the Privy Council gave Massachusetts its first test-case measuring the newly moved General Court's legality.

Little resulted from the initial petition against Massachusetts' colonial charter, however, duplicity resounded from England's political leadership.¹²⁹ On 19 January 1632, nearly a year before Gardiner's petition, Governor Winthrop had received an order from the Privy Council reassuring support for the Massachusetts charter. "Rest assured," noted the Council, "if things were carried as was pretended when the patents were granted . . . his Majesty would not only maintaine the liberties and privileges heretofore granted, but supply anything further that might tend to the" colony's "good government, prosperity

¹²⁶James Baxter, "Memoir of Sir Ferdinando Gorges," from *Sir Ferdinando Gorges and his Province of Maine*, vol. I, edited by, James Phinney Baxter, (Boston: The Prince Society, vol. XVIII, 1890., repri., New York: Burt Franklin, Research and Source Work Series # 131, 1967) 158 - 160.

¹²⁷Ibid.

¹²⁸Ferdinando Gorges, "Letters and Other Papers," "Sir. F. Gorges to the Privy Council," from *Sir Ferdinando Gorges and his Province of Maine*, vol. III, edited by, James Phinney Baxter, (Boston: The Prince Society, vol. XX, 1890., reprinted, New York: Burt Franklin, Research and Source Work Series # 131, 1967), 270 - 271.

¹²⁹Winthrop, *Winthrop's Journal: The History of New England, 1630 - 1649*, Hosmer, ed., 99.

and comfort.”¹³⁰ This order directly promised King Charles’s protection to the colony’s leadership providing they follow their charter to the letter.

Confirming its promise to protect the Bay colony’s prerogatives, the Privy Council ruled against the Gardiner petition after scant deliberation. Discounting the petitioner’s claims that Massachusetts lacked the authority to punish and expel people from its colony, the Privy Council did not suggest that the Company’s transfer to New England invalidated its charter prerogatives. To the contrary, the ruling favoring Massachusetts validated charter authority to punish all English citizens that entered the colony. The charter of Massachusetts clearly established self-determination for the colony. Gardiner’s failure to call the colony’s jurisdiction into question provided a sound precedent that the Bay leadership could use against future complaints of a similar nature. Despite the apparent support for the colony’s charter shown by England’s leadership, the Royal Commission, created soon after the Gardiner ruling, eliminated many charter prerogatives.

The Royal Commission of 1636 possessed privileges that overlapped and subordinated those possessed by the Massachusetts Colony, without specifically attacking

¹³⁰John Winthrop, “Copy of a Letter from Mr. Winthrop, Governor of the Massachusetts, to Mr. Bradford, Governor of the Plimouth, also a Copy of an Order of his Majesty’s Council, January 19, 1631/32,” from *The Thomas Hutchinson Papers*, Hutchinson, ed., 58.

its charter.¹³¹ Charles initially encouraged immigration to the American colonies, however, by 1634 the number of emigrants had become alarming. To keep a closer eye on the rapidly growing New England province, the Royal Commission received immense supervisory authority. The Archbishop of Canterbury, William Laud, a staunch opponent to the Puritan cause and the Massachusetts Colony, received the directorship for this new regulating body. This created immediate consternation in Massachusetts. With the Commission's formation, the official battle over the judicature of New England began.

Coming so soon after the Gardiner petition, the Royal Commission undoubtedly surprised the leadership of Massachusetts. By 1634, King Charles had supported Virginia's charter rights from arbitrary revocation and his Privy Council had dismissed a petition challenging the colony's governmental integrity. To Governor Winthrop, charter rights Massachusetts possessed seemed assured and justly protected by England's ruling body. The Petition of Rights, passed by Parliament in 1628, gave Winthrop additional security confirming his colonial investments. Despite all these apparently favorable signs, the Royal Commission quickly showed that few guarantees regarding rights or

¹³¹Fear of increased immigration to Massachusetts began as early as 1634 [cite *Acts of the Privy Council, Colonial Series*, I. 200-01]. In December 1634, a document entitled, *The Commission for Foreign Plantations to the Officers of the Port of London*, was issued wherein it was noted that many people were transporting to Massachusetts, many "whose only end is to live as much as they can without the reach of authority." ["The Commission for Foreign Plantations to the Officers of the Port of London," from *Winthrop Papers*, Vol. III, 1631-1637, The Massachusetts Historical Society, (Boston: The Merrymount Press, 1943), 180.] This position radically differed from that proposed by James at Hampton Court; presumably Charles merely wanted all of the Puritans to conform, without the option of leaving England.

possessions existed in Stuart Government. When dismissing the 1628 Parliament, Charles I stated firmly his intent to rule without calling future Parliaments. The Royal Commission illustrated the procedures Charles would use toward gaining complete control over his realm. Little ambiguity could be found in the document used to create the Royal Commission. It described clearly the powers possessed by the new regulating body. In spite of the charter held by Massachusetts, the Commission gained authority to “make laws, ordinances, and constitutions, concerning either the state or public of the said colonies.”¹³² Further, the Order gave to the Commission responsibility “for ordering and directing [the colonies] in their demeanors towards foreign princes and their people, and likewise towards us and our subjects.”¹³³ The implications behind these first two clauses were profound. Completely emasculated, the colony’s chosen leadership instantly lost all freedom regarding internal policy and internal management. The Royal Commission essentially recreated the London-based General Court by moving the ultimate decision-making body from the colony back to England.

As the Royal Order continued, the extensive powers given the Commission became more clear and threatening to colony rights. The Commission received authority to punish “all offenders or violators of constitutions and ordinances, either by imprison-

¹³²“Royal Commission for Regulating Plantations, April 28, 1634,” from *The Thomas Hutchinson Papers*, Thomas Hutchinson, ed., (Boston: The Prince Society, vol. I., 1865; reprint, New York: Burt Franklin, 1967), 78.

¹³³*Ibid.*

ment or other restraints, or by loss of life or members, according as the quality of their offense shall require.”¹³⁴ Additionally, the Commission received the “power . . . to remove all governors and presidents of the said colonies, upon just cause appearing” and “to appoint others in their stead.”¹³⁵ Further, the Commission could require Governors to give account regarding their “office and government,” and whomever they found unsatisfactory, they could punish.¹³⁶ Discarding almost to the letter all privileges reserved to General Courts in the colonies, the Commission received many other important powers. For instance, the Commission gained the “power to constitute and ordain tribunals and courts of justice, both ecclesiastical and civil,” along with all appeals “from and to the said courts in all cases and matters, as well criminal and civil.”¹³⁷ Similarly, the Commission could “alter, revoke, and appeal,” any unacceptable law or ruling and “publish” whatever remedy “to new and growing evils” as “appear necessary and expedient.”¹³⁸

The Order’s concluding statements provided the clearest insight into the Commissions’ objectives and purpose. The new Commission gained authority to view and analyze “letters patents and other writings whatsoever,” issued by either King Charles or

¹³⁴Ibid., 78 - 9.

¹³⁵Ibid.

¹³⁶Ibid.

¹³⁷Ibid., 79.

¹³⁸Ibid.

King James “concerning the planting of any colonies in any country, provinces, islands.”¹³⁹ The Order authorized examination of all documents. If these appeared “to have been surreptitiously and unduly obtained, or that any privileges or liberties therein granted be hurtful to us, our crown, or prerogative royal,” the Commission could revoke them.¹⁴⁰ This concluding statement in the Royal Order made unmistakable Charles’s intent to follow his father’s arbitrary policies toward the American Colonies. Under the prerogatives given to the Royal Commission, no property claim or colonial possession could be considered beyond potential seizure. John Winthrop, or any Cambridge Agreement signer, would not have joined the Massachusetts Bay colony had Charles I created the Royal Commission before 1629.

The colonists risked a great deal in coming to America. They took the risk, however, because they believed that the benefits of self-judicature and the liberty to practice their religion were worth the associated risks. These assumptions made by Massachusetts’ colonists were not ill-founded at the time they began emigrating in 1630. Their agreement with Charles created a binding method for judicature, and guaranteed vast political-autonomy to Massachusetts’ leadership. The colonists repeatedly showed a respect for their obligations and restrictions under their charter.¹⁴¹ Charles I, however,

¹³⁹Ibid.

¹⁴⁰Ibid., 80.

¹⁴¹It was easy to follow the letter of the charter, considering the documents very liberal wording.

when he created the Royal Commission completely ignored his promise and violated England's laws and traditions.

The Bay Colony's leadership gave a quick, profoundly negative, response to the Royal Commission and its extensive prerogatives. Leaders of the colony based their response upon a basic constitutional principle of equity within society, a concept defining acceptable behavior even for a King. Winthrop's journal mentions the Commission on 18 September 1634, and his words illustrate the sentiment held by others in the colony. Winthrop wrote that "there came over a copy of the commission granted to the two archbishops and ten others of the council, to regulate all plantations, and power given them, . . . to call in all patents, to make laws, to raise tythes and portions for ministers, to remove and punish governors, and to hear and determine all causes, and inflict all punishments, even death itself, etc."¹⁴² As Winthrop's diary entry continued, he stated his conviction that the Commission aimed specifically toward reducing the Massachusetts colony. He wrote that "there were ships and soldiers" sent from England "suspected to be against us, to compel us, by force, to receive a new governor, and the disciplines of the Church of England."¹⁴³ Considering the potential danger, Winthrop "occasioned the magistrates and deputies to hasten our fortifications," in fact, they raised six hundred men

¹⁴²Winthrop, *Winthrop's Journal: The History of New England, 1630 - 1649*, Hosmer, ed., 134 - 135.

¹⁴³Ibid., 135.

for the occasion.¹⁴⁴ The colonists pronounced they would “defend our lawful possessions if we are able; if not, to avoid and protract.”¹⁴⁵

The weaknesses that the embryonic colony possessed in 1634 restricted its struggles against England to verbal and not physical attacks. Winthrop’s declaration that the small colony would willingly fight the futile battle against England’s army if need be illustrated the colonists’ determination. These Puritans would not be willing to risk their lives over principles possessing dubious legal merit. To the contrary, the colony’s leadership had followed the letter of their charter and had acted according to the spirit of England’s laws and traditions. They considered their struggle with England to be based on strong legal footing; the Royal Commission was illegally founded and its acceptance would condone arbitrary government and undermine the Petition of Rights.

The English who gravitated to Massachusetts in the early seventeenth-century refused to give away the principles they believed were theirs by right of birth. Always remembering England’s legal history, the fledgling colony followed the established policy of resisting arbitrary government that characterized English society. The colonists had many options regarding the Royal Commission, yet clearly any response other than resistance ceded back to Charles the prerogatives he freely gave to the colony. Those in Massachusetts followed the path taken by the Virginia Colony in the 1620’s when it

¹⁴⁴Ibid.

¹⁴⁵Dickerson, “The Massachusetts Charter and the Bay Colony,” 102.

resisted James I. This path of principle-based resistance predated the Stuart Kings, dating to the beginning period of English constitutional development.

Founded by English citizens, the colonists of Massachusetts zealously guarded privileges and guarantees that had become the birthright of all English citizens. The American Revolution did not occur because American colonists wanted political innovations, but because they resisted political innovation. The changes that had occurred by 1775, which prompted the American Revolution, did not occur in North America but rather in England; change that resulted from Stuart absolutism and the constitutional crisis that resulted from this concept.

Chapter Three

England's Constitutional History: Precedents For Resisting Absolutism

I . . . commend highly their wisdom, by whom the foundations of this common-wealth have been laid; wherein . . . is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule. . . . The axioms of our regal government are these: . . . the king's grant of any favour made contrary to the law is void . . . [and] what power the king hath, he hath it by law; the bounds and limits of it are known.¹⁴⁶

The Royal Commission represents a small, somewhat insignificant, segment from Massachusetts' history, yet provides an important link between seventeenth- and eighteenth-century England. Often historians view the frequent struggles Massachusetts made against England in isolation: one battle against a King's absolutism, another battle against a Parliament's sovereignty. There existed a conceptual linkage, however, between the colony's polemic relationship with Charles I and those events that eventually led to the American Revolution. Determining why Massachusetts resisted the Royal Commission yields important insights into the true impetus behind the American Revolution.

This chapter will describe the constitutional arguments that prevailed during seventeenth-century England, providing as a result the intellectual framework for the colonization of Massachusetts. The absolutist paradigm advanced by James I is important

¹⁴⁶Richard Hooker, "On Ecclesiastical Polity," [1600] bk. VIII, c. 11, from Taswell-Langmead, *English Constitutional History*, 326.

to American history. Although, in 1628 England's Constitution presented an immutable quality to law, this eventually dissolved in the crisis-filled eighteenth century. Massachusetts' interpretive alliance with Parliament, so vital in 1636, becomes by 1765 explosive and destructive.

I. Absolutism: England's Constitution from 1603 to 1628.

When studied outside its historical context, absolutism and divine right kingship might not seem such innovative concepts. Indeed, these two ideas are innovative not as political doctrine, *per se*, but only as political doctrine within England's political traditions. When James introduced divine right kingship, he utilized Biblical references and incorporated ideas devised by past theorists.¹⁴⁷ Lacking literacy, and access to key governmental documents throughout England's history, many citizens in seventeenth-

¹⁴⁷See examples from: John of Paris, "On Royal and Papal Power," [circa 1302] cited from, *Medieval Political Theory -- A Reader. The Quest for the Body Politic, 1100-1400*, Cary J. Nederman and Kate Langdon Forhan, ed., (New York: Routledge, 1993), 161-63; "Sovereignty must be perpetual power; the ruler could not be truly sovereign if he were but a trustee of the people. . . . The sovereign must be absolute." Jean Bodin, "La Republique," [1576] quotation from Mosse, *The Struggle for Sovereignty in England*, 28. James's work, *Basilicon Doron*, is just one example illustrating the king's broad use of sources, classical and biblical. A random sample from *Basilicon Doron*'s sources referred to: Plato's *Politics*; Aristotle's *Politics*; Cicero's *De Republic*; Tacitus' *Histories*; and Seneca's *De Clementia*. [See: King James VI/I, "Basilicon Doron," from *King James VI and I: Political Writing*, Johann P. Sommerville, ed., 20 - 21.]

century England even believed the absolutist position King James advanced.¹⁴⁸ Despite the varied support absolutism received from his subjects, James I's political concepts differed drastically from those accepted by the leading theorist in sixteenth-century England. Although, other interpretations were common in Tudor England, when Scotland's James VI inherited England's throne he opposed previously popular perceptions regarding English society. To his credit, James maintained great consistency in his political beliefs. Scotland's King since 1567, his mother Mary Queen of Scots abdicating when he was only a year old, James had become accustomed to ruling many years before 1603. Studying under the foremost classicist of the sixteenth century, George Buchanan, James acquired great confidence in his knowledge of political theories and the classical teachings from ages past.¹⁴⁹ Although educated by Buchanan, James showed his independence by adopting conceptual positions completely contrary to his teacher, who

¹⁴⁸David Wootton, ed., *Divine Right and Democracy: An Anthology of Political Writing in Stuart England*, (London: Penguin Books, 1986), 29 - 38.

¹⁴⁹George Buchanan, a renowned poet, historian and academic, taught in France for many years before returning to Scotland around the time of James's birth in 1566. Although, eventually becoming James's tutor from 1570 to 1576, Buchanan opposed Mary Queen of Scots rule. In 1571 Buchanan published *Detectio Mariae Reginae*, and openly asserted that monarchs were accountable to their subjects, who could depose tyrant rulers. In 1582, he published a history of Scotland entitled *Rerum Scoticarum Historia*, which listed incidents where Scottish kings were held accountable by their subjects for tyrannical behavior. King James, and Scotland's Parliament, actively opposed the principles Buchanan presented in his various writing. Two years after his death, Scotland's Parliament ordered that Buchanan's works be recalled, so their offensive ideas might be removed from public access. [Fitzroy Maclean, *Scotland: A Concise History*, 85.]

along with John Knox was an outspoken critic of royal absolutism. Viewing life from a different vantage point than his educators, James's political views probably emerged as a reaction to the events that surrounded him, events that as King he could not easily ignore.

Many environmental factors impacted James I's belief structure, understanding these increases understanding into his affect on English government. Firstly, the treatment his mother, Mary Queen of Scots, received from her subjects and abroad, may have influenced the future English King. While it is difficult to deny Queen Mary's destructive behavior, her Scottish subjects deposed her and later Queen Elizabeth executed her on the grounds of treason. Twenty-one years old when Elizabeth finally decided to execute Mary, James understood the significance of a former-monarch being beheaded; no longer did royal birth hold the same mystique.¹⁵⁰

Besides the execution of his mother, the political ramifications of Protestantism undoubtedly affected James's belief structure. The struggle for sovereignty between popes and kings had existed for at least five hundred years before James's birth, yet Protestantism offered greater cause for papal encroachments into the political arena. In

¹⁵⁰Having signed a treaty with England in 1585, and having hopes to succeed Elizabeth on her death, James made only a formal protest over his Mother's execution. [Fitzroy Maclean, *Scotland: A Concise History*, 104.] On the issue of Mary's beheading Queen Elizabeth also realized the dangers that would result from executing a person of royal blood. Regarding the intricacies behind Queen Elizabeth's thoughts of royal executions, see: Elizabeth Jenkins, *Elizabeth the Great*, (New York: Coward-McCann, Inc., 1958), 143.; John Guy, *Tudor England*, (Oxford: Oxford University Press, 1988; repri., 1991.), 334 - 7.; J. P. Kenyon, *Stuart England*, The Pelican History of England Series, J.E. Morpurgo, ed., (London: Penguin Books, 1978; repri., 1990), 41, 61 - 2.

1570, when Pope Pius V excommunicated Elizabeth I and issued a Bull deposing her, the battle between church and state reached a new dimension. While only three years old when Pius deposed Elizabeth, James was nineteen when in 1585 Pope Sixtus V excommunicated Henry of Navarre, the Protestant heir to France's throne. Although, Papal Bulls possessed little enforcing power within Protestant nations, radical Catholics actively resisted Protestant rulers. In France, Catholic fanatics executed both Henry III and Henry IV (former Henry of Navarre). The Protestant religion, as practiced in Scotland, also challenged royal sovereignty. In fact, James staged a successful but lengthy battle asserting royal control over ecclesiastical matters within Scotland, ending his struggles in 1598.

When considering his impact on English society, ignoring this basic fact would be foolish: James I matured to adulthood in a political society different from England. Being Scotland's James VI for thirty-six years before 1603, the sentiments and biases associated with being raised outside English society can never be over looked. Until 1603 James I gave little thought to these concepts and documents: Anglo-Saxon traditions, Henry I's Charter of Liberties, Magna Carta, the depositions of Edward III, Richard II, and Richard III. Before 1603, James I did not revere the traditions incorporated within England's Common Law.¹⁵¹ In fact, Scottish legal traditions traced back to French Civil Law,

¹⁵¹James I never really revered the Common Law traditions of England. By 1607, King James admitted to Parliament: "of the Common law, . . . I can professe no great knowledge." [King James I, "A Speech to Both the Houses of Parliament, Delivered in the Great Chamber at White Hall, the Last Day of March, 1607," from *King James VI and*

which his grandfather James V imported to Scotland.¹⁵² An important consideration, when analyzing James's absolutism is that the king had advanced these theories many years before coming to England. James wrote two of his greatest works on absolutism by 1598, *The Trew Law of Free Monarchies* and *Basilicon Doron*; the former being published that same year, the later being published in 1599. James was an absolutist king; he adhered consistently to his beliefs and never denied his absolutism. Having established the historical context behind his arrival to England, delving further into his words and actions is now possible.

The single most important change James I made in interpreting England's Constitution was how he perceived the law of nature. Unlike Sir John Fortescue, John Aylmer or Richard Onslow, James did not believe natural law guaranteed immutable privileges to property or certainty before law. Dismissing the basic tenet behind Cicero's natural law, James did not believe in the general equality of man. James stated throughout *The Trew Law of Free Monarchies* and *Basilicon Doron*, that God elevated kings over the rest of society. Although, at times James conceded that kings ought to rule according to law, he always claimed that there existed no earthly entity that could compel

I: Political Writings, Johann Sommerville, ed., 171.]

¹⁵²*Ibid.*, 172 - 74. There are two important quotations from this speech: "It hath bin objected that there is a great Antipathy of the Lawes and Customes of these two Nations [Scotland and England]. It is much mistaken: for Scotland hath no Common Law as here . . ." [*Ibid.*, 173]; "the Ciuill Law: Iames the fift brought it out of France by establishing the Session there, according to the forme of the Court of Parliament of France, which he had seene in the time of his being there." [*Ibid.*, 174]

monarchs to follow their own laws. Relying on his divine right theory, James believed that kings were “God’s lieutenants upon earth,” and as such were “accountable to none but God onely.”¹⁵³ At its most basic element, his absolutism could never agree with the pre-Stuart interpretation of England’s Constitution. Denying social equality, James made inequality the foundational premise for governing his kingdom. England may not have always guarded social equality throughout its long history, in fact examples of great inequality are numerous. Nonetheless, the political foundation for English society before James asserted conceptually that nature made everyone equal in essence.

In his *Trew Law*, James considered the potential justifications for revolt that his subjects might make.¹⁵⁴ He stated as a position of fact, that in cases of an unjust king, the people were to blame and consequently had no right to revolt. Likewise, he pointed out that if by some off chance the people claimed that the king broke a contract (via the coronation oath) he made with his subjects, only God had the authority to judge him. He wanted the subjects to wait patiently for God to make judgement.¹⁵⁵ If no judgement

¹⁵³King James I, “A Speach to the Lords and Commons of the Parliament at White-Hall, on Wednesday the XXI. Of March. Anno. 1609,” from *King James VI and I: Political Writings*, Johann Sommerville, ed., 181. James declared that king’s were elevated by God in writings before 1610, the above citation being used because the clarity of the writing not as an innovation in his thought. In this same passage, James declared, kings not only “sit upon Gods throne, but even by God himselfe they are called Gods.”

¹⁵⁴*Trew Law* is very important to the study of Massachusetts. Its arguments are the blue print for absolutism and eventually mercantilism.

¹⁵⁵James claimed that he did not intend to allow kings free reign on earth or to claim that they could break promises without punishment. To the contrary, he wrote, “I

came, according to James, this meant that God ruled in the king's favor.

On every issue for potential rebellion, James altered generally accepted definitions in England to secure his position as divinely appointed king. James expressed authoritatively, that Natural law did exist but that it required that subjects obey their sovereign absolutely. Likewise, James attacked the commonly held view that subjects in England had immutable rights and liberties. On dissolving the Parliament in 1621, James illustrating his consistency, boldly declared, "the subjects cannot call any immunities hee enjoys his auintient and undoubted rights, inheritance, or liberties, but graces, permissions, or graunts from our kings, and that such words are very anti-monarchicall."¹⁵⁶ In making such an assertion, James denied England's political traditions but presented clearly the political beliefs that he held publicly since 1598. James held non-English views regarding England's Constitution but publicly declared his position before receiving the Throne.

Despite the effort to learn English practices and customs, James never accepted precedents that limited the king's prerogative. To the contrary, he fully perceived his prerogatives to be absolute and divinely ordained. Although a learned man, the Scottish

remit [kings] to the sorest and sharpest schoolemaster that can be deuised for them: for the further a king is perferred by God aboue all aother ranks & degrees of men, and the higher that his seat is aboue theirs, the greater is his obligation to his maker." [Ibid., 83.]

¹⁵⁶James I, "Declaration on Dissolving Parliament, 1621," cited by Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, ed. John Mitchell Kemble, 22.

king did not study England's chronicled history sufficiently. Clearly, he did not acknowledge the promises made by former English kings. Likewise, his behavior refuted the privileges held by the ancient Witenagemot and their right to depose arbitrary kingship. Seemingly, he dismissed as unlawful the deposition of Kings Edward II and Richard II by claiming the same absolutist ideology they had adopted, and over which they lost their regal title.

James's arbitrary tendencies became immediately evident to his new English subjects. In 1603, during the trip from Scotland to London, the new king came upon a thief caught in the act. James reportedly had the thief executed on the spot, without "the formality of a trial."¹⁵⁷ On hearing this episode, political philosopher Sir John Harrington declared, "I hear the new king has hanged one man before he was tried; it is strangely done. Now if the wind blows thus, why may not a man be tried before he has offended."¹⁵⁸ Harrington's sentiments, that the new king would disregard basic English liberties seemed all too evident.

A second indicator that James would follow his absolutist beliefs occurred during his initial encounter with certain Puritan emissaries. As James headed toward London in 1603, Puritan leaders presented their new king with the Millenary Petition.¹⁵⁹ In this

¹⁵⁷Taswell-Langmead, *English Constitutional History*, 331.

¹⁵⁸*Ibid.*

¹⁵⁹This document was called the Millenary Petition because it was claimed that a thousand ministers were consulted for its construction. In reality there were about 825

petition the Puritans presented the doctrinal differences between themselves and the greater Church of England. The treatment that these Puritan leaders received from their new monarch foreshadowed the commonplace abuses to liberty that characterized Stuart rule, and over which the Massachusetts colony continually struggled. When the prominent Puritan divine, John Reynolds, submitted to James the Millenary Petition, he initially found the king cooperative and friendly. Within the main points of the Petition were requests “that non-residency be not permitted: that King Edward’s statute for the lawfulness of minister’ marriage be revived: that ministers be not urged to subscribe but according to the law to the Articles of Religion, and the King’s Supremacy only.”¹⁶⁰ Additionally, the Petition requested that clergy not hold multiple benefices, a practice frequently done.¹⁶¹ The Petition included several other specific concerns, all focusing on the “reformation of certain ceremonies and abuses of the Church.”¹⁶² In conclusion, the petitioners claimed, these practices mentioned were against the scriptures, and should

ministers that were consulted. [Ibid., 329.]

¹⁶⁰“The Millenary Petition, 1603,” from *The Stuart Constitution, 1603-1688, Documents and Commentary*, ed. J. P. Kenyon, (London: Cambridge University Press, 1966), 133.

¹⁶¹Ibid. Complaints against non-resident, and multi-beneficed clergy aimed quite accurately at the root causes for church corruption. Clergy such Archbishop Laud, like Cardinal Wolsey, epitomized worldliness and characterized a main concerns of the Puritans. This became a major issue for Puritans in Massachusetts, who become subordinated in 1634 to Laud under the Royal Commission.

¹⁶²Ibid., 132.

cease based on that argument.¹⁶³ At its conclusion, the Petition requested a conference or some further meeting to resolve their concerns.

Veiling his deep distrust for Puritans, James agreed to discuss the issues raised in the Millenary Petition at a three-day meeting at Hampton Court starting on 14 January 1604.¹⁶⁴ In the Hampton Court meeting, on one side gathered several eminent bishops and leaders from the Church of England, while on the other side stood Reynolds and other Puritan leaders. Initially, the King and his bishop advisers discussed the issues raised by the Puritans. At one point, however, when the Puritan leaders began to criticize the Church hierarchy and particular abuses by bishops; James grew enraged.¹⁶⁵ In a spiteful rebuke, he noted that “where there was no bishop there would be no king.”¹⁶⁶ James declared further, perhaps foreshadowing the Puritan movement to Massachusetts,

¹⁶³Ibid., 134.

¹⁶⁴Despite Kenyon’s assertion that James ended the Hampton Court meeting “amicably” and his implication that the king was somewhat receptive to the Puritans’ pleas, contradictory claims are available. [see: *The Stuart Constitution, 1603-1688*, ed. Kenyon, 126-7.] The harsh treatment of the Puritans at Hampton Court will be shown in the text, as described by Taswell-Langmead, *English Constitutional History*, 329-30. Further, in his introduction, Charles McIlwain, declared that James “did hate Puritans above any other religious party in either of his kingdoms and his hatred was of long standing.” McIlwain’s claim is well substantiated by James’s political works, as shall be shown later. Suffice to say, James possessed a firmly hostile position toward the Puritans before they ever submitted the Millenary Petition, and so the Hampton Conference may have been merely agreed upon for the sake of appearances. [See: King James I, *The Political Works of James I*, ed. and intro., by Charles Howard McIlwain, xc-xci.]

¹⁶⁵Taswell-Langmead, *English Constitutional History*, 329-30.

¹⁶⁶Ibid., 329.

“If this be all your Party hath to say, I will make them conforme themselves, or else I will harrie them out of the Land, or else do worse.”¹⁶⁷

Verbal rebukes to the Puritan’s request for Church reform did not placate the king. Immediately after dissolving the Hampton Court meeting, James sent to prison the ten leading Puritans who submitted the Millenary Petition. James noted how judges in Star Chamber had ruled “that it was an offense fineable at discretion, and very near to treason and felony, as it tended to sedition and rebellion.”¹⁶⁸ The decision to send the petitioners to prison, “at discretion” contradicted the essence behind England’s Constitution, justifying the fears many Puritans had during the Stuart reign. Despite the arbitrary nature behind James’s response to the Puritans, again, he acted with remarkable consistency.

On one level, the Puritans’ reception from James illustrated his consistent goal to rule as an absolutist monarch. In England the rule of law had restrained kings, deposing tyrannical ones and censuring arbitrary acts. England’s traditional definition of kingship differed greatly from James’s divine right concepts, which advanced the idea that the king was, for all intents and purposes, God to his subjects.¹⁶⁹ True, James held a much

¹⁶⁷*Political Works of James I*, ed. McIlwain, xc.

¹⁶⁸*Ibid.*, 330.

¹⁶⁹James I made this telling quotation: “euen by God himself [kings] are called Gods. . . . Kings are iustly called Gods, . . . the like power [of God] haue Kings: they make and vnmake their subiects: they haue power of raising, and casting downe: of life, and of death: Iudges ouer all their subiects, and in all causes, and yet accomptable to none

different position regarding kingship than did his subjects but he behaved consistently. Remembering the thief's execution in 1603, sending ten Puritans to prison merely validated John Harrington's fears.¹⁷⁰

On the second level, James's reaction at Hampton Court agreed with his previously held views toward Puritans in general. James's behavior toward the Puritans mirrored closely the advice he gave in his 1599 work, *Basilikon Doron*. In this work, also entitled *His Majesties Instructions to His Dearest Sonne, Henry the Prince*, James wrote, "Take heede therefore (my Sonne) to such Puritanes, verie pestes in the Church and Common-Weale, whom no deserts can oblige, neither oathes or promises binde, breathing nothing but sedition and calumnies, aspiring without measure, railing without reason, and making their imaginations (without any warrant of the word) the square of their conscience."¹⁷¹ In continuation James wrote, "I protest before the great God, . . . that ye shall

but God onely. . . . and make of their subiects like men at the Chesse; A pawne to take a Bishop or a Knight, and to cry vp, or downe any of their subiects, as they do their money." [King James I, "A Speach to the Lords and Commons of Parliament at White-Hall," [1609] from *The Political Works of James I*, ed. McIlwain, 307-8.]

¹⁷⁰Indisputably, this conceptual difference became a major reason for the Civil War, which though not occurring during James reign can easily be traced to his reign. The most destructive legacy James left his son Charles was the divine right concept of kingship. There is a tremendous continuity between the manner James treated Parliament and its treatment by Charles; both attacked any criticism regarding the merits of absolutist monarchy.

¹⁷¹King James I, "Basilikon Doron. Or His Majesties Instrvctions to His Dearest Sonne, Henry the Prince," [1599] from *Political Works of James I*, ed. McIlwain, 23-4. In the introduction to *Basilikon Doron* James very specifically identified to the general reader his distaste for Puritans and established his definition for the sect. [Ibid., 6.]

neuer finde with any Hie-land or Border-theeues greater ingratitude, and moe lies and vile periuries, then with these phanaticke spirits.”¹⁷² These final words are very telling, “And to end my aduice anent the Church estate, cherish no man more then a good Pastor, hate no man more then a proude Puritane.”¹⁷³

To eliminate misconceptions regarding his positions on the Church of England, James on 16 July 1604 enacted, *A Proclamation Enjoining Conformity to the Form of the Service of God Established*. This document referred to the Hampton Court proceedings, noting that “no well grounded matter appeared to us or our said Council why the state of the Church here by law established should in any material point be altered.”¹⁷⁴ It further warned English subjects from “listening to the troublesome spirits of some persons who never receive contentment, either in civil or ecclesiastical matters, but in their own fantasies, especially of certain ministers who, under pretended zeal of reformation, are the chief authors of divisions and sects among our people.”¹⁷⁵ Although, James declared it his desire for conformity “by clemency and by weight of reason, and not by rigour of

¹⁷²Ibid., 24.

¹⁷³Ibid.

¹⁷⁴King James I, “A Proclamation Enjoining Conformity to the Form of the Service of God Established,” [1604] from *The Stuart Constitution, 1603-1688*, ed. Kenyon, 135.

¹⁷⁵Ibid., 135-36. See, *Supra*, fn 217, 218, illustrating the amazing consistency in James’s vocabulary and impression regarding the Puritans. Within this quotation is also found reference to James’s assertion that the Puritan petitioners were seditious and guilty of treason.

law,” he did not preach temerity.¹⁷⁶ James wrote, “if our hope herein fails us, we must advertise them that our duty towards God requireth at our hands that what intractable men do not perform upon our admonition they must be compelled unto by authority.”¹⁷⁷

English leaders quickly voiced their concern toward James’s absolutist behavior. In the Parliament of 1604, Speaker Sir Edward Phelips felt such trepidation by James’s rule that he felt it requisite to remind the king of “the limited nature of his regal power.” The first words spoken by Phelips during the proceedings reminded James that “new laws could not be instilled, nor inconvenient laws abrogated, by any other power than that of the High Court of Parliament, that is, by the agreement of the commons, the accord of the Lords and the assent of the Sovereign;¹⁷⁸ that to the king belonged the right either negatively to frustrate, or affirmatively to ratify: every bill must pass the two houses before it could be submitted to his pleasure.”¹⁷⁹ Similarly, in the Apology of the Commons (1604), among many statements asserting the liberties of English citizens, Parlia-

¹⁷⁶Ibid., 137.

¹⁷⁷Ibid., 136.

¹⁷⁸Phelips in no way refers to “sovereign” in the same way as did Bodin or Hobbes. His reference is to a mixed sovereign, of course, Bodin and Hobbes asserted that a mixed sovereign is no sovereign at all. Clearly, other impressions of the term “sovereign” existed other than Bodin’s and Hobbes’. However, in 1628 when the term “sovereign” is inserted by the Lords into the Petition of Rights, there occurred a great uproar. Alfrod, a member of the 1628 Parliament, declared regarding the term: “Bodin saith that it is free from any condition. By this we shall acknowledge a regal as well as a legal power. Let us give that to the king that the law gives him, and no more.” [Taswell-Langmead, *English Constitutional History*, 368.]

¹⁷⁹Ibid., 331-2.

ment issued a firm rebuke of absolutism. The Commons declared assertively, that they would misinform his Majesty “if any man should deliver that the kings of England have any absolute power in themselves, either to alter religion (which God defend should be in the power of any mortal man whatsoever), or to make any laws concerning the same, otherwise than, in temporal causes, by the consent of parliament.”¹⁸⁰

James’s political philosophy created instant tension in England. At every opportunity Parliament dismissed his absolutist claims and frequently tried to limit his prerogative.¹⁸¹ The desire by Parliament to thwart absolutism carried on into the reign of Charles I, who became king in 1625. Likewise, Charles continued his father’s absolutist convictions, adopting completely the belief in divine right of kings. The tension in England, which began with James’s first arbitrary act continued to escalate, resulting in 1628 with the issuance of *The Petition of Rights*. This 1628 document is the final protective device at the disposal to the colonists of Massachusetts, who received their

¹⁸⁰Ibid., 335-36.

¹⁸¹A clear proof that Parliament refused all absolutist claims by James (although he continually asserted the claim), was the reaction over Dr. Cowell’s legal dictionary, *The Interpreter*. Cowell’s work listed under King: “He is above the law by his absolute power . . . [he is] not of constraint. . . .”; and under Parliament: “either the king is above the parliament, . . . or else he is no absolute king . . . yet simply to bind a prince to or by those laws were repugnant to the nature and constitution of an absolute monarchy.” Parliament in 1610 was so outraged by *The Interpreter* that it pressured James I to denounce the book and to revoke all copies of it. [Taswell-Langmead, *English Constitutional History*, 341-43.; David Wootton, ed., *Divine Right and Democracy: An Anthology of Political Writings in Stuart England*, 30 - 2.; Lawrence Stone, *The Causes of the English Revolution, 1529 - 1642*, 98.]

charter a year later in 1629.

Charles I had just one intent in calling Parliament in 1628. He did not want to hear grievances, he only wanted money. From his opening speech to the two houses assembled, no doubt remained regarding how lowly he held the importance of Parliament. After mentioning to Parliament his duty to protect the state's interests, Charles stated, "I . . . judging a parliament to be the antient, speediest, and best way in this time of common danger, to give such Supply as to secure ourselves, and save our friends from imminent ruin, have called you together."¹⁸² Toward eliminating any misconceptions regarding his desire, Charles warned: "Every man now must do his conscience; wherefore if you (which God forbid) should not do your duties in contributing what the state at this time needs, I must, . . . use those other means, which God hath put into my hands, . . . Take not this as a threatening (for I scorn to threaten any but my equals) but an admonition," from the king.¹⁸³

The mannerisms used by Charles showed clearly his inherited belief in divine right. This behavior, being directly at odds with some English traditions, offended the Commons. Quickly discarding the king's threat, the Commons began to formulate legislation that encapsulated the spirit behind Magna Charta -- the spirit guaranteeing English liberties. There had occurred arbitrary acts by the monarch, which prompted Sir

¹⁸²William Cobbett, ed, *The Parliamentary History of England*, vol. II, 1625-1642, (London: R. Bagshaw Co., 1807, reprinted, New York: AMS Press, 1966), 213.

¹⁸³Ibid.

John Elliot to “passionately and rhetorically,” declare that he “misliked much the violating of our laws.”¹⁸⁴ Elliot concluded his forceful declaration proposing the creation of a committee to deal with the said problems.

Trying to appease the Commons, Charles promised in several statements not to arbitrarily arrest anyone nor to act against the Great Charter.¹⁸⁵ The king responded too late. Sir Edward Coke convinced the House to continue with the proposed bill. “Was it ever known,” spoke Coke, “that general words were sufficient satisfaction to particular grievances?” With splendid rhetoric, Coke continued, “The kings answer is very gracious; but what is the law of the realm? that is the question. . . . Let us put up a Petition of Right; not that I distrust the king, but that we cannot take his trust but in a parliamentary way.”¹⁸⁶ Coke’s advice resolved the Commons to proceed, and they began immediately to draft the Petition of Rights.

Although, a semantical battle between the Commons and Lords hampered its first draft, Parliament eventually passed the Petition of Rights. Within the Petition, the “Rights and Liberties of the Subjects” were redefined and elaborated. English citizens had held these privileges since Edward the Confessor’s reign in the mid-eleventh century.

¹⁸⁴Ibid., 232.

¹⁸⁵Ibid., 248-52; 344-45 [“you shall find as much security in his majesty’s Royal Word and Promise, as in the strength of any law ye can make.” 331-2]. See also: Taswell-Langmead, *English Constitutions History*, 368.

¹⁸⁶Ibid. See also: Cobbett, *Parliamentary History of England*, vol. II, 348-9.

The first precept provided protection against arbitrary loss of property. This clause stated that English citizens had “inherited this freedom that they should not be compelled to contribute to any tax, tallage, aid, or other like charge, not set by common consent in Parliament.”¹⁸⁷ Additionally, the Petition reminded that the “Great Charter of Liberties” had established guarantees to every freeman. Following the rights in Magna Charta, the statute declared “that no freeman may be taken or imprisoned,” or lose his “liberties or his free customs or be outlawed or exiled or in any manner destroyed, but by the lawful judgement of his peers or by the law of the land.”¹⁸⁸

The Petition of Rights referred frequently to past charters, which defined liberties for England’s citizens. This document’s intent clearly aimed toward the reminding, not to legislating, of English rights. For example, the Petition’s fourth clause read: “And in the twentieth year of the reign of King Edward the Third it was declared and enacted by authority of Parliament, that no man, of what estate or condition that he be, should be put out of his land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought to answer by due process of law.”¹⁸⁹ In another clause the Petition stated that Charles had stationed soldiers and mariners “throughout the realm” and that

¹⁸⁷King Charles I, “The Petition of Right,” c.1. [1628] from *The Stuart Constitution, 1603-1688*, ed. Kenyon, 82.

¹⁸⁸Ibid., [c.3.] 83.

¹⁸⁹Ibid. [c.4.]

inhabitants had been forced to lodge these persons.¹⁹⁰ This practice, according to the Petition, was “against the laws and customs of this realm and to the great grievance and vexation of the people.”¹⁹¹

After listing many grievances and abuses, the Petition concluded definitively. The final clause included five conclusive resolves. The first resolve requested from Charles a promise that “no man hereafter be compelled to make or yeild any gift, loan, benevolence, [or] tax . . . without common consent by Act of Parliament.”¹⁹² It further requested that Charles not confine or otherwise molest anyone for refusing to give gift, loan or benevolence when he made request *sans* Parliament.¹⁹³ In its second resolve the Petition asked that no freeman be in any way “imprisoned or detained.” without due process of law.¹⁹⁴ Thirdly, the Petition requested that the king remove all soldiers and mariners residing unlawfully in residential quarters, and that he abolish the practice.¹⁹⁵ Fourthly, the Petition requested from Charles that every “proceeding by martial law may be revoked

¹⁹⁰This practice was revised by Parliament legislation through the Quartering Act past just years before the American Revolution, and caused great alarm in the colonies.

¹⁹¹*Ibid.* [c.6.]

¹⁹²*Ibid.*, [c.8.] 84.

¹⁹³*Ibid.*

¹⁹⁴*Ibid.*

¹⁹⁵*Ibid.*

and annulled.”¹⁹⁶ It also requested that no future proceedings by martial law occur in the future, nor any person executed, “destroyed or put to death contrary to the laws and franchises of the land.”¹⁹⁷ The Petition of Right concluded with these words: “all which they most humbly pray . . . as their rights and liberties according to the laws and statutes of this realm.”¹⁹⁸

His sincerity being doubted by those in the House of Commons, Charles was pressured to reaffirm his position regarding the Petition on three separate occasions.¹⁹⁹ On the 2 June 1628 after hearing the Petition read aloud for a second time, the king gave the following reply: “The king willeth, that Right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrongs or oppressions, contrary to their just Rights and Liberties.”²⁰⁰ After careful consideration, Parliament found Charles’ second response unacceptable. The leadership in Parliament feared that the monarch reserved too much prerogative by prefacing his response, “the King willeth.” Having penned such a powerfully written document, Parliament did not want there to develop any potential

¹⁹⁶Ibid.

¹⁹⁷Ibid.

¹⁹⁸Ibid.

¹⁹⁹Cobbett, *Parliamentary History of England*, 352 [May 9, 1628]; 377 [June 2, 1628]; and 409 [June 7, 1628].

²⁰⁰Ibid., 377.

loopholes confirming absolutism.

Unsatisfied by his first two responses, Parliament required Charles make one final affirmation for the Petition before giving him his desired supply. The king made his final response to Parliament's Petition on 7 June 1628. His final answer contained this preface: "This I am sure, is full; yet no more than I granted you in my first Answer; for the meaning of that was to confirm all your liberties; knowing according to your protestations, that you neither mean nor can hurt my prerogatives."²⁰¹ Afterward his preface, Charles declared: "And I assure you that my maxim is, that the peoples liberties strengthen the king's prerogative, and that the king's prerogative is to defend the people's liberties."²⁰² As his acquiescence showed, Charles realized that English subjects were jealous of their liberties and determined to keep England's Constitution immutable. Still, Charles failed to learn from the Parliament of 1628. Soon afterward, Charles I ignored his promises of 1628. Civil war became the price for his decision.

By 1628 the battle to define England's Constitution had its needed two sides and had already fought a major campaign. As early as 1603, James had transplanted to England the absolutist doctrine he had developed and implemented in Scotland. While in Scotland, James argued that the state's fundamental law supported absolutism, King

²⁰¹Ibid., 409.

²⁰²Ibid.

Fergus having conquered and essentially enslaved all Scotland's ancestors.²⁰³ England possessed a different political heritage, one not based on enslavement. Her fundamental laws traced to Roman and Saxon traditions of equity. Despite the differences between England's and Scotland's political heritage, James ruled both nations as an absolute king. Overlooking the resulting political tension toward his absolutism, James refused to concede what he believed were his kingly prerogatives. England, in his opinion, did not possess a Constitution in the legal sense of the word. As King, James ceded privileges to those meriting privileges and took away privileges, property or life from whomever he declared unworthy. Using an absolutist model, constitutional rights did not and could not exist.

When Charles succeeded his father in 1625, the new king retained, if not enhanced, the absolutist paradigm. James jealously guarded his prerogatives, he practiced diplomacy and attempted to continue the form, if not the intent, of England's political traditions. Charles lacked his father's diplomacy. A main tenet in James' absolutism conceded that kings were obligated to follow their coronation promise and abide by their own laws. Judging from his opening speech to the Parliament of 1628, Charles looked disdainfully at England's political traditions, especially the haughty Commons. England's Constitution, in Charles' view, guaranteed nothing and in no way possessed power enough to restrain a king's prerogative. If England had a Constitution under Charles'

²⁰³The particulars of Scotland's history are addressed in appendix B, and will also be discussed in the upcoming section of this chapter.

rule, he believed its articles could only have declared that kings were absolute. The leadership of Parliament, headed by Sir Edward Coke, however, viewed England's Constitution differently than Charles did, and their interpretation had precedent-based power.

A brief sketch portraying Coke's image of England's Constitution will provide the final piece to understanding Massachusetts political development. The colonists of Massachusetts believed they benefited from the Petition of Rights, seeing in it the guarantee to law-based rule in England. Prior to 1603, property holders took law-based rule for granted; the next section will explain the political traditions that led to this complacency. In 1628, no one could foresee that Charles would disregard his promises to Parliament. Consequently, by 1629 it seemed as if the people had defeated absolutism. It was this belief that encouraged Puritans to colonize across the Atlantic.

II. Equity under Law: England's Constitution from 600 to 1628.

In *Trew Law*, James relied on sources from the distant past to claim an irrefutable precedent for absolutism. His absolutist arguments were far more convincing in Scotland than they were in England. While to Scottish subjects, James could trace the foundations of their government to a single man, the "absolutist" King Fergus, his English subjects possessed a different heritage. Only the astute Scottish historian could notice that the king's vision of Fergus contained misconceptions. While he presented Fergus as the

absolutist king, creating law, establishing government, this was an exaggeration. Fergus did establish a new dynasty to the Dalriada Kingdom, which formerly included only Ireland, but he continued to pay tribute to Ireland and accept Irish sovereignty.²⁰⁴ Attempts by James to revise English history faced greater challenges than they did in Scotland, England's political heritage was well documented; legal codes dating from King Aethelberht's Doms (601 -604) existed providing continuity to constitutional traditions.²⁰⁵

A major problem in James' English reign was his failure to adapt to his new nation. He tried to rule both England and Scotland as if they possessed identical histories. Analysis into English kingship reveals that her past kings had seldom denied the traditions of their predecessors. England had endured monarchs who ruled absolutely, or at least tried to, but none of these kings showed as blatant a disregard for legal restraint as James. Many opportunities existed for past kings and queens to create new traditions in England, her history being replete with political turmoil and dynastic changes. Examples

²⁰⁴Fitzroy Maclean, *Scotland: A Concise History*, 18. Additionally, the dynasty Fergus founded suffered near ruin a mere sixty-three years after its founding. St. Columba, establishing a Monastery at Iona in 563, came from Ireland when the Dalriada Kingdom was near collapse, having suffered a devastating defeat from the Picts wherein their king was slain. St. Columba consecrated Aidan the False, Fergus' grandson, as king and stabilized the shaken Kingdom. [Ibid., 19.]

²⁰⁵King Aethelberht, "Doms of Athelberht," [601 - 604] from *Sources of English Constitutional History*, vol. I., A Selection of Documents From A.D. 600 to the Interregnum, edited by Carol Stephenson and Fredrick George Marcham, (New York: Harper & Row, 1972, revised ed.,) 2 - 4.

show, however, that even King Cnute (1016 - 35), of Danish birth, and King William I (1066 - 87),²⁰⁶ of Norman birth, stressed to their subjects that their reigns continued the same Anglo-Saxon legal form used by Alfred the Great (871 - 99).²⁰⁷ Incorporating the laws from royal predecessors, and building upon the reputations of previous monarchs, became the norm for English kings up to the Stuart period.²⁰⁸

The foundational premise behind English kingship, unlike James' absolutist views, asserted that the people established the laws for society; the king existing as the law's enforcer not its creator. While James asserted that Scotland originated from Fergus' benevolence, and consequently all laws came from him, in England law origi-

²⁰⁶Ironically, in *Trew Law* James ridiculed England's legal traditions, noting that the Norman Invasion destroyed the Anglo-Saxon government system and pointing out that such a calamity had seldom occurred in Scotland. James wrote: "For when the Bastard of *Normandie* came into *England*, and made himselfe king, was it not by force, and with a mighty army? Where he gaue the Law, and took none, changed the Lawes, inuerted the order of gouernement, set downe the strangers his followers in many of the old possessours roomes, as at this day appeareth a great part of the Gentlemen in *England*, beeing come of the *Norman* blood, and their old Lawes, which to this day they are ruled by, are written in his language, and not theirs: And yet his successours haue great happinesse enioyed the Crowne to this day: Whereof the like was also done by all them that conquested them before." King James I, *Trew Law*, 74.

²⁰⁷Constitutional historians contend that governmental limitation originated from the spirit behind King Ethelbert's legal codes (600) with such laws extending in an unbroken series down to the Stuart period. [Taswell-Langmead, *Constitutional History of England*, 25.; Sir Matthew Hale, *The History of the Common Law of England*, 36 - 56.]

²⁰⁸John Cannon and Ralph Griffiths, *The Oxford Illustrated History of the British Monarchy*, 33 - 5.

nated from oral tradition, or “folkright.”²⁰⁹ Royal decrees, in Anglo-Saxon England, were not considered law, *per se*, since they merely clarified already established folkright.²¹⁰ The need for royal decrees existed because as English society enlarged, one kingdom incorporating another, there developed discrepancies regarding which folkright had precedent.

In determining what folkright would become law, kings during the Anglo-Saxon period did not make such decisions based on their own prerogatives.²¹¹ Always before folkright became written law, king and Witan, would meet and discuss relevant precedents before determining the proposed folkright’s true essence and meaning.²¹² The

²⁰⁹Henry Royston Loyn, *The Governance of Anglo-Saxon England, 500 - 1087*, (Stanford: Stanford University Press, 1984), 43. Christopher Brooke wrote concerning early English law: “The essence of early English law is that it was ‘popular’ law. The people at large were the repositories of law; they were the judges in the public courts. Law represented custom, of which any man with a good memory might be the repository, and local opinion; it was the one quasi-democratic thing about our early society.” [Christopher Brooke, *From Alfred to Henry III, 871 - 1272*, The Norton Library History of England, Christopher Brooke and Denis Mack Smith, gen. ed.’s, (New York: W. W. Norton & Company, 1961, 3rd ed., 1969), 68 - 9.

²¹⁰Henry Loyn, *The Governance of Anglo-Saxon England: 500 - 1087*, 43.

²¹¹Ibid. William Stubbs wrote relevantly: “The king never legislates by his own ordinances . . . The codes are in fact not so much the introductions of new principles as the declarations of the customs or common law of the race, dating far beyond the existence of written record, preserved in the memories of the wise, and kept alive for the most part in constant general experience.” [William Stubbs, *The Constitutional History of England*, Classics of British Historical Literature, John Clive, ed., abridged by John Cornford, (Chicago: The University of Chicago Press, 1979), 42.]

²¹²Ibid.; Carl Stephenson and Frederick Marcham, ed.’s, *Sources of English Constitutional History*, 1.

Witan, or “meeting of the wise,” served an important function in Anglo-Saxon England since, as its name implied, it represented the repository for folkright. Kings came into power, died and were eventually replaced but the Witan’s composition stretched for a greater length of time, ensuring continuity. Despite being unicameral in form, the Witan possessed many parliamentary attributes, providing a spring for precedents that Parliaments later used against kings throughout English history. King Charles’ Parliament of 1628 viewed itself as a “meeting of the wise,” assembled to clarify oral traditions. Led by Coke’s historical references, Parliaments during the early Stuart period did not want to eliminate the monarchy. They merely wanted acknowledgment that certain rights and privileges were immutable.

Many learned constitutional scholars existed during King Charles’ reign. Sir Roger Twysden, for instance, wrote a remarkably insightful work dealing with England’s governmental structure and its traditional practices. Twysden’s book, *Certaine Considerations Upon the Government of England*, served as a good literary rebuttal to James’ *Trew Law*: in both works, the philosophical elements from two combating schools are clearly and concisely laid out. James’ *Trew Law*, described, more than anything, a method for viewing England’s Constitution: all law is changeable. Twysden viewed England’s constitutional guarantees as unchangeable, encapsulating natural law premises that incorporated, and as such, superseded any one human or human institution.

Despite being separated by many years, Sir Roger Twysden and James I presented legal philosophies concerning England that allow for insights into two divergent and

combustible belief structures. Charles I adopted his father's method for viewing England's Constitution, as the Petition of Rights controversy made clear. As this paper's concluding chapter will show, Parliament itself eventually adopted James' philosophical views in the years preceding the American Revolution.²¹³ The Massachusetts colonists agreed with Twysden's perceptions regarding England's Constitution, so did Parliament until swayed by mercantile principles and the temptations to acquire Empire.²¹⁴ The

²¹³This position is supported by reading the *Declaratory Act* from 1766, which stated that colonial legislatures were completely subservient to Parliament. This act completely negated all privileges recieved via colonial Charter. However, absolutist interpretations of Parliament's power date many years before the *Declaratory Act*. Sir Matthew Hale, a prominent constitutional theorist wrote in 1713, "And doubtless, many of those Things that now obtain as Common Law, had their Original by Parliamentary Acts or Constitutions, made in Writing by the King, Lords and Commons; though those Acts are now either not extant, or if extant, were made before the Time of Memory [before the reign of Richard I]; . . . were the rest of those Laws extant, probably the Footsteps of the Original Institution of many more Laws that now obtain meerly as Common Law, or Customary Laws, by immemorial Usage, would appear to have been at first Statute Laws, or Acts of Parliament." [Sir Matthew Hale, *The History of the Common Law*, [1713] edited by Charles M. Gray, Classics of British Historical Literature, John Clive ed., (Chicago: The University of Chicago Press, 1971), 4.] Hale's statement implied that all law originated from Parliament, instead of from the people in the form of folkright. Historically, Hale seems misinformed regarding Parliament's very existence, since it did not form truly until the Fourteenth century. What Hale, undoubtedly meant by "Parliament," was the ancient Witan, which as shall be shown possessed great powers but did not resemble Parliament in composition (being unicameral), and operated more like a Royal Council than a representative body. See: Henry Loyn, *The Governance of Anglo-Saxon England, 500 - 1087*, 100 - 106.

²¹⁴Sir Roger Twysden was a very well known individual in the mid-Seventeenth century England, however his importance does not rely on his being read by those in Massachusetts or even those in Parliament. Twysden is utilized as a source for this study because his perceptions regarding England's Constitution are: supported by chronicled history; coincided with the views presented by every Parliament from 1604 up to at least 1642; and because his argument's structure and utilization of sources resembled that

American Revolution, like most wars, occurred because verbal negotiations failed. The war of words, which preceded the 1775 bloodshed, began with James' ascension in 1603 and aimed at reconciling England's past with James' absolutist beliefs.

In *Certaine Considerations*, Twysden, following James' example, began his study of government by looking at the philosophical premises that led to England's political establishment. Twysden used Cicero, Caesar's contemporary and an outspoken critic of absolutist rule, to begin his analysis into England's foundational principles.²¹⁵ "Cicero is of the opinion" Twysden wrote, that "commonwealths, cities, and kings were constituted that everyone might enjoy justice, the weaker not oppressed by the stronger."²¹⁶ Al-

used by James I. Unlike James, Twysden's arguments are not accepted in this study at face value, he is not the author of a philosophical school, only its good spokesperson. James' arguments for English absolutism, however, are individualized, being as they are his personal interpretations regarding political philosophy.

²¹⁵Cicero made two very important statements related to Julius Caesar, in the third book of *De Officiis* [On Duties], a well read book throughout the whole medieval period. The Roman Republican, Cicero, wrote that the Emperor would often quote Euripides, saying *If right may ever be infringed this can be done for the sake of kingship: in all else be god-fearing*. Cicero's reply was, "the man who allowed himself a single exception of such a kind deserved his death! Criminality could go no further." In the next paragraph Cicero wrote, "Consider the paradox of a person who admits the wickedness of tyrannizing a country which was once free, and ought to be free still, but who nevertheless sees advantage in himself becoming its tyrant if he can. In the attempt to rescue him from that delusion there must be no limit to our reproaches and appeals. Who, in God's name, could possibly derive advantage from murdering his country? Of all murders that is the most hideous and repulsive." Cicero, *De Officiis*, Walter Miller, ed., trans., Cicero in Twenty-Eight Volumes, vol. XXI, The Loeb Classical Library, G. P. Goold, ed., (Cambridge: Harvard University Press, 1913, reprinted 1990), III, 83.

²¹⁶Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 1.

though, Cicero's opinion regarding why societies began differed from James I, his opinion agreed with King Ine (688 - 95), whose law code formed the essence behind Magna Charta and every constitutional document thereafter.²¹⁷

Cicero's ideals of Roman republicanism linked neatly with England's Anglo-Saxon founding principles, at least as seen in King Ine's law code. The *Dooms of Ine* read: having consulted Witan, and "taken counsel . . . that just laws and just royal dooms should be established and assured to all our people," and that none may "henceforth pervert our dooms," we establish the following laws.²¹⁸ Ine's intent to establish law as the promulgator of equality resembled Cicero's fine words. "Right reason," wrote Cicero, "is indeed a true law which is in accordance with nature, applies to all men, and is unchangeable and eternal."²¹⁹ According to Cicero, to invalidate or even restrict right reason with human legislation was immoral and impermissible, to try and annul it

²¹⁷Christopher Brooke, *The Saxon and Norman Kings*, 90 - 1. King Ine's law codes, though not created by Ine (being folkright), were well structured and became the basis for King Alfred's legal code. King Alfred's law codes were of great importance, being confirmed by later Kings and referred to as a confirmation for unchangeable liberties and justice for English citizens. See also: Henry Loyn, *The Governance of Anglo-Saxon England*, 41 - 47; Christopher Brooke, *From Alfred to Henry III*, 871 - 1272, 66 - 81; Austin Lane Poole, *Domesday Book to Magna Carta: 1087 - 1216*, The Oxford History of England, Sir George Clark, ed., (Oxford: Oxford University Press, 1951, 2nd ed., 1993) 2 - 6.; Sir William Holdsworth, *A History of English Law*, Vol. II., 209.

²¹⁸King Ine, "Dooms of Ine," cited from *Sources of English Constitutional History*, Carl Stephenson & Frederick Marcham, ed., 6 - 7.

²¹⁹Cicero, "De Republica," quoted in Stanlis, *Edmund Burke and Natural Law*, 251.

completely was impossible.²²⁰ “Neither the senate nor the people,” continued Cicero, “can absolve us from our obligation to obey this law.”²²¹ Using “right reason,” Cicero argued, “there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor.”²²²

Twysden in introducing his ideas concerning English government focused on the founding rationale behind kingship. Referring frequently to past sources, he wrote that kingship was originally “imposed on such as were held the most wise and just; agreeing with Justine, that not ambition, but experimental moderation, amongst good men advanced the first kings.”²²³ The king, as presented by Twysden’s sources, differed greatly from James’ power hungry Fergus. He presented kingship as a cooperative venture toward establishing peace between coequals. Similarly, Twysden wrote, “the word of God, . . . expressly said, ‘Hee that ruleth over man must be just,’ and that Kings are made by God to doe judgement and justice.”²²⁴ He supported his position by citing from the Church Father’s: “St. Augustine . . . shews God did not give man dominion over

²²⁰Ibid.

²²¹Ibid.

²²²Ibid.

²²³Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 1.

²²⁴Ibid., 5.

rational creatures, but brute.”²²⁵ According to the picture drawn from these sources, kings emerged to ensure peace and justice, they did not emerge to enslave, or to remove liberties from those in society.

While kings originated from a need to provide justice in society, law codes emerged to ensure fairness. Twysden wrote, that “man” discovered quickly that no one person, or succession, could maintain justice infallibly. “Therefore,” reasoned Twysden, “that every one might enjoy equall right, Lawes were found out.”²²⁶ By pointing out that laws existed to provide direction to kings, he implied that laws originated through the people’s joint wisdom, and not as dictates from an all too human king. He further noted, that although people commonly call England a ‘monarchy,’ many writers before 1603 held that the king “was to rule his subjects according to their directions and no otherwise.”²²⁷ In fact, wrote Twysden, traditionally kings never had “any power of punishing but according to the line and measure of the law in his ordinary courts of justice.”²²⁸ The supremacy of law concept as presented in *Certaine Considerations*, is supportable from events throughout England’s history.

The first part of *Certaine Considerations* established a definition for England’s Constitution completely opposite to absolutist tenets. England’s Constitution lacked a

²²⁵Ibid., 3.

²²⁶Ibid., 5.

²²⁷Ibid., 15.

²²⁸Ibid.

single documented form and frequently suffered from misinterpretation, especially during the seventeenth and eighteenth centuries. Under Twysden's thesis, England's Constitution existed originally as Cicero's concept of "right reason," which is nothing other than an unbiased, acceptance of mankind's essential equality. Any legislative act negating man's equality, by violating right reason, became unconstitutional and without force of law.

Certain Considerations' constitutional definition agreed with the nation's prime governmental documents and the behavior of its key institution: Parliament, and earlier, the Witan. According to Twysden's thesis, English kings emerged to ensure equity; they recieved power sufficient to police the people's vanities but not enough to indulge their own. He believed that English society had always recognized that kings were first human, second kings: the human part within the king needed restraint, so the kingly part could ensure justice.

When Twysden used "right reason" as the underlying essence behind England's Constitution, he did not present a new theory, he only reminded his readers what history illustrated. Sir John Doderidge, a Member of Parliament in 1620, agreed with this concept, writing that common law is "often styled in our books as common reason."²²⁹

²²⁹Sir John Doderidge, *The English Lawyer*, [London, 1631]from George Mosse, *The Struggle for Sovereignty in England: From the Reign of Queen Elizabeth to the Petition of Rights*, 62. Doderidge in *The English Lawyer* gave the following definition of law: "A rule or principle of the law of England, is a conclusion either of the law of nature, or derived from general custom used within the realm, containing in short sum the reason or direction of many particulars or special occurrences." [Ibid., 153.] He also wrote

Likewise, even Sir Francis Bacon, an often-time proponent of royal absolutism, wrote “Common reason is common law,” and negating common law was impossible.²³⁰ To both Doderidge and Bacon, common law represented “higher and more perfect law,” a position strongly influenced by Coke’s powerful arguments.²³¹ Coke wrote in *First Institutes*, regarding legal reason: “by reasoning and debating of grave learned men the darkness of ignorance is expelled, and by light of legal reason the right is discerned, and thereupon judgement given according to law, which is perfect reason.”²³² Supporting Twysden, Coke, declared “an act of law shall prejudice no man.”²³³ Proving his point, Coke, citing the Statute of Carlisle, stated that common law courts had even annulled acts of Parliament when they were against common right and reason.²³⁴

Beyond establishing a firm definition for England’s Constitution, Twysden wanted to illustrate that “certainty before the law” served as the inheritance for English

regarding the process of law: “the process of law, then, was always the deduction of the particular from the general, the general maxim being founded on common sense.” [Ibid., 93].

²³⁰Sir Francis Bacon, “Reading on the Statute of Uses,” *Works of Sir Francis Bacon*, Spedding and Heath, ed., (London, 1892), VII, 415. Also, George Mosse, *The Struggle for Sovereignty in England: From the Reign of Queen Elizabeth to the Petition of Rights*, 75.

²³¹Ibid., 141.

²³²Sir Edward Coke, “First Institutes,” from Ibid., 142.

²³³Sir Edward Coke, “Sir Moyle Finch’s Case,” from Ibid., 143 - 4.

²³⁴Ibid., 144 - 5.

citizens. He reminded his readers that traditionally English kings “did not [even] esteeme themselves absolutely kings . . . til the people did at their coronation.”²³⁵ Twysden referred accurately to the practice began in Anglo-Saxon times of the Witan electing whom from the Royal family would become king.²³⁶ Primogeniture did not become an integral part of English political society until the Norman period, and although under normal circumstance a king’s eldest son would succeed his Father, the incidents of this occurring were rare.²³⁷ Much confusion remains regarding the Witan’s duties during early England’s history, yet officially, a prince did not become king until “elected” by the Witan.²³⁸ Certainly, Witan did not “elect” kings in a modern sense. The fact remains, however, that legitimacy of an heir apparent necessitated consent by the ruled. This indicates that legal custom possessed a great deal of power in early England.²³⁹

²³⁵Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 25.

²³⁶Taswell-Langmead, writes that “all Germanic kingdoms were elective,” although each contained a royal family, from which selection would occur. [Taswell-Langmead, *Constitutional History of England*, 19.]

²³⁷Henry Loyn, *The Governance of Anglo-Saxon England, 500 - 1087*, 6 - 15. Loyn writes regarding succession: “with imperfect records . . . there is no record of son succeeding father between 672 and 839, when Ethelwulf succeeded Egbert.” [Ibid., 16.]

²³⁸Ibid., 100 - 101.

²³⁹Ibid., 101 - 106. Although, thought to resemble a royal council, the Witenagemot was more complex and difficult to adequately classify. Strictly speaking the members of the Witenagemot “were the king, the ealdormen or governors of the shires, the king’s thegns, the bishops, and generally the *principes* and *sapientes* of the Kingdom.” [Taswell-Langmead, *English Constitutional History*, 18.] The Witan consisted of over five hundred people, attendance by the members was required, and its

Before the Witan chose who would be king, they made certain consideration regarding the potential candidates “fitness” for the duties of king. During the early Anglo-Saxon period, military prowess was a major consideration since kings led their people in war. Another major consideration was temperament, or the likelihood that the candidate would become a just and faithful king.²⁴⁰ Twysden explained, “the Saxon kings had not an absolute but limitted power, that in those tymes they did take oaths as a security for the people’s enjoying justice under; and it is most certayn, since the conquest our kings have ever beene esteemed legall or limited monarchs. The Conqueror himselfe made such a declaration of his office.”²⁴¹ The promise by kings to rule according to law played an important role in English history.

James asserted that the kings were above the law; however, in Anglo-Saxon England the Witan deposed kings that discarded the law, or acted contrary to their coronation oath.²⁴² There are at least five examples where the Witan deposed kings in the

meetings had a solemnness resembling the later Parliaments. There are records indicating that Witans met in more than fifty different locations between 900 and 1066.

²⁴⁰Henry Loyn, *The Governance of Anglo-Saxon England, 500 - 1087*, 31 - 42.

²⁴¹Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 86. Relating to William I’s declaration to be restrained by law, and continue Anglo-Saxon legal traditions, see: William Stubbs, *The Constitutional History of England*, 84 - 87.

²⁴²Henry Loyn, *The Governance of Anglo-Saxon England, 500 - 1087*, 18.

Eighth century alone, although the reasons varied.²⁴³ The Witan's prerogative to depose a king, introduced a strong argument against James' absolutism. Deposition occurred on at least five occasions after the Norman Conquest: Edward II, Richard II, and Henry VI, Charles I, and James II.²⁴⁴ Deposition raises many questions regarding the nature of kingship; if the consent of the Witan could legally remove a king from his throne, then clearly law ruled supreme in England. While James may have discarded the coronation oath as being merely a unenforceable promise to his subjects, England's history suggested that it entailed much more.

Returning to the Massachusetts example, John Winthrop, in resisting Charles I, operated on the ancient example that law limited the king's prerogatives. Winthrop voiced the same argument that prompted the Parliament of 1628 to push for the Petition of Rights, and echoed the concerns voiced throughout Twysden's work. "This maxime," he wrote, "that the king cannot alone alter the law, etc. is (I conceive) the basis or grownd

²⁴³Ibid., 18 - 19. Taswell-Langmead provided the following list as examples of deposed kings but this is certainly not an exhaustive list: King Elthelward in 765, King Sigebert in 755, King Alcred in 774, and King Ethelred II in 1013. [Taswell-Langmead, *Constitutional History of England*, 19 - 20.]

²⁴⁴An argument could be made that deposition occurred on many other occasions throughout English history if all the various civil wars are counted, specifically: King John's loss of regal power, which occurred after he reneged on his Magna Charta promises and the Barons offered England's Throne to King Louis of France [Ibid, 87 - 91]; and Henry III's loss of power, after Simon de Montfort's successful Civil War (1263 - 5) [Elizabeth Hallam, gen., ed., *The Plantagenet Encyclopedia: An Alphabetical Guide to 400 Years of English History*, (London: George Weidenfield & Nicholson Ltd., 1990), 93, 138 - 40.]

of all liberty and franchise of the subject.”²⁴⁵ Continuing, he wrote, “As for my part I cannot imagine how the subject can have any thing surer and lasting in government where the power onely depends on the monarch’s will.”

Had King Charles acted according to English traditions, and acknowledged that law limited him, he might have avoided tremendous civil unrest. *Certain Considerations* listed six limitations to kingship considered warranted according to England’s legal traditions. Twysden explained, “these are great rights and liberties which the English doe enjoy; so in my opinion they are not all so much the mixture or limitation of the monarch as the effects of his beeing restreyned.”²⁴⁶ Both James I and his son rejected those limitations that Twysden believed restrained kingship, although these seemed quite basic. Firstly, the king “is to governe his subjects by and according to those lawes which at his coronation he is sworne to observe.”²⁴⁷ Secondly, kings “cannot alone in any perticular alter any lawes already establisht, either common or statute.” Thirdly, kings “cannot alone make newe lawes.”²⁴⁸ James seemed to agree with the spirit behind these first three limitations, although he was not completely consistent. James agreed in a statement given to Star Chamber in 1616, to renew his promise and oath given at his

²⁴⁵Sir Roger Twysden, *Certain Considerations Upon the Government of England*, 89 - 90.

²⁴⁶*Ibid.*, 87.

²⁴⁷*Ibid.*

²⁴⁸*Ibid.*

Coronation “concerning Iustice, and the promise therein for maintenance of the Law of the Land”²⁴⁹ Qualifying his terms, James continued, “for Law, I mean the Common Law of the Land, according to which the King gouvernes, and by which the people are gouverned.”²⁵⁰ When pushed by his subjects to acknowledge a limitation on his powers as king, however, James showed great stubbornness.

Twysden continued his analysis of kingship by addressing regal judicature constraints in his fourth point. According to Twysden, kings alone could not interpret laws but needed to rely on the courts of justice and his sworn judges.²⁵¹ This point, regarding judicial prerogatives, was a key issue between James I and Coke. James believed his prerogatives included the right to sit as judge in the normal court of Common Pleas. The king it is recorded declared, “that he thought the law was founded upon reason, and that he and others had reason, as well as the judges.”²⁵² Coke disagreed, arguing that although the king understood many things, he lacked the specific knowledge of English laws. “Causes which concern the life, or inheritance, . . . of his subjects,” argued Coke, “are not to be decided by natural reason but by the artificial reason and

²⁴⁹King James I, “A Speech in the Starre-Chamber, The XX. of Jvne. Anno 1616,” *Political Works of James I*, ed. McIlwain, 329.

²⁵⁰*Ibid.*

²⁵¹Twysden, *Certaine Considerations Upon the Government of England*, 87.

²⁵²Sir Edward Coke, “Prohibitions del Roy, Michaelmas 5 Jac. I.,” [1607] from *The Stuart Constitution, 1603-1688. Documents and Commentary*, ed. J.P. Kenyon, 181.

judgement of law.”²⁵³ In conclusion, Coke said, “law is an act which required long study and experience before a man can attain the cognisance of it,” which is “the golden metewand and measure to try the causes of the subjects.”²⁵⁴ Reportedly when he heard Coke’s words, James “was greatly offended,” saying, “that then [I] should be under the law, which [it] was treason to affirm.”²⁵⁵

The fifth point that Twysden made regarding the powers of the king pertained directly to arbitrary rule. He suggested that the king “cannot proceede against any subject, civilly or criminally, but in his ordinary courts of justice, and according to the knowne lawes of the land.”²⁵⁶ Much intensive debate over this right occurred during the Parliament of 1621. Specifically, Member of Parliament Mr. Crewe, stated conclusively, “that which we call our undowbted Inheritance the king termeth permission Grace, presedents and tolleracion of his predecessors. . . . The king by his Charter cannot out the subiect of his Inheritance to the Lawes made in parliament. . . . The king is Inherited in his subiects, The subiects in the Lawes.”²⁵⁷ James’ premise that the privileges of Magna

²⁵³Ibid.

²⁵⁴Ibid.

²⁵⁵Ibid.

²⁵⁶Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 87.

²⁵⁷“Z Diary: Notes by an Unknown Writer,” from *Commons Debates, 1621*, vol. VI, edited by Wallace Notestein, Frances Relf, and Hartley Simpson, Yale Historical Publications, Manuscripts and Edited Texts, vol. XIV, (New Haven: Yale University Press, 1935), 239. [Also see: 240-5, refer internally to fn. 28.]

Charta, or the Charter of Liberties, were nothing other than the 'tolleracion' of previous kings is the root to the absolutist thought.

The final point Twysden made regarding kingship, contradicted absolutism's main premise and supported greatly the concepts held by the Massachusetts colonists. He asserted that the king's "praerogatives are not numberlesse, but conteyne in themselves matter of prescription. None of which can bee a warrant for any employed by him to doe wrong or injury to any man, but hee must answer the party grieved in an ordinary court of justice, and be punished according to the law."²⁵⁸ This statement would have caused Twysden great censure had James read his words. James pronounced that his prerogatives were beyond the wonderment of his subjects, and beyond their touch. In fact, he told the Parliament of 1621, that the royal prerogative was a "mystery of state," warning the danger of attempting to define in any way the power of the King.²⁵⁹ Similarly, in 1616 James declared: "That which concerns the mysterie of the Kings power, is not lawfull to be disputed; for this is to wade into the weakness of Princes, and to take away the mysticall reuerence, that belongs vnto them that sit in the Throne of God."²⁶⁰ With such

²⁵⁸Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 87.

²⁵⁹"The Anonymous Journal X," from *Commons Debates, 1621*, vol. II, ed. Notestein, Relf, and Simpson, 12.; "Rawlinson B 151, Collections for the Parliament of 1621," from *Commons Debates, 1621*, vol. VI, ed. Notestein, Relf, and Simpson, 372.

²⁶⁰King James I, "A Speach in the Starre-Chamber," [1606] from *The Political Works of James I*, ed. by McIlwain, 333.

an elevated impression of infallibility, it is little wonder that there formed resentment to the Stuart kings.

To study England's history is to investigate political intrigue, social injustice and Civil War, and yet the spirit of political liberty survived from the Anglo-Saxon chronicles. Twysden astutely noted that, never "doe wee find any complaint from the commons more frequent, then that they are not used according to the lawes and customes of the land."²⁶¹ From reviewing England's history, evidence exists to claim that nearly every major constitutional document resulted from pressure by the people for the king to comply with the coronation oath.²⁶² Whether or not the American Revolution can be considered a constitutional struggle aimed at gaining recognition of the same liberties confirmed by Magna Charta, and the Petition of Rights, is the focus of the next two chapters.

James I and Twysden represent two positions that remain consistent throughout

²⁶¹Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, 83.

²⁶²Harold Stannard, wrote regarding English legal traditions: "every landmark in English constitutional history from Magna Carta in 1215 to the Parliament Act of 1911 is the memorial of a crisis." [Harold Stannard, *The Two Constitutions: A Comparative Study of British and American Constitutional Systems*, 4.] Similarly, William Stubbs wrote regarding Anglo-Saxon England: "As a rule it may be said that a publication of laws is the result of some political change or series of changes; so that the very act of legislation implies some crisis in the history of the legislator." [William Stubbs, *The Constitutional History of England*, 42.] If Stannard and Stubbs are correct, which appears to be so, then England possesses a history overflowing with political change and crisis. Despite all these crisis, however, England retained a remarkable consistency to its political identity up until 1603.

the seventeenth century, each asserting its own version of England's unwritten Constitution. The upcoming chapter will show that Parliament altered the way it viewed the positions expressed by James and Twysden. The leaders of Massachusetts, however, remained true to their original beliefs. Arguments used by the leaders of Massachusetts against Charles I, resemble exactly those used against Parliament over a hundred years later.

Chapter Four

Myopic Policies and Revolution: A Study of Mercantilism and the Massachusetts Colony

Permit me then, Sir, to lead your attention very far back; back to the act of navigation; the cornerstone of the policy of this country with regard to its colonies. Sir, that policy was, from the beginning, purely commercial; and the commercial system was wholly restrictive. It was a system of monopoly. No trade was let loose from that constraint, but merely to enable the colonists to dispose of such articles as we forced upon them, and for which, without some degree of liberty, they could not pay. Hence all your specific and detailed enumerations: hence the innumerable checks and counterchecks: hence that infinite variety of paper chain by which you bind together this complicated system of the colonies. This principle of commercial monopoly runs through no less than twenty-nine acts of parliament, from the year 1660 to the unfortunate period of 1764.²⁶⁵

On 9 October 1651, the English Parliament passed an act that became the beginning step toward developing an extensive mercantilist program based on the Acts of Trade and Navigation. The Navigation Act of 1651, being the product of the Interregnum quickly faded into obscurity, however, it represented the mercantile spirit. Mercantilism eventually erupted into a myriad of constraining legislation directed toward the American colonies, specifically affecting Massachusetts. In a very real sense, the Navigation Act of 1651 is the beginning step toward the American Revolution. The spirit and intent behind this Act, and over fifty similar mercantile acts passed after 1651, announced to Massachu-

²⁶⁵Edmund Burke, *Burke's Speeches, Speech on American Taxation*, edited by F.G. Shelby (London: Macmillian & Co Ltd, 1956, reprinted: Westport: Greenwood Publishing Press, 1974) 23.

setts that James's absolutism had not died with Charles's beheading in 1649. Parliamentary attempts to control colonial commerce served as an omen to Massachusetts, it suggested that England had not yet resolved the constitutional issues that had prompted the Civil War.

As the American colonies developed, mercantile precepts slowly inculcated London's power elite. Mercantilist thinkers perceived colonial possession in a considerably different way than did those who settled in Massachusetts. To the mercantilist, colonies possessed value only if they aided the mother state to become strong, prosperous, and independent.²⁶⁶ Mercantilism, put simply, aimed at creating a self-sufficient state. The key to achieving national self-sufficiency hinged on possessing adequate raw resources. If a nation possessed all its needed raw resources, mercantilists reasoned, dependency on other nations would lessen allowing for the upper hand in commercial concerns.²⁶⁷ Nations rarely possess within their borders all their needed resources,

²⁶⁶It had even been asserted in England regarding colonies "that only as far as they recognized their obligation to subserve the general good of the kingdom were they worth keeping at all." Charles Mclean Andrews, *The Colonial Period of American History*, vol. IV, *England's Commercial and Colonial Policy*, (New Haven: Yale University Press, 1938; sixth printing 1964) 3.; Great Britain, Parliament, *Proceedings and Debates of the British Parliament Respecting North America, 1542 - 1688*, vol I., edited by Leo Francis Stock, (Washington: The Carnegie Institute of Washington, 1924) 28, 70. [Citation of proceedings of 27 Feb. 1621 & 28 May 1624, respectively.] [hereafter referred to as Leo Francis Stock, *Proceedings and Debates of the British Parliament Respecting North America, 1542 - 1688*]

²⁶⁷Merril Jensen, ed., *English Historical Documents*, vol. IX, *American Colonial Documents to 1776*, (London: Eyre & Spottiswoods, 1955),353.

making natural self-sufficiency nearly impossible. If colonies existed as true extensions to a nation's political boundaries, however, and resources in British North America belonged to England, then the mercantilist goal was feasible. England's Parliament, influenced by London's merchant class, started legislating restrictions that would, in effect, accomplish the mercantilist ideal. The body of these laws encompass the Acts of Trade and Navigation.²⁶⁸

The list of mercantile legislation passed in the seventeenth century was immense.²⁶⁹ Its core components are found in the four Navigation Acts of 1660, 1663, 1673, and 1696. Resentment toward the Navigation Acts developed slowly, though some colonists immediately recognized the dangers inherent in such legislation. The Navigation Acts, though economically sound, repudiated the premise that colonists were English citizens, with rights and liberties equal to those residing in the Mother Country.

I. Palatine Guarantees and Mercantilism: A Constitution Revoked.

The Bay Colony's charter dictated colonial relationships with England. It

²⁶⁸Charles Mclean Andrews, *England's Commercial and Colonial Policy*, 22.

²⁶⁹Leonard Woods Labaree, *Royal Instructions to British Colonial Governors, 1670 - 1776*, vol. II., (New Haven: Meredith Publishing Co., 1935; reprinted, New York: Octagon Book, Inc., 1967) 752. see *Appendix A*, for illustrative citation of circular letter to colonial Governors, containing complete list of mercantile policies affecting American colonies.

established the moral and legal contract between the King and the Massachusetts settlers. Importantly, the Charter of Massachusetts established the colony as an entity separate from Parliament's jurisdictional control.²⁷⁰ Throughout the early Stuart period Parliament had few opportunities to interfere with colonial affairs and so, during its beginning years the status of Massachusetts' as a palatine state went unchallenged.²⁷¹ Following its charter prerogatives, the government of the colony came to resemble exactly the form of ancient Counties Palatine.²⁷² Massachusetts alone had responsibility for the judicature and governmental concerns related to the colony.

²⁷⁰Harold Stannard, *The Two Constitutions: A Comparative Study of British and American Constitutional Systems*, 64 - 7.; Thomas Pownall, *The Administration of the Colonies: Wherein Their Rights and Constitution are Discussed and Stated*, A Da Capo Press Reprint Series, The Era of the American Revolution, Leonard W. Levy, gen. ed., (New York: Da Capo Press, 1971, unabridged republication of fourth ed. published, 1768), 56 - 59.; Louise Phelps Kellogg, *The American Colonial Charter: A Study of English Administration in Relation Thereto, Chiefly After 1688*, A Da Capo Press Reprint Series, The Era of the American Revolution, Leonard W. Levy, gen. ed., (New York: Da Capo Press, 1971, republication of 1st edition published in *Annual Report of the American Historical Association for the Year 1903*, vol., I., 1904), 6 - 7.

²⁷¹The Parliament of 1621 dealt briefly regarding the Virginian colony but for the most part all of James's Parliaments aimed at gaining confirmation that kingly prerogatives were constrained by legal principles, namely England's Constitution. [See: Leo Francis Stock, *Proceedings and Debates of the British Parliament Respecting North America, 1542 - 1688*, 28.]

²⁷²During William's reign county palatine's were described as "earldoms in which the earls were endowed with the superiority of whole counties, so that all the landowners held feudally of them," and they "exercised all the *regalia* or royal rights, nominated the sheriffs, held their own councils and acted as independent princes except in the owing of homage and fealty to the king." William Stubbs, *The Constitutional History of England*, 89.

The exact origin for county palatines in England is unclear. William I allowed these “ministates” to continue during his reign.²⁷³ He tried hard to maintain the appearance that his rule was as rightful heir to Edward the Confessor and not as Norman conqueror. He continued most of the governmental norms practiced during the Anglo-Saxon period.²⁷⁴ The earldoms of Chester and the bishopric of Durham, two important ancient palatines, retained their independent character for an extremely long time.²⁷⁵ Historically, these past palatines were beyond the control of Parliament. When palatines were eventually incorporated under Parliament’s jurisdiction, as Chester was during King Henry VIII’s reign and Durham during King Charles II’s reign, the king gave representational privileges in compensation.²⁷⁶

Massachusetts resisted Charles I and the Royal Commission on the principle that as a county palatine the colony’s internal government lay outside England’s general political sphere. According to the 1628 Petition of Rights, England’s Constitution guaranteed that the legal contract between Massachusetts and Charles I would protect the

²⁷³William Stubbs, *The Constitutional History of England*, 86 - 87.

²⁷⁴Ibid. Stubbs wrote regarding King William I: “William the Conqueror claimed the crown of England as the chosen heir of Edward the Confessor . . . a claim which the English did not admit and which the Normans themselves saw that fallacy, but which he . . . did his best to justify.”

²⁷⁵Ibid.

²⁷⁶Ibid., 280.; Thomas Pownall, *The Administration of the Colonies*, 59 - 85.; Robert Bliss, *Revolution and Empire: English Politics and the American Colonies in the Seventeenth Century*, 42 - 5.

colony's palatine status. According to English constitutional principles, the king could not revoke his contract with the Bay Colony settlers unless they violated their charter. Likewise, according to constitutional principles, the king could not transfer the colonists' allegiance to his leadership to any other power or entity. It is this secondary level that concerns the relationship between Massachusetts' colonists and Parliament. After Parliament defeated Charles I, in 1649, the palatine relationship between Massachusetts and England gained a new element, one never addressed during the Interregnum nor sufficiently resolved after the Restoration in 1660. England's political turmoil adversely affected her relationship with the American colonies by altering the nation's constitutional structure.

The colony's assertiveness in opposing Charles I resulted in an early, though inconsequential, *Quo Warranto* issued against the colony. In 1638 the Privy Council issued a *Quo Warranto* against Massachusetts demanding the colony give back its charter because it refused to accept the Royal Commission's jurisdiction.²⁷⁷ Massachusetts refused. Believing the *Quo Warranto* to be unconstitutional Winthrop decided to ignore the request and stall for time.²⁷⁸ When continually pressured by the King, the Governor issued the following telling statement: if things continue, "The Common people here will

²⁷⁷Charles Andrew, *The Colonial Period of American History, The Settlements*, Vol. I., 420.

²⁷⁸Gilman Ostrander, *The Rights of Man in America, 1606 - 1861*, (Columbia: University of Missouri Press, 1960), 39 - 50.

conceive that his Majesty hast cast them off, and that, hereby, they are freed from their allegiance and subjection, and . . . will be ready to confederate themselves under a new government, for their necessary safety and subsistence.”²⁷⁹ Charles I, soon distracted in 1642 by the Civil War, never used force to try and retrieve the Charter. The colony retained its original Charter until 1684.²⁸⁰

Winthrop’s refusal to surrender the charter is historically significant. Massachusetts could never have resisted had Charles decided to take the colony by force. Despite the colony’s physical weakness, Winthrop realized that accepting the King’s despotism would have meant denying England’s unwritten Constitution. Embracing fully his interpretation that Massachusetts existed as a palatine state, possessing guaranteed privileges and prerogatives, Winthrop made an early stand against all encroachments of the colony’s charter.

Threatening to dissolve allegiance to Charles, Winthrop followed closely the practices within England since Anglo-Saxon times. If the king failed to perform his

²⁷⁹Robert Bliss, *Revolution and Empire*, 42.

²⁸⁰Thomas Pownall, *The Administration of the Colonies*, 45. Pownall noted that after the 1688 Glorious Revolution, the new Parliament resolved that Massachusetts lost its Charter under King James II through illegal means. A resolution was drafted, and passed in the House of Commons, that would have restored to Massachusetts her 1629 Charter but the Parliament was dissolved before it reached the House of Lords. When Massachusetts eventually received its new Charter in 1691 many of the same privileges provided by in the original charter were retained. The main difference in the 1691 Charter, that the Governor would be appointed by the King, created much resentment by the Massachusetts colonists.

duties, fealty ceased. Winthrop by refusing to honor Charles's *Quo Warranto* threatened a miniature civil war against the king's unconstitutional behavior. The American Revolution occurred on the same principle. If the American Colonies allowed Parliament to assume absolute power over them, England's Constitution would have lost its meaning, and arbitrary power would have gained an unalterable precedent.

When analyzing the Navigation Acts, Massachusetts' county palatine status is important to remember. Although, the Massachusetts colonists never accepted the Navigation Acts happily, a logical argument existed regarding these economic policies that compelled the colony to accept them partially. The leaders of Massachusetts acknowledged that Parliament had jurisdictional right to dictate trade practices within England, if internal sovereignty remained with the colony. Initially, the Act of Trade and Navigation dealt strictly with regulating trade throughout Britain, aiming primarily at damaging Dutch-led trading with the colonies. As mercantilism grew in popularity, however, the navigation acts became broader, eventually encroaching blatantly into colonial legislative areas. Finally, with the Declaratory Act of 1765, Parliament announced that it had complete sovereignty over the American colonies, which in effect represented a *Quo Warranto* as arbitrary as the one issued by Charles I.

II. The Navigation Acts: Steps Toward Revolution.

The first Navigation Act passed Parliament two years after the regicide of Charles

I. In no period after this date were the American Colonies protected from the growing encroachments of the British Parliament. A contract between monarch and subject encouraged the creation of colonies in America. It is significant that an initial act of the Commonwealth was to restrict and funnel colonial trade.

Serving as the model for future legislation, the Act of 1651 is important although the specifics of its restrictions were not very significant. Essentially, it attacked the Dutch shipping industry that had become so active within America. The act forbid commerce from being “imported or brought into the commonwealth of England or Ireland,” except upon ships that “belong to the people of this commonwealth or the plantations thereof.”²⁸¹ The act further stipulated that the ships’ “masters and mariners” be “also for the most part . . . of this commonwealth.”²⁸² Additionally, it required that all vessels coming from a European port and heading to any Commonwealth territory must be owned, and for the most part manned, by persons of the Commonwealth.

When Oliver Cromwell died in 1658, his legislation perished with him. Two short years later, the Commonwealth had collapsed and Parliament offered England’s Crown to the exiled Charles II. The accomplishments of the Interregnum, whether good or bad, were naturally repugnant to the new king. However, the precedent established by the 1651 navigation act did not escape his initial Parliament. Although Charles II

²⁸¹David Hawke, *U.S. Colonial History: Readings and Documents*, 149.

²⁸²*Ibid.*

invalidated the Act of 1651 upon his restoration, he inserted its spirit and intent into the Act of 1660.

The year 1660, marked the birth of the Acts of Trade and Navigation that, for the most part, remained binding upon the American colonists until 1776. This Act did more than replace the earlier one. The framework established by the 1660 legislation remained intact up to the American Revolution, although other acts were to follow. In fact, the subsequent Acts passed in the seventeenth century either included a restriction into the regulatory framework established by the 1660 act or aimed at ensuring its enforcement.

The Act of 1660 had important restrictions. Clearly referring to the colonies in America, it also included the colonies in Asia, Africa, plus any island's under English jurisdiction.²⁸³ The act served as a universal piece of legislation, supposedly enacted for the "wealth, safety, and strength" of England, rather than for the benefit of individual interest groups.²⁸⁴ The Act of 1660 also restricted foreign competition in the English marketplace. It forbade any goods or commodities from being exported or imported from any port under England's jurisdiction, unless shipped in "vessels as do truly and without fraud belong only" to English citizens.²⁸⁵ The act also required that "the master and

²⁸³"The Navigation Act, 1660" from *Seventeenth-Century Economic Documents*, Joan Thirsk and J.P. Cooper, ed.s, (Oxford: Clarendon Press, 1972), 520.

²⁸⁴*Ibid.*, 520.

²⁸⁵*Ibid.*, 520.

three-fourths of the mariners” be English.²⁸⁶ All foreigners were forbidden to “exercise the trade or occupation of a merchant or factor in any the said places.”²⁸⁷ Similarly, it stipulated that colonists could employ for shipping only those vessels constructed in England, or her colonies. Finally, the act also enumerated from sale: sugar, tobacco, cotton-wool, indigo, ginger, furstick, or other dying wood.

At the time of its passage, the Act seemed to adequately eliminate trade practices that weakened England’s national economy; flaws, however, became quickly apparent. Specifically, merchants could ship commodities not explicitly enumerated from one colony to another, and then directly to European countries. Also, colonial merchants could still import foreign products to America without restrictions if carried on English ships. Parliamentary leaders feared that without further legislation they would not achieve the goal behind the Act of 1660. The Staple Act of 1663 addressed the perceived flaws found in the earlier act. In this Act “no commodity of the growth, production, or manufacture of Europe” could be “imported into any . . . colony” unless it was “bona fide, and without fraud, laden and shipped in England.”²⁸⁸ The act attempted to make England the “staple” or focus for colonial trade. Nonetheless, many flaws remained unresolved after the act’s passage.

²⁸⁶Ibid.

²⁸⁷Ibid.

²⁸⁸Michael Kammen, *Empire and Interest: The American Colonies and the Politics of Mercantilism*, (New York: J.B. Lippincott Company, 1970), 24.

Under the Staple Act, Parliament did not prohibit non-enumerated goods from being shipped, in English vessels, to foreign ports. Consequently, the colonies had to ship their products to England only if they were enumerated items. Colonial trade that never reached England's shores increased after the Staple Act.²⁸⁹ Additionally, neither the Act of 1660 nor the Staple Act prohibited the inter-colonial trade of enumerated goods. Ships laden with these goods could leave colonial ports for neighboring colonies and go instead to foreign countries.²⁹⁰ In fact, Massachusetts, and her sister northern colonies, conducted such active inter-colonial trade that they rivaled the trade-industry within England proper.²⁹¹

The political leaders in Massachusetts were uncertain how to deal with the first two acts of navigation. On one hand, enumerated goods directly affected the colony's maximization of profits, which threatened its economic stability. However, leadership within the Bay colony did acknowledge to a certain degree Parliament's right to direct national trade. Massachusetts' territorial claims, of course, did not include all of the Atlantic and so the navigation acts seemed unquestionable. Bothered by the tenuous

²⁸⁹Thomas C. Barrow, *Trade and Empire: The British Customs Service in Colonial America, 1660-1775*, (Cambridge, Massachusetts, Harvard University Press, 1967), 6.

²⁹⁰Michael Kammen, *Empire and Interest: The American Colonies and the Politics of Mercantilism*, 24.

²⁹¹Thomas Barrow, *Trade and Empire: The British Customs Service in Colonial America, 1660 - 1775*, 6.

nature behind these acts, however, the colony issued in 1671 a *Declaration of Liberties*. This document listed eight points regarding perceived liberties, two of which were important. Statement six declared that “the Gouvernor, Deputy Gouvernor, Assistants, & select representatives or deputies have full power and authoritie, both legislatively & executive, for the gouvernement of all people here . . . excepting lawe or lawes repugnant to the lawes of England.”²⁹² Equally important, statement eight declared succinctly, “Wee conceive any imposition prejudiciall to our country contrary to any just lawe of ours, to be an infringement of our right.”²⁹³

Despite the strong words issued by Massachusetts’ political leadership in 1671, the Bay Colony acquiesced to Parliament’s legislative prerogatives regarding commerce. In place of direct opposition to Parliament’s trade acts, colonists from Massachusetts utilized whatever loopholes were available. Inter-colonial trade increased after the Staple Act, as did trade in non-enumerated items, which colonial merchants transported directly to foreign ports. Trade in non-enumerated goods, since they did not first go to mainland England, provided opportunities for smugglers. Although, Parliament did not focus much energy toward enforcing the navigation acts, too many holes apparently existed in the navigation system.

The Act of 1673 finally addressed legislatively the concerns that emerged after the

²⁹²Massachusetts, General Court, “Independency In Colonial Massachusetts,” [1671] from *Documents of American History*, Henry Steele Commager, ed., 34.

²⁹³*Ibid.*

Staple Act. This act aimed at ensuring that England received increased duties on trade from its colonies. According to the Act of 1673, Parliament required that all vessels provide a “bond . . . with sufficient Surety to bring the same to England.”²⁹⁴ If merchants gave no bond in the colonies, Parliament required duty payment before the enumerated products could be loaded. This legislation, unlike its two predecessors, specifically targeted trade from the American colonies; it aimed at regulating American colonial commerce and was not universal in focus.²⁹⁵ The 1673 Navigation Act provided for the procurement of revenue to a much larger and specific degree than did the previous acts. By passing the Act, Parliament eliminated for colonial merchants tax-free benefits not available to Englishmen at home. It also focused on limiting the inter-colonial coastal trade, “especially in those commodities desired in England.” The stated goal of the Act was to “reduce shipment of enumerated goods sent directly to foreigners; to raise royal revenues by increasing supplies of such taxable imports as tobacco and sugar; and, generally, to tighten control over colonial markets.”²⁹⁶

Accompanying the Act of 1673, Parliament legislated a measure for its enforcement. By this associated measure, Parliament extended the Customs Service to the American colonies. Within five years after passing the Act of 1673, nearly all American

²⁹⁴Michael Kammen, *Empire and Interest: The American Colonies and the Politics of Mercantilism*, 24.

²⁹⁵*Ibid.*, 25.

²⁹⁶*Ibid.* [citing the Act of 1673.]

colonies had a customs officer. By extending the Customs Service, Parliament finally connected the elaborate navigational system established by the Acts of 1660, 1663 and 1673.²⁹⁷ Transporting the Customs Service into the colonies marked a mile stone in Anglo/American relations.²⁹⁸

By 1673, Parliament's intent to funnel colonial trade through England was unmistakable. Still, Massachusetts did not concede to England any of its charter-held prerogatives. While the mercantile model dictated affairs surrounding the Bay Colony's territorial boundaries, the political leaders in Massachusetts continued to proclaim their legislative autonomy. A document from 2 October 1678, provides an example of Massachusetts reaction to the navigation acts. "That for the acts passed in Parliament, for the encouraging trade and navigation," wrote Massachusetts' General Court, "wee humbly conceive,. . . the laws of England are bounded within the fower seas, and doe not reach America."²⁹⁹ In a statement resembling arguments used during the eighteenth century, the General Court concluded, "the subjects of his majestie here being not represented in Parliament, so wee have not looked at ourselves to be impeded in our trade by them, nor

²⁹⁷Jack Sosin, *English America and the Restoration Monarchy of Charles II: Transatlantic Politics, Commerce, and Kinship*, (Lincoln: University of Nebraska Press, 1980), 45.

²⁹⁸Thomas Barrow, *Trade and Empire: The British Customs Service in Colonial America*, 12.

²⁹⁹Massachusetts, General Court, "Independency In Colonial Massachusetts", [1678] from *Documents in American History*, Henry Steele Commager, ed., 34.

have wee abated in our relative allegence to his Majestie.”³⁰⁰

After establishing the Customs Service in the colonies, it appears that the colonists still refused to follow the navigation acts. One customs officer named Giles Bland, reported in September of 1675 the problems he faced trying to enforce the navigation acts. One problem, Bland noted, was that “instead of cooperating the local authorities had done everything possible to impede his work.”³⁰¹ He also stated that “the Acts of Trade were violated every daily, European goods being introduced illegally and enumerated commodities being exported without payment of the duties.”³⁰² Bland’s account was apparently not unusual. Edward Randolph, a customs officer of notoriety who eventually became Survey General for the American colonies, listed in 1677 the faults found in Massachusetts colonial government. His report stated that the colonies violated “all the Acts of Trade,” and cost the English Crown over £ 100,000 yearly.³⁰³

The mercantile resolve of Parliamentary leaders grew after the 1688 Glorious Revolution. Parliament passed the final navigation act in 1696.³⁰⁴ The Act focused

³⁰⁰Ibid. It should be noted that during the first decade the customs office operated in Massachusetts, three collectors were killed, two were imprisoned, and one collector was tried for treason. [Thomas Barrow, *Trade and Empire: The British Customs Service in Colonial America, 1660 - 1775*, 21.]

³⁰¹Ibid., 22.

³⁰²Ibid.

³⁰³Ibid., 34.

³⁰⁴Great Britain, Parliament, “The Navigation Act of 1696,” from *American Historical Documents*, Henry Steele Commager., ed., 38.

specifically on enforcing previously passed legislation: clarifying ambiguities within earlier acts and increasing colonial governors responsibilities for enforcement. Additionally, the Act created new penalties for violators by establishing Vice-Admiralty courts in the colonies.³⁰⁵ The breadth of clauses within the 1696 act indicated Parliament's commitment to the mercantile system England had constructed. As a central point from the 1696 act, authority for navigation act enforcement centered in London. Three months after the 1696 act became law, authority for the navigation act's enforcement shifted to London in three crucial steps. First, Parliament created a network of Admiralty Courts in the colonies. Second, they sent out Royal Advocate Generals to the American colonies to oversee the "King's interests." Finally, the Customs Service became completely independent from colonial jurisdiction. The Act of 1696, with its thoroughness, completed the Acts of Trade and Navigation that had first begun with the Act of 1660.

The Act of 1696 did not stop the continued resistance by some American colonists to the Navigation Acts. In part, two reports from the Commissioner of Trade for the colonies in 1697 and 1702 offer proof of this continued resistance. The report from 1697

³⁰⁵The resistance to the Acts of Trade had continued during the reign of William and Mary, as the Act of 1696 attests. The act contained several references regarding frequent colonial violations of the Acts of Trade. Provision XIV of the 1696 act is an example: "And whereas several ships and vessels laden with tobacco, sugar, and other goods of the growth and product of his Majesty's plantations in America, have been discharged in several ports of the kingdom of Scotland and Ireland, contrary to the laws and statutes now in being, under pretense that the said ships and vessels were driven thither by stress of weather, or for want of provisions, and other disabilities could not proceed on their voyage." [Ibid.]

expressed the following: “And whereas we have upon several occasions represented to your Majesty the dangers which threaten our trade. . .from the breeches made upon the Acts of Navigation and other matters referring to the plantations.”³⁰⁶ While the report from the commissioner sent in 1702 stated: “the colonies under proprietary and charter governments continuing to be nurseries of illegal trade and guilty of over irregular practices, to the great prejudice of her Majesty’s revenue.”³⁰⁷ These reports refer to the occurrence of “illegal trade” in a matter-of-fact way indicating that it was commonplace.

The acts that formed England’s navigation system between the years 1660 and 1696 all illustrate Parliament’s perception regarding the English colonies. It became clear that Parliament considered the colonies under its jurisdiction. The Acts of 1673 and 1696 demonstrated an increased interest into the American colonies and this interest continued to grow as the new century progressed. The colonies started to play a much more important role in Parliament’s fiscal decisions during the eighteenth century. The mercantile program Parliament implemented after 1696 shifted to individual acts aimed at strengthening specific commodities within the home economy. Generally, this legislation aimed at three goals: preventing exportation of items not enumerated in previous acts;

³⁰⁶Great Britain, Commissioner of Trade, “The Commissioners Of Trade And Plantations Report On The State Of Trade,” [1697] from *Seventeenth-Century Economic Documents*, Joan Thirsk and J.P. Cooper, eds., 568.

³⁰⁷Great Britain, Commissioner of Trade, “The Commissioners Of Trade And Plantations Report On The State Of Trade”, [1702], from *Seventeenth-Century Economic Documents*, Joan Thirsk and J.P. Cooper, eds., 583.

preventing colonial development of manufactures potentially competitive with the home economy; and manipulating colonies to purchase specific items from the Mother Country through various incentives. A few examples of how these mercantile principles pervaded the legislation after 1696, provides some useful insights.³⁰⁸

With the Wool Act of 1699, Parliament passed its first major legislative act regarding the North American colonies since 1696.³⁰⁹ This act prohibited the manufactures of wool, yarn, or woollen cloth to be exported from the area manufactured, and aimed at ensuring that a woollen industry would not develop in the colonies to compete with England. Legislation in 1732 aimed at ensuring that a hat industry to compete with England's did not form in the American colonies. In the Hat Act of 1732, Parliament made exporting hats from any colony to England, foreign countries, or other colonies illegal. Further, it required aspiring hat-makers to serve a seven-year apprenticeship. The act also limited the amount of people entering the hat-making industry by stipulating that a master hat-maker could not have more than two apprentices at a time.³¹⁰

In 1733, Parliament attempted to increase revenue from the American colonies. The British West Indies sugar companies, a powerful interest group, complained to

³⁰⁸See Appendix A, for an indepth list of the navigation acts.

³⁰⁹Emory R. Johnson, et al.,ed., *History of Domestic and Foreign Commerce of the United States*, Burt Franklin: Research and Source Works Series # 72, vol.I, (New York: Burt Franklin, 1915), 45.

³¹⁰Ibid.

Parliament that colonial America frequently purchased non-British West Indies sugar. In response to these growing complaints, Parliament passed the Molasses Act of 1733. The act had the following telling preface: "An act for the better securing and encouraging the trade of his Majesty's sugar colonies in America."³¹¹ The act made duties on sugar from the French, Dutch, Spanish or Danish West Indies so high that they discouraged such trade. Commerce from these foreign colonies, however, formed the trade triangle by which colonists in America received the needed hard currency to purchase imported English goods. Consequently the colonists ignored the Molasses Act and it became defunct.³¹² This noncompliance and England's subsequent failure to enforce the act, foreshadowed future problems regarding the navigation acts.³¹³

In 1750 with the Iron Act, Parliament, again, tried to constrain colonial industry. This act, like the Wool and Hat Acts, specifically aimed at reducing possible competition with England from colonial industries. The act allowed pig and bar iron importation to England duty free but forbid "the erection in the colonies of any mill for rolling or slitting iron, or any plating forge, and of any furnace for making steel."³¹⁴ The Iron Act aimed toward keeping the colonies dependent on England for any processed iron products.

³¹¹Great Britain, Parliament, "The Molasses Act," [May 17, 1733] from *Documents of American History*, Henry Steele Commager, ed., 42.

³¹²Emmory R. Johnson, et al., eds., *History of Domestic and Foreign Commerce of the United States*, 43.

³¹³*Ibid.*

³¹⁴*Ibid.*, 46.

After the passage of the Iron Act the stage was set for the American Revolution; all the “actors” on the field of battle were firmly in place.³¹⁵ Britain had for over a hundred years placed restrictions on colonial commerce and for over a hundred years colonists had evaded these restrictions. By its various navigational acts, Parliament had implied that it had dominion over the American colonies. The American colonies in reply to Parliament, expressed by their resistance that they believed “the laws of England. . .doe not reach America.”³¹⁶

The policies that Parliament enacted after 1750 shifted from regulatory in nature to fiscal in nature.³¹⁷ This shift gave colonists greater justification to challenge Parlia-

³¹⁵Historian Emory Johnson wrote that after 1750 “a new principle . . . with regard to the Colonies [emerged], by which the scheme of a regular plantation Parliamentary revenue was adopted. . . . A revenue not substituted in place of, but superadded to a monopoly; which monopoly was enforced at the same time, with additional strictness, and the enforcement into military hands.” [Ibid., 48]

³¹⁶Massachusetts, General Court, “Independency in Colonial Massachusetts,” from *Documents of American History*, Henry Steele Commager, ed., 34.

³¹⁷While resistance to the Acts of Trade and Navigation were considered obnoxious to most all colonial merchants, there seemed scant legal footing upon which to resist these legislative acts. Clearly, Parliament relied on the Acts of Trade and Navigation as a means toward gaining revenue or rather funnelling revenue from the colonies to the trade centers in London. This revenue scheme had to be tolerated on legal grounds by the colonists, yet when Parliament, led by Chancellor of the Exchequer George Grenville, shifted its legislative focus toward gaining revenue directly from the colonists, rather than indirectly through the colonial merchants, a conceptual line had been crossed. Many colonists, Benjamin Franklin among them, distinguished between regulatory “*external*” taxation and the direct “*internal*” method of taxation. According to Franklin, colonists opposed the new “*internal*” taxes used by Parliament, and not necessarily the “*external*” taxes already in place through the Acts of Trade and Navigation. To many other colonial leaders, however, such as James Otis, there existed

ment's legislation. Massachusetts had dubious legal grounds for challenging Parliament's authority to govern trade within England. When Parliament's legislative aim shifted, however, toward raising revenue in the colonies, then colonists gained a legally firm basis for resisting these future acts. Massachusetts had never completely conceded Parliament's right to pass even regulatory acts that adversely affected its industry. The gathering of revenue from these "*external*," or regulatory taxes had always been at best only begrudgingly tolerated. Consequently, when Parliament's legislative intent became clearly to utilize an "*internal*" tax on the colonists, the legal battle that had been latent became alive and forceful.

The thought of utilizing more direct methods for gaining a revenue from the colonies in North America dated at least to Sir Robert Walpole's ministry.³¹⁸ The large debt incurred while pursuing the Seven Years' War against France, which doubled the national debt, focused attention to the colonies as an alternative to increasing the already large tax burden of those living in England. Chancellor of the Exchequer in 1763, George Grenville noted that the American customs service cost more to operate than it brought in to the English Government.³¹⁹ Steeped in a mercantilists' mind set toward viewing the

no distinction between internal or external taxes, all taxation without representative authorization lacked validity, and could not be distinguished from common larceny. See: Edmund S. Morgan, *The Birth of the Republic, 1763 - 89*, 16 - 8, 30 - 6; David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, 359 - 61.

³¹⁸Edmund S. Morgan, *The Birth of the Republic, 1763 - 89*, 15.

³¹⁹*Ibid.*

purpose for colonies, Grenville could see little justification for raising taxes in England to support the costs associated with having colonies. Grenville set the stage for the final phase of England's relationship with her North American colonies; viewing the colonies as an underutilized asset he was determined to balance England's books by converting colonial wealth into governmental receipts.

The first Act initiated by Grenville was the Sugar or Revenue Act, passed into law by Parliament in 1764. This act had many clauses offensive to many American colonists. The act reduced the duties on colonial imports of foreign molasses from prohibitory rates to a revenue basis and forbade the importation of foreign rum. Additionally, the act retained the duty on foreign sugar and placed duties on foreign indigo, coffee when not bought in Great Britain, wines direct from Madeira, Spanish and Portuguese wines from Great Britain and silks and other fabrics from Great Britain. The act also added to the list of enumerated goods: coffee, pimentos, coconuts, whale fins, raw silk, hides and skins, pot ash and pearl ash, iron and lumber. Unlike previous navigation acts, Parliament's declared intent with the Sugar Act was to raise a revenue from the colonies to compensate England for money spent on the Customs Service.³²⁰ The implications behind the Sugar Act barely had time to affect Bay colonists before another act of similar nature barraged them.

Believing there existed much more untapped revenue within the North American

³²⁰Ibid., 17.

colonies, Grenville proposed the Stamp Act of 1765. The goal behind this act was to raise, solely from the colonies in America, £ 60,000 of much needed revenue for England.³²¹ Grenville mistakenly believed that the act would “arouse little opposition in the colonies.”³²² The act required colonists pay a duty “for every skin or . . . piece of paper, on which shall be . . . printed, any declaration, . . . or other pleading, . . . in any court of law within the British colonies and plantations in America.”³²³ Additionally, the Stamp Act extended the Admiralty Courts into the colonies with an aim toward increased enforcement for both acts.

Colonial resistance to the 1764 and 1765 Acts greatly exceeded that expected by Grenville and his allies in Parliament. Resolutions against the Stamp Act passed with fiery emotion throughout the American colonies.³²⁴ The colonists used a variety of tactics to resist these acts, including a series of nonimportation agreements. Colonial resistance to the Stamp Act reached such a height that on 17 January 1766, London merchants sent Parliament a petition against the act. In their petition the London merchants stated:

³²¹Great Britain, Parliament, “The Stamp Act,” [March 22, 1765] from *Documents of American History*, Henry Steele Commager, ed., 53.

³²²*Ibid.*

³²³*Ibid.*

³²⁴See: Virginia, General Court, “Virginia Stamp Act Resolutions,” [May 30, 1765] from *Documents of American History*, Henry Steele Commager, ed., 55.; “Instructions of The Town Of Braintree Massachusetts On the Stamp Act,” [October 14, 1765] from *Ibid.*, 56.; “Resolutions of the Stamp Act Congress,” [October 19, 1765] from *Ibid.*, 57.; and “Northampton County Resolutions on the Stamp Act,” [February 11, 1766] from *Ibid.*, 59.

“[commerce with America] must be deemed of the highest importance in the commercial system of this nation; and that this commerce, . . . now lies under such difficulties and discouragement, [because of the Stamp Act] that nothing less than its utter ruin is apprehended.”³²⁵ The merchants concluded: “to preserve the strength of this nation entire, its commerce flourishing, the revenues increasing,” repeal the Stamp Act.³²⁶

The severe opposition to the Stamp and Sugar Act were not without affect on Parliament. Additionally, the Marquis of Rockingham, who replaced Grenville as first minister of England, viewed the Stamp Act unfavorably. An opponent of Grenville, the new first minister refused to be tied down with the administration of an act that he had not initiated and that would prove difficult to enforce. The utter denouncement of these two acts led Parliament in 1766 to repeal both. Importantly, in the first conflict over Parliamentary revenue acts the colonists emerged victorious. Although repealing the acts of 1764 and 1765, Rockingham, and his Parliament allies, still believed they could gain revenue from the colonies and proceeded with other fiscal legislature. A lesson, however, had been learned from the Sugar and Stamp Act’s failure. The next two acts aimed at preventing future colonial resistance to acts of Parliament: the Quartering Act of 1765 and the Declaratory Act of 1766. Rockingham designed these acts to ensure that future fiscal acts need not be repealed. The Quartering Act required that the colonists provide

³²⁵“Petition Of London Merchants Against The Stamp Act,” [January 17, 1766] from *Documents of American History*, Henry Steele Commager, ed., 59.

³²⁶*Ibid.*

“quarters for the army” whenever a need occurred.³²⁷ Rockingham promised the Act would lapse on 24 March 1767, but it lasted beyond that date, to the outrage of the colonists.³²⁸

The Declaratory Act passed in 1766 represents the most assertive legislature passed by Parliament. Its preface stated that many American colonies had in the past, “against law, claimed to themselves, or to general assemblies of the same, the sole and exclusive right of imposing duties and taxes upon his Majesty’s subjects in the said colonies.”³²⁹ To refute this misconception, Parliament “declared” that the “colonies . . . in America have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and Parliament of Great Britain.”³³⁰ It further stated that “all resolutions, votes, orders, and proceedings, in any of the said colonies or plantations, whereby the power and authority of the Parliament of Great Britain, to make laws and statutes. . . is denied, or drawn into question are, and are hereby declared to be, utterly null and void to all intents and purposes whatsoever.”³³¹

³²⁷Great Britain, Parliament, “Quartering Act,” [March 24, 1765] from *Documents of American History*, Henry Steele Commager, ed., 61. Remember this practice was outlawed under the Petition of Rights!

³²⁸*Ibid.*

³²⁹Great Britain, Parliament, “The Declaratory Act,” [March 18, 1766] from *Documents of American History*, Henry Steele Commager, ed., 60.

³³⁰*Ibid.*

³³¹*Ibid.*

The five-year span from 1763 to 1768 represents a critical period in the relationship between England and her North American colonies. While political leaders in England searched hard for ways toward gaining increasing amounts of revenue from the colonies, those affected by these legislative acts polished and clarified their ideological opposition to these measures. In the five years between 1763 and 1768, six different political leaders held the important posts of Prime Minister or Chancellor of the Exchequer: George Grenville, Marquis of Rockingham, William Pitt (later the Earl of Chatham), Charles Townshend, Lord Hillsborough, and Lord North, respectively. These six different, and often competing, personalities worked vigilantly toward improving the financial strength of the British Empire. From an “empire” perception the methods used by these able politicians seemed logical and sound. By 1763, mercantilism had become so infused into England’s political mind-set that the obscure theories of political justice, or of the fundamental ideal described in Magna Charta, were pushed aside by more pressing concerns of fiscal stability. After the passage of the Quartering and Declaratory Act, American colonists could no longer ignore the actions of Parliament. It was finally clear and “declared” legislatively that the colonies were considered subordinate to England. Parliamentary leaders finally openly contradicted any previous illusions of autonomy held by colonist. The acts that followed it solidified the implications of the Declaratory Act.

Using the prerogatives established under the Declaratory Act, Parliament, under the direction of new Chancellor of the Exchequer Charles Townshend, passed several acts

in 1767 aimed at asserting England's authority. In many respects, these acts initiated the action-reaction cycle that eventually ended in war with England. Among the post-1767 acts, one suspended the assembly of New York until it complied with the Quartering Act, another established a board of commissioners of the customs for the colonies, and the final act, a revenue act, aimed at raising £ 40,000 from the colonies. While American colonists considered each of these acts to be oppressive, the Revenue Act was the most despised.

The Revenue Act of 1767 specified as its intent the halting of "clandestine" trading and the raising of "a revenue" in America.³³² This act placed duties for raising a revenue on several items, including tea. Additionally, the act issued a "writ of assistance, to authorize and empower the officers of his Majesty's customs to enter and go into any house, warehouse, shop, cellar, or other place, in the British colonies or plantations in America," to search for illegal goods.³³³ The ramifications from this act, due to its far reaching authority, were enormous. Many American colonists responded violently to the Revenue Act of 1767. Besides many proclamations against the acts of 1767,³³⁴ colonists

³³²Great Britain, Parliament, "The Townshend Revenue Act," [June 29, 1767] from *Documents of American History*, Henry Steele Commager, ed., 63.

³³³Ibid.

³³⁴See: "Massachusetts Circular Letter," [February 11, 1768] from *Documents of American History*, Henry Steele Commager, ed., 66.; and "New York Sons Of Liberty Resolutions On Tea," [November 29, 1773] from Ibid., 70.

implemented several nonimportation agreements in protest.³³⁵ The resistance became so fervent that Parliament decided that same year to rescind all the provisions in the Revenue Act, except the tax on tea. Resistance to British policies by this time, however, had grown so strong that the colonists refused any Parliament taxation at all. The tax on tea, though perceived by Parliament to be a small face saving measure, greatly enraged the colonists. The outrage over this sole remaining tax grew to such a pitch that by 1773 it had become uncontrollable. A group of colonists vented their anger on 16 December 1773 when several, dressed as Native Americans, boarded a tea ship and dumped its contents into Massachusetts Bay. The ramifications of that action, called the Boston Tea party, prompted Parliament to pass its final acts.

The Intolerable Acts of 1775, were Parliament's response to the Boston Tea Party and mark the final attempt by England to gain control over her colonies in America. The five acts that composed the Intolerable Acts were so oppressive that the American colonists were left with few options.³³⁶ London merchants again petitioned Parliament to change her policies toward the American colonies, yet Parliament refused.³³⁷ In the end,

³³⁵“Boston Non-Importation Agreement,” [August 1, 1768] from *Documents of American History*, Henry Steele Commager, ed., 67.

³³⁶Great Britain, Parliament, “The Intolerable Acts,” [1775] from *Documents of American History*, Henry Steele Commager, ed., 71.

³³⁷“Petition Of London Merchants For The Reconciliation With America,” [January 23, 1775] from *Documents of American History*, Henry Steele Commager, ed., 87.

America solidified its opposition to Parliament and the Revolution began.

The final chapter will explain the significance behind mercantilism and the Acts of Trade and Navigation as a causal element to the American Revolution. Massachusetts dissolved its ties to England over very legalistic and well-founded issues. English constitutional principles and the colonial charter of Massachusetts represent the measuring rod that Bay colonists used to determine whether Parliament was treating them justly or unjustly. The terms they used remained constant. Never before 1776 did the Massachusetts colonists request anything more than Parliament abidance to their colonial charter. As James Bowdin, member of Massachusetts' General Council declared in 1773, "although the Colonies considered as Part of the Dominions of the Crown are intitled to equal Liberties, the Inhabitants of this Colony think it a Happiness, that those Liberties are confirmed and secured to them by a Charter; whereby the Honour and Faith of the Crown are pledged, that those Liberties shall not be violated."³³⁸ To the colonists in Massachusetts their Charter represented as sacred a document as the Petition of Rights or Magna Charta, to violate one of these documents invalidated the others and repudiated the rule of law.

³³⁸James Bowdin, "The Answer of the Council," [12 January 1773] from *The Briefs of the American Revolution: Constitutional Arguments Between Thomas Hutchinson, Governor of Massachusetts Bay, and James Bowdin for the Council and John Admas for the House of Representatives*, edited by John Phillip Reid, New York University School of Law Series in Legal History: Vol., I., Linden Studies in American Constitutional History, (New York: New York University Press, 1981), 41.

Chapter Five

Conclusion: The American Revolution Reconsidered

The source . . . of this irregularity, [colonial resistance to England] is a false opinion, broached at the time of the Stamp Act and ever since cultivated until it became general, that the people of the colonies are subject to no authority but their own legislatures and that the Acts of the Parliament of Great Britain . . . are not obligatory.³³⁵

-- Massachusetts Governor Thomas Hutchinson

Governor Hutchinson, in the plenitude of his vanity and self-sufficiency, thought he could convince all America and all Europe that the Parliament of Great Britain had an authority supreme, sovereign, absolute, and uncontrollable over the Colonies, in all cases whatsoever. . . . The public stood astonished!³³⁶

-- John Adams

If eighteenth-century England had possessed a single, documented, Constitution they could have avoided the American Revolution. After the Declaratory Act of 1766, friction between England and her American colonies, particularly Massachusetts, reached an apex. An ideological gulf had developed that appeared insurmountable. Political leaders on both sides of the Atlantic struggled to resolve the growing impasse created by the American colonies' persistent refusal to accept Parliament's sovereignty. Despite the

³³⁵Thomas Hutchinson, "Letter from Governor Hutchinson to the earl of Dartmouth," [23 October 1772] from *The Briefs of the American Revolution*, 4 - 5.

³³⁶John Adams, "Letter from John Adams to William Tudor," [8 March 1817] from *The Briefs of The American Revolution*, 14.

political deadlock, both sides agreed that the conflict centered on constitutional issues relating to England's foundational premise and the most basic rights guaranteed under English law. Lacking a single definitive form, however, England's Constitution contained no universal pronouncement regarding political justice. Parliament leaders and colonial leaders in eighteenth-century England could both construct an English Constitution favoring their cause; revolution resulted from this political deficiency.

This study's main intent has been to identify the confusion and uncertainty that faced English citizens residing in the American colonies, specifically in Massachusetts. History should not aim toward mere recitation of past events, but rather should search deeper and attempt to identify the underlying causes to why events occurred. As identified in this study's introduction, frequently studies on the American Revolution have focused on side-issues and incorrectly attributed these as the main cause for America's independence. Many studies have claimed that colonists did not like being English, or that they saw greater benefits in being independent. An inadequate breadth of research causes one to reach questionable conclusions. If one focuses exclusively on eighteenth-century events, the motives for the American Revolution might support these more incidental conclusions. Massachusetts, however, did not gain its colonial charter in the eighteenth century; its foundation was the product of seventeenth-century constitutionalism, a point that we cannot ignore. Incorrect analyses of the American Revolution occur when one does not take full account of the transitions in English politics.

In the ten years preceding the American Revolution, many arguments about

England's Constitution occurred between Parliament and colonial leaders. No general consensus resulted. To members of Parliament, all citizens within the British Empire at birth became duty-bound to all decisions made on their behalf. Deliberation regarding justice or equity, according to Parliament, was not the birthright of English citizens; good citizenship required faith that governmental decisions were wise and without flaws. The model Thomas Hobbes constructed in his book *Leviathan*, closely resembled the one advanced by Parliament in the eighteenth century. While Hobbes geared his model to absolute monarchy, his concept of sovereignty applied to whoever ruled in society, be it one person or many. In Hobbesian theory, the key to a peaceful and well ordered society was to combine legislative, judicial and executive powers into one person or body. The major Parliament leaders of the seventeenth century found Hobbes' theories repugnant, believing such absolutism had caused the 1642 Revolution. To these seventeenth-century thinkers a peaceful society required a balanced and divided Constitution. Charles Montesquieu praised this constitutional theory in his book *The Spirit of the Laws*, which provides a useful contra position to Hobbes' theories.

Published in 1748, Montesquieu's *The Spirit of the Laws* influenced thinkers in both England and the colonies, not to mention France. In his work, Montesquieu analyzed all governmental forms and described their natures, thereby making their flaws and virtues evident. When analyzing England, Montesquieu wrote that she was the "one

nation in the world whose constitution has political liberty for its direct purpose.”³³⁷ The qualities Montesquieu saw in England’s government mirror those American colonists demanded from Parliament. These qualities also represent those rights that Parliament had demanded Charles I acknowledge: a government restrained according to the Petition of Rights.

According to Montesquieu, England achieved political liberty by avoiding principles that encouraged despotism and political enslavement. Unchecked power is the greatest danger to political liberty. Montesquieu writes, “any man who has power is led to abuse it; he continues until he finds limit.”³³⁸ Likewise, Montesquieu observed that “when legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear the same monarch or senate that makes tyrannical laws will execute them tyrannically.”³³⁹ Similarly, he noted that linking judicial power with legislative and executive power would destroy liberty. “If [the power of judging] were joined to legislative power,” wrote Montesquieu, “the power over the life and liberty of the citizens would be arbitrary, for the judge would be

³³⁷Charles de Secondt Montesquieu, *The Spirit of the Laws*, trans., & ed., by Anne M. Cohler, Basia C. Miller, and Harold Stone, Cambridge Texts in the History of Political Thought, series ed., Raymon Geuss and Quentin Skinner, (Cambridge: Cambridge University Press, 1989, reprint. ed., 1992), 156. Political liberty in a citizen, according to Montesquieu, is the “tranquility of spirit which comes from the opinion each has of his security.” [Ibid., 157.]

³³⁸Ibid., 155.

³³⁹Ibid.

the legislator. If it were joined to executive power, the judge would have the force of an oppressor.”³⁴⁰ To eliminate the danger of power being abused, Montesquieu believed “power must check power by the arrangement of things,” and a constitution must establish this proper arrangement.³⁴¹ Montesquieu believed England’s Constitution provided this requisite balance.

Ironically, the balanced constitution that Montesquieu believed England possessed is exactly what the leaders from Massachusetts wanted Parliament to acknowledge. Leaders in Massachusetts struggled against the same Hobbesian principles that had turned Parliament against Charles I. With the 1766 Declaratory Act, American colonists realized that Parliament believed itself completely absolute and beyond question or censure. In the period after 1766 these colonists were forced to decide whether they would allow Parliament’s position to go unchallenged. Both Parliamentary leaders and American colonists knew that every year the Declaratory Act remained a binding declaration of Anglo/American relations, the more difficult it would be to alter this relationship. Political leaders in Massachusetts refused to allow the legal principles implied within the Declaratory Act to go unchallenged. If Parliament had acknowledged that England possessed a balanced Constitution, of the type Montesquieu described, then perhaps they would have peacefully resolved this vital legal issue.

³⁴⁰Ibid.

³⁴¹Ibid.

The American colonies became the locus for identifying the flaws in England's eighteenth-century Constitution. After the Glorious Revolution of 1688, Parliament had finally succeeded in garnering the lion's share of the three governmental branches: executive, legislative, and judicial. As Montesquieu pointed out, combining the three branches of government into one body would lead inevitably to tyranny. The balanced Constitution that Montesquieu believed England possessed appeared to exist in the eighteenth century because it had existed in the seventeenth century.

Dating from Anglo-Saxon times, the People had wrested legislation favoring a balanced Constitution from arbitrary kings. The Petition of Right, like Magna Charta and earlier documents, legislated constraints on the King's prerogatives and guaranteed protection for English citizens. No legislation after 1628 repealed the principles of the Petition of Right and every new constraint controlling the monarch seemed only to reinforce citizen rights. To Montesquieu, and to most within England, Parliament's growth in power and control seemed only to ensure that they could avoid tyranny. However, the colonies in America, being unrepresented in Parliament, realized that the tyranny of the people could be as abusive as the tyranny by a king.

In eighteenth-century England, consensus served as the only stop-gate to Parliamentary tyranny. Citizens in Bristol, England, for example, did not fear that Parliament would pass legislation prejudicial to their interests because there existed representatives who would defend Bristol interests. Additionally, there would be no purpose for a focused attack specifically against Bristol. If England did not have any colonies, or if her

colonies had direct Parliamentary representation, then there would have been only an indecipherable constitutional change between the seventeenth and eighteenth centuries. As a united body Parliament protected the principles behind the Petition of Right, but only as they related to those in England. When dealing with the American colonies, Parliament found no colonial protector and as a result abuse occurred. Under the seventeenth-century Constitution, the King protected the interests of those not represented in Parliament; ironically, the weakening of the Monarchy eventually harmed colonial interests.

An important constitutional debate took place in Massachusetts that clarified the changes that had occurred to England's Constitution between the seventeenth and eighteenth centuries. Had Montesquieu witnessed the 1773 debate between Governor Thomas Hutchinson and the Council and House of Representatives in Massachusetts, he would have realized that Parliament renounced all the principles formerly guarded by England's traditional Constitution. Speaking on Parliament's behalf, Hutchinson addressed on 6 January 1773 both houses of Massachusetts' General Court in an attempt to solve the discord that had existed since the Stamp Act. Hutchinson believed he possessed great insights into the why the American colonies had been founded. He believed it would be an easy thing to convince the leaders of Massachusetts that Parliament ought legally to rule the colony absolutely. When Hutchinson listened to the response given by the council and house of representative, he realized that his task would be more difficult than anticipated.

Hutchinson addressed the two legislative bodies in his colony with great sincerity and high hopes for successfully resolving the growing problems in the Bay colony. An avid historian, Hutchinson believed it was his duty to instruct the people of Massachusetts and prove to them that their resistance to Parliament violated England's constitutional principles. The day after his initial address, Hutchinson wrote to a friend that "at the delivery of the speech the members seemed amazed, three-quarters of them having taken for granted that all that had been done by Parliament was arbitrary and unconstitutional without having ever been informed what is their constitution."³⁴² While to another friend, Hutchinson apologized that in his address he labored "to prove points so evident" but "the prejudices people were under made it necessary."³⁴³ Hutchinson did an excellent job arguing the majority-position of Parliament during the eighteenth century but the difference between Hutchinson's viewpoints and those held by the Bay colony's leadership is remarkable.

Throughout his address, Thomas Hutchinson made it clear that he had read Massachusetts' Charter of 1629 and that he knew the positions advanced by his Whig opponents. Early in his speech Hutchinson said: "it has been urged . . . that by [Charter]" those in Massachusetts had gained "the liberties and Immunities of free and natural

³⁴²Thomas Hutchinson, "Letter from Governor Hutchinson to John Pownall," [7 January 1773] from *The Briefs of the American Revolution*, 14.

³⁴³Thomas Hutchinson, "Letter from Governor Thomas Hutchinson to Commodore James Gambier," [14 February 1773] from *The Briefs of the American Revolution*, 7.

Subjects . . . as if they had been born within the Realm of England.”³⁴⁴ Yet, to Winthrop and those who emigrated with him in 1630, the grant of all rights of free and natural citizens conferred all the privileges confirmed in the Petition of Rights. Governor Hutchinson, viewed these charter privileges differently, saying that “this clause in the Charter does not confer or reserve any Liberties but what would have been enjoyed without it and what the inhabitants of every other Colony do enjoy where they are without a Charter.”³⁴⁵ By discounting one of the most important privileges within Massachusetts’ Charter of 1629, Hutchinson quickly made clear that his views differed vastly from the leadership of the Council and House of Representatives.

Realizing that the essential conflict between England and Massachusetts involved taxation without representation, Hutchinson stated his position on this important issue. The majority claim in Massachusetts asserted that since all colony residents held full English citizenship, representation was requisite before any assessment of taxation. Hutchinson responded to this claim by explaining that when the colonists first removed themselves to Massachusetts, they ceded their privileges of representation. “By this their voluntary Removal,” Hutchinson reasoned, “they have relinquished for a Time at least, one of the Rights of an English Subject which they might if they pleased have continued to enjoy and may again enjoy whensoever they will return to the place where it can be

³⁴⁴Thomas Hutchinson, “The Address of the Governor,” [6 January 1773] from *The Briefs of the American Revolution*, 18.

³⁴⁵*Ibid.*, 19.

exercised.”³⁴⁶ According to Hutchinson, colonial residents did not possess any claim to the privileges guaranteed those living in England, and any rights they did possess, they held by the benevolence of Parliament.

The premise for Hutchinson’s statements regarding colonial rights, or lack of rights, rested upon his firm belief that Parliamentary sovereignty had existed since Massachusetts’ initial colonization. While chapter two of this study described Parliament and Massachusetts as initially political allies based on similar ideas of citizen rights, Hutchinson completely disagreed with this conclusion. Remarkably, Hutchinson stated that “when our Predecessors first took Possession of this Plantation or Colony, under a Grant and Charter from the Crown of England, it was their Sense, and it was the Sense of the Kingdom, that they were to remain subject to the supreme authority of Parliament.”³⁴⁷ He continued by saying “this appears from the Charter itself and from other irresistible Evidence,”³⁴⁸ and further claimed that Parliament’s “Supreme authority has, from time to time been exercised . . . and submitted to by the Colony, . . . and acknowledged by the Legislature.”³⁴⁹ In Hutchinson’s view, Massachusetts’ governmental powers came not from Charles I, but from Parliament, a position that wholly lacked historical basis, although it may have been popular in the eighteenth century.

³⁴⁶Ibid.

³⁴⁷Ibid., 15.

³⁴⁸Ibid.

³⁴⁹Ibid.

In the conclusion of his address, Hutchinson argued that two sovereign legislative bodies could never rule governments as coequals, one must always submit to the other. “I know of no Line that can be drawn,” asserted the Governor, “between the supreme Authority of Parliament and the total Independence of the Colonies.”³⁵⁰ The governor believed that the existence of independent legislative bodies would “make two Governments as distinct as the Kingdoms of England and Scotland before the Union.”³⁵¹ If two distinct governments did exist, Hutchinson reasoned, then Massachusetts would have no right of protection from England and she would be vulnerable to foreign attack. Considering this danger, Hutchinson questioned, “Is there any Thing which we have more Reason to dread than Independence? I hope it will never be our Misfortune to know by Experience the difference between the Liberties of an English Colonists and those of the Spanish, French or Dutch.”³⁵²

The body of Hutchinson’s address contained numerous errors, which his audience, the joint assembly of the Council and House of Representatives in the colony, recognized. The first error pertains to Hutchinson’s presentation of the relationship between Parliament and Massachusetts. As explained in chapter one, Massachusetts had a relationship only with Charles I; for the Charter of 1629 never mentioned Parliament. Charles I had

³⁵⁰Ibid., 20.

³⁵¹Ibid.

³⁵²Ibid., 21.

dissolved Parliament in 1629, before colonization of Massachusetts had begun, and he did not call another Parliament until 1642. Similarly, Charles I had established himself as the absolute sovereign in England; not even the leaders in the Parliament of 1628 claimed to possess absolute sovereignty over the king. At the time Massachusetts received its charter, England's political leaders were fighting for Montesquieu's balanced constitutional model, they only wanted their traditional role in England's government -- nothing more.

Similarly, the leaders in the two legislative bodies of the colony denied Hutchinson's very use of the term "absolute," since it denied immutable rights to English citizens. The main goal sought with the Petition of Right, as chapter two demonstrated, was to establish that English citizens possessed guaranteed rights and immunities from arbitrary government. By definition, an absolute ruler possessed no superior, and made decisions regarding right and wrong without needing to consult with anyone. Parliamentary leaders resisted royal absolutism from the very moment James I became England's king. Utilizing Hutchinson's theories, every legislative document ascribing citizens' rights from the Charter of Liberties to the Petition of Rights were useless documents, binding on no one and passed for no purpose. All of Coke's fears regarding citizens rights under Charles I, Hutchinson claimed as valid prerogatives for Parliament. In all, Hutchinson proposed a completely arbitrary and changeable Constitution, one alterable by every powerful speech made in Parliament and providing no guarantees for political liberty.

Hidden in Hutchinson's address lay essential elements explaining why England

lost her American colonies. When James Bowdin and John Adams, writing for the Council and House of Representatives respectively, made their replies to Hutchinson they did so with heavy hearts. Analysis of Hutchinson's speech made it clear to Bowdin and Adams that their governor had completely misunderstood their colony's foundational premise. What was worse, Hutchinson's opinion represented the commonplace viewpoint within England. When the Governor had explained that colonists by leaving England ceded their rights of representation, there could no longer be any misinterpreting the Declaratory Act. With Parliament's position skillfully presented, Massachusetts' colonists were left with only two choices: either accept Parliament's sovereignty or deny the principle and risk treason.

The constitutional debates Hutchinson began on 6 January 1773 lasted until 6 March 1773, when he dissolved the Assembly having reached a political impasse. Both Bowdin and Adams prepared two separate rebuttals to Hutchinson's speeches, neither could sway the governor from his position that Parliament ought to rule absolutely over the colonies.³⁵³ Hutchinson ridiculed Bowdin's well-prepared speeches, since they

³⁵³The Council's first response, written by James Bowdin, was delivered to the governor 25 January 1773. After the governor's replication on 16 February 1773, Bowdin wrote a rejoinder for the council, which was presented 25 February 1773. John Adams' speeches, written for the house of representatives, were presented 26 January and 2 March 1773. Hutchinson delivered three speeches: 6 January, 16 February, and 6 March 1773. For details of these speeches see: "The Address of the Governor," [6 January 1773] from *The Briefs of the American Revolution*, 15 - 23; "The Answer of the Council," [25 January 1773] from *Ibid.*, 32 - 44; "The Answer of the House," [26 January 1773] from *Ibid.*, 53 - 73; "The Replication of the Governor," [16 February 1773] from *Ibid.*, 84 - 102; "The Rejoinder of the Council," [16 February 1773] from *Ibid.*, 114 - 117;

utilized historical precedents to prove that the Charter of Massachusetts established a contract only between the King and the Bay Colony. The contract Massachusetts had with Charles I intended to guarantee those colonists all benefits under England's Constitution. Bowdin argued that the same clause that stipulated Massachusetts could make no law contrary to the laws of England, placed an equal restriction on England. "Was not England bound," argued Bowdin, "(and did not our ancestors understand it so) by the same honor, to make no laws repugnant to the laws and rights of America."³⁵⁴ Taxation without representation, argued Bowdin, violated the terms of his colony's charter and the contract with Charles I.³⁵⁵ Since Hutchinson denied that the Charter conveyed any rights to the colony's settlers, Bowdin's legal-based argument failed to impress the governor.

Adams approached Hutchinson's speech from a different angle arguing that Massachusetts' leaders had never accepted Parliamentary sovereignty. He argued that the original emigrants to Massachusetts recognized only the King's supervisory prerogatives. According to Adams, "Parliament lost no Authority over [Massachusetts], having never

"The Rejoinder of the House," [2 March 1773] from *Ibid.*, 125 - 143; and "The Surrejoinder of the Governor," [6 March 1773] from *Ibid.*, 146 - 154.

³⁵⁴James Bowdin, "The Answer of the Council," [25 January 1773] from *The Briefs of the American Revolution*, 39.

³⁵⁵*Ibid.*, 36. To prove the "no tax without representation" principle, Bowdin cited from Magna Carta, 34 Edward I, 25 Edward III, 3 Charles I (Petition of Rights), and 1 William III. [*Ibid.*]

had such Authority” over the colony.³⁵⁶ “The Power and Authority of Parliament,” Adams claimed, were “constitutionally confined within the Limits of the Realm and the Nation collectively, of which alone it is Representing and Legislative Assembly.”³⁵⁷ He also attacked Hutchinson’s treatment of the charter. By “your Excellency’s Manner of Reasoning,” Adams wrote, “the Words of the Charter can have no sense or Meaning.” Continuing, he added: “We forbear remarking upon the Absurdity of a Grant to Persons born within the Realm, of the same Liberties which would have belonged to them if they had been born within the Realm.”³⁵⁸ Despite the clarity and precision of Adams’ responses to Hutchinson, he like Bowdin failed to convince the governor that England’s Constitution ought to protect Massachusetts against arbitrary government.

In the surrejoinder, Hutchinson reiterated the position that he and most in England held regarding governmental principles. The final remarks he gave to the Council and the House of Representative summarized the insurmountable governmental theories that doomed England to lose her colonies. “There are . . . a few plain fundamental Principles of Government,” asserted the Governor, “which carry within themselves such Evidence as cannot be resisted, and are no sooner proposed than assented to -- Such as these -- That in every Government there must be somewhere a supreme uncontrollable Power, an

³⁵⁶John Adams, “The Answer of the House,” [26 January 1773] from *The Briefs of the American Revolution*, 63.

³⁵⁷Ibid.

³⁵⁸Ibid.

absolute Authority to decide and determine.”³⁵⁹ Continuing he claimed, “That two such powers cannot coexist, but necessarily will make two distinct States -- That in a State of Society we give up Part of our natural Liberty in order to secure that legal Freedom which is the great End of Government to maintain and preserve.”³⁶⁰ Hutchinson’s final principle declared, “that a Right in Individuals or Parts of Government to judge the Decisions of the Supreme Authority and to submit or not submit as they think proper cannot consist with a State of Government and must work the Dissolution of it.”³⁶¹

In all, Hutchinson pointed to a governmental model resembling Hobbesian doctrine, a government with no checks and balances. The political leaders of Massachusetts ascribing to Montesquieu’s governmental model, as did Parliament leaders in the early seventeenth century, found the governor’s model unacceptable. To Bowdin and Adams, Hutchinson argued slavery for the sake of peace, a formula that appeared to them repugnant. The Governor concluded his surrejoinder, however, with words that Bowdin and Adams could both agree: “I know of no Maxim in the Law of greater Truth than this. *Where the Constitution is contested and the Laws are vague and uncertain, there, will be the greatest Slavery.*”³⁶² Hutchinson, the council and the house of representatives all saw

³⁵⁹Thomas Hutchinson, “The Surrejoinder of the Governor,” [6 March 1773] from *The Briefs of the American Revolution*, 154.

³⁶⁰Ibid.

³⁶¹Ibid.

³⁶²Ibid.

the reasons for political discord between England and her colonies. Solving this problem, however, would have required a complete alteration of political principles on one side of the Atlantic; this proved an unworkable solution.

In conclusion, a key reason why the American Revolution occurred was because Massachusetts received a colonial charter in 1629 that implied England possessed an immutable Constitution. On the eve of American colonization, James I and Charles I had complete freedom to establish the binding principles for the relationship between England and her colonies. As the Virginia example illustrated, English kings could establish colonies as a direct extension of their personal domain. English kings could have financed and directed all colonial expeditions, or encouraged Parliament to finance these excursions. Despite all the choices available, Charles I gave to the Massachusetts Bay Company a charter that vested the powers of government to those chosen by the company. Charles I authorized a county palatine in America, and also promised to protect the investments made by the members of the Massachusetts Bay Company.

Parliamentary leaders could have avoided the American Revolution without compromising vital principles held by those in Massachusetts or those in England. This solution, however, was not available in the eighteenth century. If Parliament had passed the Declaratory Act in 1706, there would have existed less opportunity for confusion between England and her colony to develop. The Declaratory Act established a binding principle for the relationship between England and her colonies, but established it one hundred and thirty-nine years too late. To declare that colonies in America were subject

to Parliament's supreme authority after such a long period of perceived independence was political folly. Governmental principles can change as societies grow and develop, however, to expect universal acceptance of these changes is absurd. The colonies in America experienced first hand Montesquieu's principle: "any man who has power is led to abuse it; he continues until he finds limit."³⁶³ Parliament, acting as one united body, utilized its absolute power until the American colonies found such power abusive and enslavement.

England's history is replete with political success and her governmental documents describe a strong resistance to tyrannical rule. Despite all her glories as a political unit, England lacks a single definitive Constitution. Dating from Anglo-Saxon times constitutional principles emerged that were considered immutable, defined by pure reason or natural law. For nearly a thousand years England existed without noticing the danger inherent in an oral Constitution. When James I implemented his doctrine of royal absolutism, the need for a single Constitution became more apparent and the potential for despotism from this flaw became realized. America's heralded Constitution was unmistakably an attempt to solve the problems found in the Mother Country. Hutchinson's words rang true when he declared that the greatest slavery would exist where a Constitution lacked definition and its laws were vague and uncertain.³⁶⁴

³⁶³Supra, fn 382.

³⁶⁴Supra, fn 406.

Appendix A

When James I introduced divine right kingship to England, he dismissed many constitutional premises that had previously seemed unquestionable. Pre-Stuart interpretations regarding England's Constitution relied on this underlying thesis: a Natural Law existed that established just and equitable rules for society. According to popular, Cicero-based, natural law theories, mankind existed in a state of general equality.¹ Consequently, ideal social law needed to facilitate equality within government. Dating back to Saxon times, England's political traditions embraced and protected this definition of natural law.² As such, at its most basic level, England's Constitution intended to mirror natural

¹The "equality by nature of Man" theory was widely held during the period before, and concurrent with, the reign of James I. Cicero, advancing Stoic philosophy, was the most prominent advocate of natural equality between Man. Writing as the Roman Republic collapsed (circa 44 BC), Cicero stated: "if nature prescribes, as she does, that every human being must help every other human being, whoever he is, just precisely because they are all human beings, then -- by the same authority -- all men have identical interests. Having identical interests means that we are all subject to one and the same law of nature." Cicero, "On Duties III," [De Officiis] in *Cicero: Selected Works*, ed. trans., Michael Grant, Penguin Classics, (New York: Penguin Books USA Inc., 1960, reprint/revised ed., 1971), 168. Cicero's position was advanced by St. Thomas Aquinas, Sir Richard Hooker, as well as absolutists like Sir Thomas Hobbes ("Nature hath made men . . . equall," [Hobbes, *Leviathan*, ed. Richard Tuck, 86]). One main issue of contention between Hobbes and Charles II, in fact, was over the issue of equality of Man. Charles II, following his fathers philosophy, firmly believed that by nature kings were superior to non-kings.

²According to Sir Roger Twysden, a seventeenth century legal theorist, the essence behind England's laws is succinctly expressed: "The subject of England is a

law and protect the general equality of mankind.

As an example of pre-Stuart thinking, the Elizabethan theorist Sir John Fortescue described England's Constitution with natural law terminology. "Law," wrote Fortescue, "even if enacted in Parliament was never entirely new; in a sense it was only declaratory of the laws of nature."³ Regarding the nature of kingship within England's Constitution, Fortescue wrote: "A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships on the people . . . without their consent."⁴ In Fortescue's view, England's Constitution established natural law, and England's king served as an agent created to enforce the tenets of this natural

people hath beene ever jealous of their freedome, and their lott is to live under a law of mercy that favors liberty. In our hystorians wee find it mentioned under severall names: Henry the First calls them the auntient liberties of the subject; . . . In the Acts and Rolls of Parliament they are called . . . 'the Law of the land,' etc.; by all which various appellations are meant nothing else but those immunities the subject hath ever enjoyed as his owne right, perteyning either to his person or his goods; and the grownd that hee doth so is, that they are allowed him by the law of the land, which the king alone can not at his owne will alter, and therefore can not take them from him, they beeing so auntient as the kingdom itselfe, which the king is to protect." Sir Roger Twysden, *Certaine Considerations Upon the Government of England*, edited by John Mitchell Kemble, from unpublished manuscript, The Camden Society. vol. 45, (London: The Camden Society Publications, 1849), 82.

³Sir John Fortescue, "Governance of England," cited from Mosse, *The Struggle for Sovereignty*, 14.

⁴Sir John Fortescue, "De Laudibus Legum Anglie," cited from Stanlis, *Edmund Burke and the Natural Law*, 218.

law.

John Aylmer, writing in 1559, similarly described the beliefs regarding England's Constitution common to Elizabethan England. In *Harborowe for the Faithful and True Subjects*, John Aylmer defended the female rule of Queen Elizabeth I, which John Knox attacked in his 1558 work *The First Blast of the Trumpet Against the Monsterous Regiment of Women*.⁵ In his defense, Aylmer stated "it is less danger to be governed in England by women than elsewhere."⁶ Explaining, Aylmer continued: "First, it is not she that ruleth, but the laws, . . . Secondly, she maketh no statute or laws, but the honourable court of parliament; she breaketh none, but it must be she and they together, or else not."⁷ Aylmer dismissed Knox's thesis by attacking the Scottish reformer's underlying premise, namely that England's monarch possessed absolute power. If "all hanged upon the king's or queen's will," Aylmer wrote, "and not upon the laws written; if she might decree and make laws alone without her senate; if she judged offences according to her wisdom and not by limitation of statute and laws; . . . if, to be short, she were a mere

⁵John Knox, who became a Protestant minister in 1547, had traveled throughout England, Germany and Geneva. Intellectually, Knox agreed with George Buchanan, King James' tutor 1570-78, and took an active role in the Scottish Reformation. For more on Knox and his role in Scotland politics, see: Fitzroy Maclean, *Scotland: A Concise History*, (London: Thames and Hudson Ltd., 1970, rev.ed., 1993), 85 - 102.

⁶John Aylmer, "An Harborowe for faithful and Trewes Subiects Against the Late Blowne Blaste, Concerning the Government of Wemen," [1559] from Taswell-Langmead, *English Constitutional History*, 324-25.

⁷Ibid.

monarch, and not a mixed ruler, you might peradventure make me to fear the matter more, and the less to defend the cause.”⁸ Writing just forty-three years before James I became England’s King, it is remarkable the confidence Aylmer showed toward the restraining power inherent in England’s Constitution. In Aylmer’s vision, no English Monarch could validly claim absolute governmental power.

Other prominent Elizabethan writers echoed Aylmer’s beliefs regarding law and the monarchy. Richard Onslow, Solicitor-General and Speaker of the Commons in 1566, described his opinion concerning England’s constitutional guarantees. “By our common law,” Onslow wrote, “although there be for the prince provided many princely prerogatives and royalties, yet it is not such as the prince can take money or other things, or do as he will at his own pleasure without order; but quietly to suffer his subjects to enjoy their own without wrongful oppression.”⁹ Sir William Staunford agreeing with Richard Onslow, wrote similarly concerning the nature of kingship. In 1590, Staunford’s book, *Exposition of the King’s Prerogative*, posited that since kingly prerogatives were a series of customary rights they could never infringe on the subjects’ ancient rights to property or certainty before the law.¹⁰

⁸Ibid.

⁹Ibid.

¹⁰Sir William Staunford, “Exposition of the King’s Prerogative,” [London, 1590] cited from George L. Mosse, *The Struggle for Sovereignty in England: From the Reign of Queen Elizabeth to the Petition of Rights*, 36.

Appendix B

Governor to Inform Himself of Laws

You shall inform yourself of the principal laws relating to the plantation trade:

An Act for the Encouraging and Increasing of Shipping and Navigation [1660; 12 Car. II, c. 18];

An Act for Preventing Frauds and Regulating Abuses in the Customs [1662; 14 Car. II, c. 11];

An Act for the Encouragement of Trade [1663, 15 Car. II, c. 7];

An Act to Prevent Planting of Tobacco in England and for Regulating the Plantation Trade [1670; 22 & 23 Car. II, c. 26]

An Act for the Encouragement of the Greenland and Eastland Trades and for Better Securing the Plantation Trade [1673; 25 Car. II, c. 7];

An Act for Preventing Fraud and Regulating Abuses in the Plantation Trade [1696; 7 & 8 Wm. III, c. 22];

An Act for the Increase and Encouragement of Seamen [1696; 7 & 8 Wm III, c. 21]

An Act for Raising a Sum not Exceeding Two Millions, &c., and for Settling the Trade to the East Indies [1698; 9 Wm. III, c. 44];

An Act to Prevent the Exportation of Wool out of Ireland and England . . . [1699; 10 Wm. III, c. 16];

An Act to Encourage the Trade to Newfoundland [1699; 10 Wm. III, c. 14];

An Act for the More Effectual Suppression of Piracy [1700; 11 Wm. III, c. 7];

An Act to Punish Governors of Plantations in This Kingdom for the Crimes by Them Committed in the Plantations [1700; 11 Wm. III, c. 12];

An Act for Granting a Further Subsidy on Wines and Merchandises Imported

[1704; 3 & 4 Anne, c. 3];

An Act to Permit the Exportation of Irish Linen Cloth to the Plantations, etc.

[1704; 3 & 4 Anne, c. 7]

An Act for the Encouraging the [sic] Importation of Naval Stores from Her Majesty's Plantations in America [1704; 3 & 4 Anne, c. 11];

An Act for the Union of the Two Kingdoms of England and Scotland [1707; 6 Anne, c. 11];

An Act for Ascertaining the Rates of Foreign Coins in Her Majesty's Plantations in America [1707; 6 Anne, c. 57];

An Act for the Encouragement of the Trade to America [1707; 6 Anne, c. 64];

An Act for Continuing Several Impositions, &c, and to Limit a Time for Prosecution upon Certain Bonds (called in the act plantation bonds) [1709; 8 Anne c. 14];

An Act for the Preservation of White and Other Pine Trees Growing in Her Majesty's Colonies of [New England] [1710; 9 Anne, c. 29];

An Act for the Encouragement of the Trade to America [1710; 9 Anne, c. 29];

An Act for the Relief of Merchants Importing Prize Goods from America [1711; 10 Anne, c. 30];

An Act for the Further Preventing Robbery, Burglary, and Other Felonies, &c., and for Declaring the Law upon Some Points Relating to Pirates [1717; 4 Geo. I, c. 11];

An Act Against Clandestine Running of Uncustomed Goods, and for the More Effectual Preventing of Frauds Relating to the Customs [1718; 5 Geo. I, c. 11];

An Act for the Better Securing the Lawful Trade of His Majesty's Subjects to and from the East Indies . . . [1718; 5 Geo. I, c. 21];

An Act for the Further Preventing His Majesty's Subjects from Trading to the East Indies under Foreign Commissions . . . [1720; 7 Geo. I, c. 21];

An Act for Giving Further Encouragement for the Importation of Naval Stores and for Other Purposes Therein Mentions [1721; 8 Geo. I, c. 12];

An Act for Encouragement of the Silk Manufactures of This Kingdom and for Importation of All Furs of the Product of the British Plantations into This Kingdom only, &c. [1721; 8 Geo. I, c. 15];

An Act to Prevent the Clandestine Running of Goods, &c., and to Subject Copper Ore of the Production of the British Plantations to Such Regulations as Other Enumerated Commodities of the Like Production are Subject to [1721; 8 Geo. I, c. 18];

An Act for the More Effectual Suppression of Piracy [1721; 8 Geo. I, c. 24];

An Act for Encouraging the Greenland Fishery [1723; 10 Geo. I, c. 16];

An Act for Repelling the Duties Laid Upon Snuff, &c., and for Giving a Further Encouragement to the Greenland Fishery [1725; 12 Geo. I, c. 26];

An Act to Revive the Laws Therein Mentioned &c., For Making Copper Ore of the British Plantations an Enumerated Commodity, for Making Perpetual an Act Therein Mentioned for Suppression of Piracy, &c. [1729; 2 Geo. II, c. 28];

An Act for the Better Preservation of His Majesty's Woods in America, and for the Importation of Naval Stores from Thence, &c. [1729; 2 Geo. II, c. 35];

An Act for Importing from His Majesty's Plantations in America Directly into Ireland Goods not Enumerated in Any Act of Parliament [1731; 4 Geo. II, c. 15];

An Act for Granting an Allowance upon the Exportation of British-made Gunpowder [1731; 4 Geo. II, c. 29];

An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America [1732; 5 Geo. II, c. 7];

An Act to Prevent the Exportation of Hats out of Any of His Majesty's Colonies or Plantations in America...[1732; 5 Geo. II, c. 22];

An Act for Encouraging the Growth of Coffee in His Majesty's Plantations in America [1732; Geo. II, c. 13];

An Act for the Better Securing and Encouraging the Trade of His Majesty's Sugar Colonies in America [6 Geo. II, c. 13];

An Act for Encouraging the Greenland Fishery [1732; 5 Geo. II, c. 28];

An Act for Reviving an Act of 5th George the First, for Better Securing the Lawful Trade of his Majesty's Subjects to and from the East Indies, &c. [1732; 5 Geo. II. c. 20];

An Act for the Further Encouragement of the Whale Fishery [1733; 6 Geo. II. c. 33];

An Act for Encouraging And Regulating the Manufacture of British Sail Cloth [1736; 9 Geo. II, c. 37];

An Act for Laying a Duty upon Apples Imported...[1737; 10 Geo. II, c. 27];

An Act to Continue Two Separate Acts... One for Encouraging the Growth of Coffee... And the other for the Better Securing And Encouraging the Trade of His Majesty's Colonies in America [1738; 11 Geo. II, c. 18];

An Act for Taking off the Duties upon Woolen and Bay Yarn Imported from Ireland to England...[1739; 12 Geo. II, c. 21];

An Act for Granting a Liberty to Carry Sugars of the Growth, Produce, or Manufacture of Any of His Majesty's Sugar Colonies in America from the Said Colonies Directly to Foreign Ports...[1739; 12 Geo. II, c. 30];

An Act to Rectify a Mistake in an Act Made in the Sixth Year of the Reign of His Late Majesty King George the First for Preventing Frauds, &c. [1740; 13 Geo. II, c. 3];

An Act for the More Effectual Securing and Encouraging the Trade of His Majesty's British Subjects to America...[1740; 13 Geo. II, c. 4];

An Act for Continuing the Several Laws Therein Mentioned Relating to the Premiums upon the Importation of Masts, Yards, and Bowsprits... [1740; 13 Geo. II, c. 28];

An Act for Restraining and Preventing Several Unwarrantable Schemes and Undertakings in His Majesty's Colonies and Plantations in America [1741; 14 Geo. II, c. 37];

An Act for the Encouragement and Increase of Seamen and for the Better Speedier Manning His Majesty's Fleet [1741; 14 Geo. II, c. 38];

An Act to Revive Several Acts, &c., and for Extending the Liberty Given by the Act of the Twelfth Year of the Reign of His Present Majesty for Carrying Sugar of the Growth of the British Sugar Colonies in America, &c., to Ships Belonging to Any of His Majesty's Subjects Residing in Great Britain...[1742; 15 Geo. II, c. 33];

An Act for Further Regulating The Plantation Trade, &c. [1742; 15 Geo. II, c. 31];

An Act to Continue Several Laws for the Encouragement of the Making of Sail Cloth in Great Britain [1742; 15 Geo. II, c. 35];

An Act for Continuing Several Laws Relating to the Exportation of British-Made Gunpowder, to the Importation of Naval Stores from the British Colonies in America, &c. [1743; 16 Geo. II, c. 26];

An Act to Continue the Several Laws Therein Mentioned for Preventing Theft and Rapine, &c., and for Granting Liberty to His Majesty's Sugar Colonies in America from the Said colonies Directly to Foreign Parts , &c. [1744; 17 Geo. II, c. 40];

An Act for the Better Encouragement of Seamen in His Majesty's Service and Privateers to Annoy the Enemy [1744; 17 Geo. II, c. 34];

An Act for Giving a Public Reward to Such Person or Persons, His Majesty's Subject or Subjects, as Shall Discover a Northwest Passage Through Hudson's Straits to the Western and Southern Ocean of America [1745; 18 Geo. II, c. 17];

An Act to Amend an Act Made in the Eleventh Year of the Reign of King William the Third, Entitled An Act for the More Effectual Suppression of Piracy [1745; 19 Geo. II, c. 30];

An Act to Continue Two Acts of Parliament, One for Encourageing the Growth of Coffee in His Majesty's Plantations and the Other for the Better Securing and Encouraging the Trade of His Majesty's Sugar Colonies in America [1746; 19 Geo. II, c. 23];

An Act for the More Effectual Securing the Duties Now Payable on Foreign-made

Sail Cloth... [1746; 19 Geo.II, c.27];

An Act for the Better Encouragement of the Trade of His Majesty's Sugar Colonies in America [1746; 19 Geo. II, c. 30];

An Act for the better Securing the Payment⁶ of Shares of Prizes Taken from the Enemy to the Royal Hospital at Greenwich and for Preventing the Embezzlement of Goods and Stores Belonging to the Said Hospital [1747; 20 Geo. II, c. 24];

An Act to Extend the Provision of an Act made in the Thirteenth Year of His Present Majesty's Reign, Entitled An Act for Naturalizing such Foreign Protestants...as Are Settled ...in Any of His Majesty's Colonies in America to Other Foreign Protestants Who Conscientiously Scruple to the Taking of an Oath [1747; 20 Geo. II, c. 44];

An Act to Continue Several Laws for Prohibiting the Importation of Books Reprinted Abroad, &c., and for Better Securing the Lawful Trade of His Majesty's Subjects to and from the East Indies, &c., [1747; 20 Geo. II, c. 47];

An Act to Continue Several Laws Relating to the Manufactures of Sail Cloth and Silk . . . [1747; 20 Geo., II. 45];

An Act to Continue Several Laws, &c., Relating to Rice, to Frauds in the Customs, &c., and to Copper Ore of the British Plantations, &c., [1747; 20 Geo. II, c. 47];

An Act for Further Regulating the Proceedings Upon Courts Martial in the Sea Service . . . [1748; 21 Geo. II, c. 11];

An Act for Permitting Tea to be Exported to Ireland and His Majesty's Plantation in America Without Paying the Inland Duties Charged Thereupon by an Act of the Eighteenth Year of his Present Majesty's Reign, &c. [1748; 21 Geo. II, c. 14];

An Act for Encouraging the Making of Indigo in the British Plantations of America [1748; 21 Geo. II, c. 30];

An Act to Continue and Amend Several Laws for the Relief of Debtors, &c. . . [1748; 21 Geo. II, c. 33];

An Act for Encouraging the People Known by the Name of Unitas Fratrum or

United Brethren to Settle in his Majesty's Colonies in America [1749; 22 Geo. II, c. 30];

An Act for Amending, Explaining, and Reducing into One Act of Parliament the Laws Relating to the Government of His Majesty's Ships, Vessels, and Forces by Sea [1749; 22 Geo. II, c. 33];

An Act for the Further Encouragement and Enlargement of the Whale Fishery . . . [1749; II Geo. II, c. 45];

An Act for the Encouraging the Growth and Culture of Raw Silk in His Majesty's Colonies or Plantations in America [1750; 23 Geo. II, c. 20];

An Act to Encourage the Importation of Pig and Bar Iron from His Majesty's Colonies in America and to Prevent the Erection of Any Mill or Other Engine for Slitting or Rolling of Iron or Any Plating Forge to Work with a Tilt Hammer, or Any Furnace for Making Steel in Any of the Said Colonies [1750; 23 Geo. II, c. 29];

An Act for Regulating the Commencement of the Year and for Correcting the Calander Now in Use [1751; 24 Geo. II, c. 23];

An Act for the More Effectual Securing the Duties upon Tobacco [1751; 24 Geo. II, c. 41];

An Act for Encouraging the Making of Potashes and Pearlashes in the British Plantations in America [1751; 24 Geo II, c. 51];

An Act for Continuing Several Laws Therein Mentioned Relating to the Permiums upon the Importation of Masts, Yards, and Bowspirits . . . [1751; 24 Geo. II, c. 52];

An Act to Regulate and Restrain Paper Bills of Credit in His Majesty's Colonies or Plantations of [New England] and to Prevent the Same being legal Tenders in Payments of Money [1751; 24 Geo. II, c. 53];

An Act to Continue Several Laws Therein Mentioned and for Granting a Liberty to Carry Sugars of the Growth, Produce, or Manufacture of Any of His Majesty's Sugar Colonies in America . . . Directly into Foreign Parts . . . [1751; 24 Geo. II, c. 57];

An Act for Avoiding and Putting an End to Certain Doubts and Questions
Relating to the Attestation of Wills and Codicils, Concerning Real Estates in That Part of
Great Britain Called England and in His Majesty's Colonies and Plantations in America
[1752; 25 Geo. II, c. 6];

An Act to Restrain the Making Insurances on Foreign Ships Bound to or from the
East Indies [1752; 25 Geo. II, c. 26];

An Act to Amend an Act . . . for Regulating the Commencement of the Year and
for Correcting the Calendar Now in Use [1752; 25 Geo. II, c. 30];

An Act for Continuing the Act for Encouraging the Growth of Coffee in His
Majesty's Plantations in America, and Also for Continuing under Certain Regulations So
Much of an Act as Relates to the Premiums upon the Importation of Mast, Yards, and
Bowsprits, Tar Pitch, and Turpentine [1752; 25 Geo. II, c. 35];

An Act for Continuing the Several Laws Relating to the Punishment of Persons
Going Armed or Disguised in Defiance of the Laws of Customs or Excise, &c., and for
the Encouraging the Trade of the Sugar Colonies in America [1753; 26 Geo. II, c. 32];
ALL which laws you will herewith RECEIVE; and you shall take a solemn oath to do
your utmost that all the clauses, matters and things contained IN the before-recited acts
and all OTHER acts of parliament now in force or that hereafter shall be made relating to
our colonies or plantations be punctually and bona fide observed, according to the true
intent and meaning thereof.

(Above in its presented form appeared in trade instructions issued between 1753 and
1765, Leonard Woods Labaree, *Royal Instructions*, vol. II, 752 - 760)

Appendix C

Each work James wrote is insightful, yet any one of his treatises provide the essential tenets defining absolutism. Considering this, focus on James's first published work, fully entitled *The Trew Law of Free Monarchies: or The Reciproock and Mutuall Dutie Betwixt A Free King, and His Naturall Subjects*, illustrates sufficiently his absolutist *modus operandi*. James's stated purpose for writing *The Trew Law of Free Monarchies*, originally published anonymously, was "to teach . . . without wasting time upon refuting the adversaries."¹ Angered by the "Sirene songs" from those in Scotland who praised or justified rebellions, especially against kings, James intended to define irrefutably "the trew grounds of the mutuall duetie, and alleageance betwixt a free and absolute Monarche, and his people."²

Utilizing fully his scholastic training, James followed a clear and restrained methodology in writing *Trew Law*. The work is divided into two main parts: the first, a three staged argument defining a subjects' duty within monarchical government; the second, refuting four common arguments justifying rebellions against unjust kings. In the

¹King James I, "The Trew Law of Free Monarchies: or The Reciproock and Mutuall Dutie Betwixt A Free King, and His Naturall Subjects," [1598] from *King James VI and I: Political Writings*, Johann Sommerville, ed., 62.

²Ibid., 64 - 5.

first part of *Trew Law*, James utilized three sources to prove that subjects owed complete, unthinking allegiance to their kings: Scripture, Scottish fundamental law, and the law of nature. In *Trew Law*'s brief introductory phase, James described the "Princes duetie to his Subjects," which actually laid out the operational premises behind James's whole absolutist argument.

In describing the Prince's duties to his subjects, James utilized the same three sources later used to define the subjects duties to their Prince. From Scripture, James wrote "Kings are called Gods by the prophetical King David, because they sit upon GOD his Throne in earth, and haue the count of their administration to giue vnto him."³ As gods on earth, he declared, kings are "to minister Iustice and Iudgement to the people;" "aduance the good, and punish the euill;" "establish good Lawes to his people, and procure obedience to the same;" procure peace, and be a "Minister of God" to his people, judging and punishing the evil.⁴ From the fundamental Lawes of Scotland, James wrote, that Kings gave "their Oath, first to maintaine the Religion presently professed, . . . and to punish all those that should presse to alter . . . the profession thereof."⁵ Additionally, kings were civilly bound to "maintain all the . . . good Lawes made by their predecessours;" and to "maintain the whole countrey, . . . in all their ancient Priuiledges

³Ibid., 64.

⁴Ibid.

⁵Ibid., 65.

and Liberties.”⁶ According to “the Law of Nature” James writes, “the King becomes a naturall Father to all his Lieges at his Coronation: And as the Father of his fatherly duty is bound to care for the nourishing, education, and vertuous gouernment of his children.”⁷

The duties a king owed to his subjects comprised a main element to James’s absolutist theory, providing a normative quality to kingship as opposed to tyranny. Despite his belief that kings had no earthly check to their prerogative, James did differentiate between good kingship and bad kingship. A good king, according to James, recognized that there existed a duty associated with kingship. In fact, following James’s paradigm, kingship necessitated a great amount of self-control and judicious wisdom. James recognized that kings who ignored the responsibility they owed their subjects, degenerated into tyrants and would eventually face Heavenly censure.⁸

James conceded that kings had a duty to their subjects, nevertheless, the duty subjects had to their kings occupied a far greater part of *Trew Law*. Although, James utilized three sources to define the allegiance that subjects owe to their kings, he employed all three to support a single position. For the scriptural proof of his thesis, James first relied on the Old Testament book of *Samuel*, which recorded that God gave Israel her first king in response to the people’s continual requests to be ruled by a king. James

⁶Ibid.

⁷Ibid.

⁸If Charles I had followed his father’s model for Kingship, the Royal Commission would never have been given jurisdiction over Massachusetts’ prerogatives.

pointed out that, in *Samuel*, God warned the Israelites that kings would become master of the nation; taking sons and daughters from families at will; requisitioning fields, vineyards, and olive trees; giving possession to whomever, all according to the singular judgement of the anointed king.⁹ Kings, argued James, were created by God, in order to placate a disgruntled nation. Further, he pointed out that God warned Israel that kings may possibly behave tyrannically, but that such was the price to pay for Monarchy.¹⁰

Using both the Old and New Testament, James noted that once God established kingship. He expected it to remain unchallenged by man. No Biblical passage, in his opinion, existed where God directed his people to rebel against an unjust or tyrannical king. To the contrary, James wrote regarding the people's allegiance to their king: "their obedience . . . ought to be to him, as to Gods Lieutenant in earth, obeying his commands in all things, except directly against God, as the commands of Gods Minister, acknowledging his a Iudge set by God ouer them, hauing power to iudge them, but to be iudged onely by God."¹¹ The Bible, according to James, forbid the subject to resist the king in any way; if the king be wicked the subjects only response could be "by sobbes and teares

⁹Ibid., 66.

¹⁰Ibid., 69 - 72. James wrote: "God commandeth *Samuel* to doe two things: the one, to grant the people their suit in giuing them a king; the other, to forewarne them, what some kings will doe vnto them, that they may not thereafter in their grudging and murmuring say, when they shal feelee the snares here fore-spoken." [68]

¹¹Ibid., 72.

to God.”¹²

Shifting from the scriptural basis for kingly power, James described the king’s position as provided by Scottish “fundamentall and ciuill Lawe.” Law, according to James, originated in Scotland only after an Irishman named Fergus, conquered all of Scotland and became her first King.¹³ Before King Fergus, Scotland possessed no laws, and no king.¹⁴ “The kings therefore in Scotland were before any estate or rankes of men within the same,” James wrote, “before any Parliaments were holden, or lawes made: and by them the lands were distrubuted . . . states erected . . . government deuised and established.”¹⁵ In one concise absolutist sentence, James declared: “the kings were the authors and makers of the Lawes, and not the Lawes of the kings.”¹⁶ While English tradition held that kings were chosen by the people to led them, James asserted that Scotland’s king conquered the people, giving land, life, and wealth as a show of benevolence, not a sign of weakness.

¹²Ibid.

¹³Fergus MacErc and his two brothers, Angus and Lorne, landed at present-day Argyll, Scotland in about 500 A.D. establishing a new dynasty to the Dalriada Kingdom. The Dalriada Kingdom unified the northern part of Britain into one rule under Kenneth MacAlpin’s reign (843). [John Cannon and Ralph Griffiths, *The Oxford Illustrated History of the British Monarchy*, (Oxford: Oxford University Press, 1988, reprinted ed., 1992), 3 - 12, 20 - 23.; Fitzroy Maclean, *Scotland: A Concise History*, 18 - 21.]

¹⁴King James I, “The Trew Law of Free Monarchies,” from *King James VI and I: Political Writings*, Johann Sommerville, ed., 73.

¹⁵Ibid.

¹⁶Ibid.

In this second proof of *Trew Law*, James created a secular basis for arbitrary rule within Scotland, separate and equal to the religious proof previously mentioned. According to James, by right of conquest, Scottish King were “ouer-Lord of the whole land,” masters “ouer euery person that inhabiteth the same, hauing power ouer the life and death of euery one of them.”¹⁷ Clarifying the ultimate power possessed by Scottish Kings, James continued, “For although a iust Prince will not take the life of any of his subiects without a cleare law; yet the same lawes whereby he taketh them, are made by himselfe, or his predecessours; and so the power flowes alwaies from him selfe.”¹⁸ Thus building on his religious proof, James pointed out that Scottish subject owed everything they possessed to their king’s generosity. Quickly, James placed Scotland’s kings above any legal convention or apparent legal contract. Still, James explained that Kings, despite being above the law were morally compelled to act true to their own laws. “A good king,” James wrote, “will frame all his actions to be according to Law; yet is hee not bound thereto but of his good will, and for good example-giuing to his subjects.”¹⁹ By placing conformity to law on an optional basis, King James essentially freed kings from any perceived condemnation from subjects for inconsistent behavior.

Finally, James’s absolutism was proven in *Trew Law* as being consistent with the

¹⁷Ibid., 75.

¹⁸Ibid.

¹⁹Ibid.

Laws of Nature. When James referred to the law of nature, in *Trew Law*, his definition differed from that used by Cicero, or English theorist before his reign. Instead of being a universal code defining just behavior, James's law of nature merely describes the way things operate outside of society. James stated that according to the law of nature, a son may never attack or resist his Father, because the son owes his existence and life force to his Father. In a similar example, James pointed out that in a body composed of limbs and head, it would never occur that an arm or leg would attempt to attack or resist the head. These illustrations used by James in describing the law of nature resembled those used by many ancient and medieval theorists. In this natural law theory, these basic units are used to illustrate the proper relationship within larger society. The body succeeds as a unit because of cooperation between its membership; likewise, a family unit exist because each member recognizes and abides by its place in the unit, realizing its particular responsibilities. Very popular with absolutist theorist, body based natural law concepts proposed that only one entity could serve as leader within a specific unit. Moving this analogy to the political sphere, it becomes justifiable for one force, such as a king, to be absolute in making decisions for the political unit. Before James came to England in 1603, however, there had always existed the premise that England possessed a mixed constitution, wherein power did not reside absolutely with either Commons, Lords or King.

Relying on his definition of the laws of nature, James illustrated how resisting a king contradicted natural law. Beginning his argument, James wrote: "the King towards

his people is rightly compared to a father of children, and to a head of a body of diuers members.”²⁰ Continuing, he explained, “the head cares for the body, so doeth the King for his people.”²¹ Using his analogy, James reasoned that in a body the head must determine, when finding an infected limb, the best remedy for the ailment; either treatment, and if treatment what sort, or amputation. Likewise, James declared that Kings were required to analyze the whole political unit under their care, determining if there existed any infected elements therein, and if so deciding either to reform this element or destroy it.²² James hoped that by using his body paradigm, perceived injustices committed by a king, which might have encouraged resistance, could be explained away; what a subject may think to be oppressive, in reality aimed toward the greater good of the political unit, and followed the dictates of natural law.

The “Father” paradigm used by James to explain a subjects’ duty to a king, united the previous two proofs, the scriptural and civil based arguments. By illustrating that kings were as a Father to their subjects, James merely built upon what had already been established through scriptural and civil law sources. From *Samuel*, God declared to the Israelites that kings would incorporate as theirs’ sons, and daughters, fields and other possessions previously held privately. Scriptural sources frequently described kings as

²⁰Ibid., 76.

²¹Ibid.

²²Ibid., 77.

Father figures within the political unit. Likewise, James had established earlier in *Trew Law* that King Fergus had gained by force and alliance all Scotland as his personal possession. James declared that in Scotland, all laws, all rights to property, and all perceived liberties existed only because Fergus, being father-like, had decided to share his absolute power. Having laid the framework, James wrote “consider, I pray you what duetie his children owe to [their Father], & whether vpon any pretext whatsoeuer, it wil not be thought monstrous and vnnaturall to his sons, to rise vp against him, to control him at their appetite, and when they think good to sley him, or cut him off.”²³ James reasoned that even following the example of the animals, never did son justly rise up against Father; likewise, never ought a subject rise up against a king.²⁴

In the second part of *Trew Law*, James, applying the absolutist principles he laid out in the first part, addressed four common arguments justifying rebellion against kings. The arguments presented in the second part of his *Trew Law* were all being circulated by reformation theorists in Scotland, like George Buchanan and John Knox. James anticipated the arguments that might be used against his theories, and by answering these hypothetical queries, he addressed the opposition and more completely explained his

²³Ibid.

²⁴James wrote regarding filial ties: “Yea, suppose the father were furiously following his sonnes with a drawen sword, is it lawfull for them to turne and strike againe, or make any resistance but by flight? I thinke surely, if there were no more but the example of bruit beasts & vnreasonable creatures, it may serue well enough to qualifie and proue this my argument.” [Ibid.]

absolutist principles. From the four arguments presented by James, three are useful in the English and Massachusetts context; these address Cicero-based natural law issues, issues that Sir Edward Coke later adopted.

The first argument favoring resistance to a king that James discussed in *Trew Law* addressed appeals to patriotism. This first argument theorized that since “euery man is borne to carry such a naturall zeale and duety to his commonwealth, as to his mother; that seeing it rent and deadly wounded, . . . by wicked and tyrannous Kings, good Citezens will be forced, . . . to put their hand to worke for freeing their common-wealth from such a pest.”²⁵ The argument that James described represented a very important issue, one he had to address. George Buchanan’s 1579 book *De Jure Regni apud Scotos* and his 1582 book *Rerum Scoticarum Historia* both asserted that since kings were accountable to the people, the people could resist and depose kings that ruled tyrannically.²⁶ The French examples, where two kings were murdered by Catholic fanatics,²⁷ and the Scottish example, where his Mother, Mary Queen of Scots was force to abdicate, undoubtedly prompted James to address Buchanan’s thesis.

Addressing the first argument favoring rebellion to kings, James gave a two part answer. Firstly, James used a theological axiom, which stated “that euill should not be

²⁵Ibid., 78.

²⁶Johann P. Sommerville, *King James VI and I: Political Writings*, xxxviii.

²⁷Supra.

done, that good may come of it,"²⁸ to discount any arguments favoring rebellion.

Continuing his argument, James argued that a king's wickedness could never be such that it would empower a subject to become a judge over that king and condemn him to death.²⁹ James argued that only kings possessed the privilege to enforce civil obedience, being ordained by God with such a duty.

Secondly, James argued that if it is indeed the State's welfare justifying rebellion, then it must be acknowledged that tyrannicide actually harms society. He reasoned, "for a king cannot be imagined to be so vnrule and tyrannous, but the common-wealth will be kept better order, . . . by him, then it can be by his way-taking."³⁰ In this argument, James suggested that to kill even a tyrant would dissolve the commonwealth, and throw the political unit back to the most primitive developmental stage. Evoking powerful absolutist doctrine, James wrote, "it is certaine that a king can neuer be so monstrously vicious, but hee will generally fauour iustice, and maintaine some order, except in the particulars, wherein his inordinante lustes and passions cary him away; where by the contrary, no King being, nothing is vnlawfull to none."³¹ Concluding his response, James cited poet Du Bartas: "Better it were to suffer some disorder in the estate, and some spots in the Common wealth, then in pretending to reforme, vtterly to ouerthrow the

²⁸Ibid., 78.

²⁹Ibid.

³⁰Ibid., 79.

³¹Ibid.

Republicke.”³²

The second argument, James investigated in *Trew Law*, addressed the religious-based appeal encouraging rebellion. This argument reasoned that since a curse “hangs ouer the common-wealth, where a wicked king reigneth, . . . there cannot be a more acceptable deed in the sight of God . . . then to free the countrey of such a curse.”³³ The position James described is exactly that stated in the third book of Cicero’s *De Officiis*,³⁴ a well read work throughout the whole medieval period. Cicero advocated frequently, that under natural law subjects always retained the right to kill tyrants, since by doing that single act, a country could be freed from the curse of tyranny.³⁵

In answering this second argument, James offered a response that completely refuted any religious arguments denouncing tyrannical behavior. Accepting the premise that bad kings were a curse, he denied “that it is lawfull to . . . shake off that curse . . . which God hath laid on them.”³⁶ According to James, “patience, earnest prayer to God, and amendment of their liues, are the onely lawful means to moue God to relieue them of

³²Du Bartas, *La Seconde Sephmaine*, troisieme jour, Les Capitaines, cited in Ibid.

³³Ibid.

³⁴Cicero, *De Officiis*, Walter Miller, ed., trans., Cicero in Twenty-Eight Volumes, vol. XXI, (Cambridge: Harvard University Press, 1913, reprinted 1990), III, 83.

³⁵Ibid.

³⁶King James I, *Trew Law of Free Monarchies*, Johann Sommerville, ed., 79.

that heauie curse.”³⁷ The utility behind the absolutist doctrine is evident in how easily James could excuse tyranny; accepting that God would punish evil nations, tyranny could appear somehow godly, by becoming a heavenly agent. James suggested that evil kings may merely be following their divine destiny by raping and pillaging their subjects.

The final argument that James addressed related to the English constitutional context. It dealt with a legalistic justification for rebelling against kings. According to this final argument, the king at his coronation entered into a legal contract between himself and his people: “whereupon . . . if the one part of the contract or Indent bee broken vpon the Kings side, the people are no longer bound to keepe their part of it, but are thereby freed of their oath.”³⁸ The belief in a binding contract between king and his people entered into at coronation embodied pre-Stuart constitutional thought, and by addressing this issue James addressed an argument later used against him in England.

In his response to the social contract theory favoring rebellion, James relied on the elevated position held by kings to refute any legalistic arguments. He denied that the coronation oath represented a contract in the legal sense, since kings were above law, (or rather were law) but he did concede that kings “willingly promiseth to his people, to discharge honorably and trewly the office giuen him by God ouer them.”³⁹ Stipulating his

³⁷Ibid., 79 - 80.

³⁸Ibid., 81.

³⁹Ibid.

interpretation of the coronation contract, James wrote, “now in this contract, betwixt the king and his people, God is doubtless the onely Iudge” because “by the oath in the coronation, God is made iudge and reuenger of the breakers.”⁴⁰ Continuing his logic, James declared, “since God is the onely Iudge betwixt the two parties contractors, the cognition and reuenge must onely appertaine to him: . . . God must first giue sentence vpon the King that breaketh, before the people can thinke themselues freed of their oath.”⁴¹ In conclusion, he reasoned that every contract breakage required a trial before judgement could be made; in the contract between people and king, God could be the only possible trial judge.

⁴⁰Ibid.

⁴¹Ibid.

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