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In the American Colonies

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IN the American colonies in the eighteenth century a situation arose quite parallel to that which existed during the contests between the crown and the courts in seventeenth-century England. In England, the prerogatives of the crown were not clearly defined. Wide claims could be made for them and equally strong claims could be made for limitations on them. A body of absolute political doctrine as to the powers of rulers had grown up on the Continent, and the two countries which then set the fashion in politics, France and Spain, were autocratic monarchies. On the other hand, the English lawyers had received a taught tradition of limitations on governmental action, subjection of officials to the law of the land, and rights guaranteed by law to the subject. In America, a rapidly developing country, with expanding trade and commerce, with great natural wealth, with an adventurous pioneer population, with its own legislatures and courts, found itself politically thirteen distinct provinces, each subject to absolute government from Westminster. The legal incidents of the relation between the
British government and the colonies were not clearly defined. There had been no need of defining them. In the era of colonization the settlements had been feeble, had needed the protection of the home government, and had raised no questions as to its powers. But the home government in the eighteenth century, like the English king in the seventeenth century, needed money badly and was looking for sources of revenue. As the king sought to raise money by impositions by his own authority, without the consent of Parliament representing the people who were to pay, so the home government sought to raise money from the colonies without applying to them or obtaining their consent. Moreover, the regime of absolute monarchy at which the Stuarts aimed involved the disregard of individual interests which had long been recognized and restriction on individual activity and enterprise which inevitably met with resistance in a time of faith in individual reason, breakdown of authoritarianism, and restless acquisitive self-assertion. In colonial America of the eighteenth century the completely centralized government through the Board of Trade and Plantations, the Privy Council, and Parliament, with no consciousness of limitations beyond what Mr. Dooley called gentlemanly restraint, involved like disregard of recognized individual interests and restrictions on individual activity and enterprise. People who had cleared the wilderness, fought with the savages, and established flourishing centers of trade and commerce in the new world did not take kindly to the restraints which the colonial status was held to involve.

Lawyers played a chief part in the contests with the Stuarts. They found their weapons in the doctrines which had been worked out by the experience of the common-law courts in trying official action by the provisions of the Great Charter. Coke made the cases under the Plantagenets the material for a commentary on Magna Carta which made a treaty between the paramount landlord and his tenants in chief a legal document defining limitations in the relation of
ruler and ruled. What the medieval cases and tradition were to Coke, Coke's Second Institute and the decisions of the common-law courts he discusses or that followed him were to the American lawyers before the Revolution. In each case the opposition was both legal and political. Lawyers took part in each in both capacities. But the lawyers gave a legal turn to the political opposition and the result was a nation ruled by law and on this side of the water a written constitution as fundamental law carrying on the medieval English idea of the law of the land.

So steeped were the eighteenth-century colonial lawyers in Coke's teachings, for Coke's Institutes were the most authoritative law books available to them and they were dealing with a tradition not a code, that the controversial literature of the era of the Revolution, if it is to be understood, must be read or interpreted by a common-law lawyer. Indeed, he must be a common-law lawyer of the nineteenth-century type, brought up to read and reread Coke and Blackstone till he got the whole feeling and atmosphere of those who led resistance to the home government. It was a wrench to many a cavalier lawyer, whose father had fought for Charles I, to stand for the law of the land against James II. It was a wrench for many a loyal Englishman in the colonies, trained in law in one of the Inns of Court, to take a stand which branded him as a rebel because he held to the teachings of his law books and felt bound to resist the claim of the British government to absolute rule.

While according to American legal theory the colonists brought the common law of England with them when they came to the new world, there was for some time no need of so advanced and technical a body of legal precepts as the seventeenth-century English law. Law, as distinguished from laws, requires lawyers, and law and lawyers are little needed until there is a considerable economic development. A frontier society needs little more than offhand magisterial justice. For example, the beginnings of the administration of justice
in New England were by no means legal justice. An English lawyer who came to Boston about 1637 wrote in 1642 that the colonial tribunals ignored the English common law and sought to administer the Mosaic law. The laws in seventeenth-century England were hard on the dissenters who were largely colonizing America and the experience of administration of justice which many of them had had was one of high-handed enforcement of penal statutes by magistrates. Accordingly, they were inclined to assume that law was "a dark and knavish business." Where the layman in the colonies at that time knew something about law he was likely to find that its ideals were those of the relationally organized society of the Middle Ages and so out of touch with those of the pioneers who were opening up the wilderness.

Need for law and for lawyers came with the economic development of the colonies and the rise of trade and commerce. From the beginning there had been colonial legislation, subject to disallowance for not conforming to the common law or to English legislation, and so calling for some knowledge of English law by those who drafted it. Appeals to the Privy Council required more care on the part of court and counsel and parties since the expense of taking a case to Westminster and the delay and expense in defending a judgment there were serious. In the latter part of the seventeenth century a system of courts replaced legislative justice and magistrates, and at the end of the century the courts of review began to be manned by trained lawyers. Moreover, at the same time and in the eighteenth century there came to be an increasing number of lawyers in the colonies who had been trained in the Inns of Court.

In Pennsylvania, Andrew Hamilton, a barrister and bencher of Gray's Inn came to Philadelphia in 1682. He is well known for his defense of Zenger in 1735, the pioneer case on freedom of the press, in which he argued successfully for the common-law rights of Englishmen. In the time just before the Revolution five barristers of the Middle Temple
CONSTITUTIONAL GUARANTEES OF LIBERTY

were at the Pennsylvania bar, and two of them signed the Declaration of Independence.

In Virginia, William Fitzhugh, educated as a lawyer in England, was practicing in 1680. In the first half of the eighteenth century there were six who had been trained in the Inns of Court, three of them becoming attorneys-general. The leader of these was Sir John Randolph who at his death in 1737 was counted among the conspicuous leaders of the profession in America. Between 1750 and the Revolution there was an exceptionally strong group of lawyers in Virginia, many of them trained in the Inns of Court, and others taught by those so trained, among them George Wythe, who afterwards decided one of the pioneer cases refusing to give effect to a legislative order contrary to the state constitution, and George Mason, who drafted the first American bill of rights.

In Maryland, Daniel Dulany, Sr., a barrister of Gray's Inn, was admitted to the bar of the Provincial Court in 1710. One of the first items in the events that led to the Revolution is his pamphlet, "The Right of the Inhabitants of Maryland to the Benefit of English Laws" (1728), growing out of disallowance of provincial legislation by the proprietor. Daniel Dulany, Jr. also trained in the Inns of Court, admitted in 1747, was the leader of the bar in struggles over arbitrary assertions of legislative-powers by royal governors and in the agitation over the Stamp Act. His pamphlet, "Considerations on the Propriety of Imposing Taxes on the British Colonies for the Purpose of Raising a Revenue by Act of Parliament" (1765) is one of the classics of that controversy. Four Maryland lawyers who signed the Declaration of Independence had studied law in the Inns of Court.

In Massachusetts, in 1647, the Governor and Assistants ordered the importation, among other books, of two copies each of Coke's First and Second Institute and of Coke's Reports. This was said to be done "to the end that we may have better light for making and proceeding about laws." But the
leaders of the bar who took part in the agitation over the Stamp Act and the events that led to the Revolution were not educated in the Inns of Court. Nor were the lawyers of colonial New York who resisted the attempt of the royal governor to review verdicts of the jury on the facts. But their reading of the law books made them obnoxious to the governor, who wrote to Lord Halifax that they enlarged the popular side of government and depreciated the powers of the crown.

Of the signers of the Declaration of Independence from North Carolina, both were lawyers, one of whom had studied under James Otis and the other under Edward Pendleton. Thus both were grounded in Coke's doctrines. Three of the lawyers practising in the province before the Revolution were trained in England.

In South Carolina, thirteen of the lawyers at the bar before the Revolution had studied in the Inns of Court. The leader among them was John Rutledge, barrister of the Inner Temple in 1761, foremost in opposition to the Stamp Act, a signer of the Declaration of Independence, and Chief Justice of the Supreme Court of the United States in 1795.

It will have been seen that lawyers trained in the Inns of Court and those who had studied in their offices in America took an active part in the contests which led to the Revolution. But where there were no lawyers trained in the Inns of Court, lawyers who had "read law" had read Coke's Institutes, published between 1628 and 1644, the authoritative systematic exposition of the common law down to Blackstone's Commentaries, published 1765-1769. Thus they were brought up on ideas of "the law of the land," and of the immemorial rights of Englishmen guaranteed by Magna Carta. Blackstone at once became the first book to be studied by American lawyers and held that place till the beginning of the present century. The Commentaries had an exceptionally large sale in the colonies. We are told that twenty-five hundred copies were bought in America before the Revolu-
tion. A subscription reprint was published in Philadelphia in 1771-1772 and the list of subscribers is headed by "John Adams, Esq., barrister at law, Boston, Massachusetts Bay." Blackstone set forth Coke's doctrine in readable form.

Five ideas were assumed by American lawyers of the time of the Revolution, and by our lawyers of the nineteenth century, as involved in government according to law in contrast to absolute monarchy. They were: (1) The idea of a fundamental law, the "law of the land," to which all official and governmental action was bound to conform, which law was to be applied by the courts in the course of orderly litigation according to the common law, and could be invoked against officials by any one aggrieved. (2) The idea of immemorial rights of Englishmen, secured by the law of the land, and of the common law in which they were recognized as the birthright of Englishmen and so of Americans. Coke's Second Institute speaks of the law of the land as the "best inheritance that the subject hath" and is full of old law-French maxims expressing that idea. (3) The idea of authoritative declarations of these rights in charters and bills of rights. Indeed, there was a precedent for a written constitution, such as all Americans believed in after independence, in the Instrument of Government adopted under the Commonwealth in 1653. It contained a few declarations of fundamental rights and provided "that all laws, statutes, ordinances, and clauses in any law statute and ordinance, to the contrary of the aforesaid liberty shall be esteemed null and void." (4) The idea of an independent judiciary, as set forth in the English Bill of Rights of 1688, to administer the fundamental law, and of lawmaking by a body distinct from the executive. (5) The idea of courts refusing to apply statutes in contravention of the fundamental law; an idea made familiar not only by the seventeenth-century cases which the lawyers found in the Abridgments, or Digests of reported decisions, and reports, but also by appeals to the Privy Council in which statutes were held to conflict with colonial
charters or to run counter to provisions in charters for legislation in accordance with or not repugnant to the common law.

In 1687, the first American law book was published in Philadelphia. Its title is as significant as its contents. The title page reads: "The Excellent Privilege of Liberty & Property," being the Birthright of the Free-born Subjects of England. Containing I Magna Charta, with a learned Comment upon it. II The Confirmation of the Charters of the Liberties of England and of the Forrest, made in the 35th year of Edward the First. III A Statute made the 34 Edw. I commonly called De Tallageo non Concedendo; wherein all Fundamental Laws, Liberties and Customs are confirmed. With a Comment upon it. IV An abstract of the Pattent granted by the King to William Penn and his Heirs and Assigns for the Province of Pennsilvania. V and Lastly, the Charter of Liberties granted by the said William Penn to the Free-men and Inhabitants of the Province of Pennsilvania and Territories thereto annexed, in America." There is a Latin motto to the effect that a greater inheritance comes to each of us from law and laws than from parents. The commentary is taken from Coke's Second Institute. In 1721 a book was published in Boston entitled "English liberties or the freeborn subject's inheritance." It contains among other things, Magna Carta, the confirmatory statute of Edward I, the Habeas Corpus Act, a Declaration of the Liberties of the Subject, and the Petition of Right. Coke's Second Institute is drawn on extensively. The law books of the time commonly repeat out of Coke's Commentary a law-French saying of the Middle Ages that the "law is the greatest inheritance the king hath, for without the law there would be no king and no inheritance." It should be added that on the eve of the Revolution, in 1774, in a case of Campbell v. Hall, in the King's Bench, an action to recover from the King's collector of customs a duty imposed by royal proclamation upon sugar exported from the island of Gremada, the court, in an opin-
ion by Lord Mansfield, one of the greatest of common-law judges, rendered judgment for the plaintiff, holding that where a local legislature had been set up, the pre-existing law of the island could only be changed by that legislature or by Parliament. Thus while American lawyers were urging restrictions of fundamental law which forbade impositions upon the colonies without their consent, the law of the land was being enforced against the crown and its officers in the nearby Caribbean. This could but confirm American lawyers in their belief in a fundamental law.

Legislation in South Carolina in 1712 adopted as the law of that Province "all such statutes in the kingdom of England as declare the rights and liberties of the subjects and enact the better securing of the same," and "such parts of statutes as declare the rights and liberties of subjects." Such statutes, aimed at the royal governors, grew out of friction between the lawyers, arguing for restrictions resting on fundamental law, and the absentee government by authority of the crown. They asserted the immemorial rights of Englishmen. The tract of Daniel Dulany, Sr. in 1728, Andrew Hamilton's argument at the trial of Zenger (1735), Otis's argument against writs of assistance (1761), the tract of the Younger Daniel Dulany against the Stamp Act (1765), and the Declaration of Rights of the Continental Congress (1774), all insist upon the common-law rights of Englishmen as the rights of the colonists. It is worth while to quote from the latter: "That our ancestors who first settled these colonies were, at the time of their emigration from the mother country, entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England." John Adams in 1765 argued that the Stamp Act was "utterly void" (1) as contrary to the natural rights of man and (2) contrary to the liberties of Englishmen. It should be noted here how a philosophical political idea and a historical legal idea are fusing in the argument of one who perhaps was more politician than lawyer. It will be necessary to
speak more fully of this fusion in another connection. The Continental Congress made its claims in title of "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts." But it asserts them as Englishmen.

It may well be asked at this point, why did none of these charters of liberties and no declaration of rights down to the Virginia Bill of Rights of 1776 include freedom of writing and speaking and freedom of the press which now stand first in our national Bill of Rights and in bills of rights generally in the states?

It is not difficult to understand why nothing was said on this subject in the Constitution of the United States as first adopted. The men who were framing that Constitution were chiefly interested in a frame of government to supersede the old Articles of Confederation. George Mason, who drew the Virginia Bill of Rights did urge one for the federal constitution, but little attention was paid to him. It was considered that each state had a bill of rights, needed because of the plenary lawmaking power of the states. But the powers of the federal government were only those given it by the Constitution, and it was thought that power to do the things feared and guarded against by bills of rights, had not been given to the general government. However, people generally in the country feared that the new government they had set up over their local governments would do the things the British government had done and insisted on the first nine amendments. The two things in the bills of rights that are not in Coke's Second Institute are freedom of the press and freedom of religion, and the reason is historical.

Today the Supreme Court of the United States holds that the provisions in the first amendment as to freedom of speech and of the press and freedom of religion are included in the fourteenth amendment; that they are to be deduced from the idea of liberty which is secured against the states by that amendment. That is the logical deduction from the idea
of liberty as Coke defines it. Logically Coke could very well have argued for freedom of speech and of the press in his Commentary on Magna Carta. Why didn’t he? The reason is historical. In the seventeenth century the common-law courts and lawyers had not been confronted with these questions. In his day they were in the jurisdiction of the Star Chamber, not of the courts. In the Middle Ages the King was in a pretty constant struggle with the feudal nobility as to who was to hold the reins of government. Before and after the Reformation there was long a struggle between state and church whether there was to be a political organization of society or a religious organization. Thus the dignity of the political authorities was a very important consideration. Any one who criticized the government was weakening the power of the government in these struggles. The government in consequence was very jealous of any criticism of any sort. Such cases were dealt with in the Star Chamber, in which common-law judges sat with others and no doubt operated in some measure as a check. But that tribunal was an administrative agency. If one criticized the government so as to endanger its supremacy or interfere with its efficient functioning, he was brought up before and disciplined by the Star Chamber. The consequence was that there are no discussions of freedom of speaking (except in Parliament) in the Second Institute.

But there came to be every reason in the eighteenth century why the colonies should be concerned about freedom of speech and of the press as they began to be irked by the complete centralization of power at Westminster and by the high-handed methods of royal governors. The pamphlets published by leading lawyers against the Stamp Act, the pamphlets attacking the disallowance of colonial statutes by the Privy Council, the legal arguments against arbitrary conduct of royal governors were considered seditious by the home government and the governors. But juries commonly thought otherwise, so that there was a continual contest to
get these matters away from juries and before appointees of
and dependents upon the government.

After the Star Chamber was abolished, Charles II attempted to use the courts by orders in the nature of an injunction
against publication of matter obnoxious to the government.
Chief Justice Scroggs was impeached in 1681 among other
things for such an order, but escaped by dissolution of Par-
liament. The method of dealing with such cases which re-
mained was called an information *ex officio* brought by the
Attorney-General for a seditious libel. A seditious libel for
the purposes of this proceeding was a publication which the
government did not like. It might criticize the conduct of
the government or of some particular official. If Parliament
was criticized, or some member of Parliament, the House of
Commons took it up. Between the Restoration (1660) and
the Revolution, there were no less than forty-two cases of
imprisonment by order of the House of Commons for criti-
cizing Parliament or some member of Parliament. But if the
crown was criticized, or the ministers of the crown, resort
was had to information *ex officio* by the Attorney-General.

What this signified was that it did not require indictment
by a Grand Jury. In an ordinary case of a serious crime
there had to be an indictment or presentment by a grand
jury. But if the king or the ministers of the king were criti-
cized the Attorney-General filed an information *ex officio*
on which the accused could be tried. The difficulty in these
cases was to get juries to convict. The sheriff was appointed
by the crown and removed by the crown, and he picked the
jury. For example, in the trial of the Seven Bishops for pre-
senting a statement to James II as to his illegal Declaration
of Indulgence, the king’s brewer was on the jury. He is re-
ported to have said that if he found the bishops guilty he
could sell no more beer to the people, while if he found them
not guilty he could sell no more to the king. One need not
say that the latter alternative was the reason why the sheriff
put him on the jury.
The political literature of the time is full of discussion of them. It is enough to mention here the case of John Wilkes in 1765, the cases of Almon, Miller, and Woodfall, who published the letter of Junis to the king (1770), and the case of the Dean of St. Asaph's in 1783. The Dean of St. Asaph's procured the publication of a document called "A Dialogue Between a Scholar and a Farmer," written by a barrister, which severely criticized the contemporary situation in British politics. Accordingly, an information *ex officio* was filed and the Dean was tried in the Court of King's Bench. The Chief Justice, following the law which had been laid down in the time of the Stuarts, charged the jury that it was for the court and not the jury to say what was a seditious libel: all that the jury could try was whether it had been published or procured to be published by the accused. But the jury in many of these cases, as in the case of the Seven Bishops, took advantage of its power to render a general verdict of acquittal, in spite of the charge of the court.

Such was the situation in eighteenth-century England. Much the same story is to be told for the colonies. The first newspaper published in this country, published in 1690, was suppressed after the first issue because it indulged in reflections on the colonial government. The second was subjected to a censorship, the censors being appointed by the royal governor. Censorship was abolished in England in the reign of William III, but it continued in the colonies. It was an institution of the church in the Middle Ages, very proper possibly as to books on matters spiritual, but carried over into matters temporal, particularly matters political, open to grave objections. To pass, however, to the legal side of the matter, the case which immediately excited the public mind was that of John Peter Zenger in New York in 1734.
One Cosby was appointed Governor of New York by the Crown in 1734. He reached New York in August of that year, having had a long voyage. In the interval between his appointment and his arrival a certain Van Dam did the things to be done by the Governor for which fees were chargeable and collected the emoluments of the office. Governor Cosby claimed the money as belonging to him by virtue of his office from the date of his appointment, while Van Dam claimed a set off for his work in performing the duties. The Governor found that the local juries were not going to be favorable to him so he conceived the idea of setting up an equity jurisdiction in the Supreme Court. He had the power of appointing and removing judges and he removed the Chief Justice, after the manner of a Stuart king because the judge's view of the law did not meet the Governor's wishes. When Van Dam tried to bring a separate action to assert his claim he found that he could not get process served because the Governor had the appointment and removal of those who alone could serve writs. Between 1701 and 1728, the legislature had refused repeatedly to set up a court of equity which could proceed without a jury. The Privy Council could reject any measure for better organization of courts that did not provide for a court of equity, but it could not compel the provincial legislature to establish one. An impasse resulted. So Governor Cosby set up a court of equity on his own responsibility, with no authority from any one but himself and his case against Van Dam was heard in that court. In truth, that court had no jurisdiction on principles of equity. The Governor's claim called for an ordinary action at law for money had and received. But such things did not trouble a masterful royal governor of the eighteenth century.

Zenger was publishing a newspaper in New York after 1733. When Governor Cosby came, Zenger began to comment on his high-handed actions. He set up a censorship by his own authority and Zenger in a vigorous article on liberty
of the press called attention to the way it operated under the control of the Governor. In another article on the right of trial by jury he commented on the way the Governor had tried to evade jury trial. At the Governor's instance one of the justices of the Supreme Court charged the Grand Jury in strong terms about seditious libel, but the Grand Jury refused to indict Zenger. However, the sheriff was under the control of the Governor and the sheriff picked the Grand Jury, so at the next term the Chief Justice charged the Grand Jury violently about seditious libel and Zenger was indicted.

Andrew Hamilton, one of the great lawyers of that time, came on from Philadelphia and defended. In those days one could argue law as well as facts to the jury, at least in a criminal case. He made a powerful argument based on Magna Carta, the law of the land and the liberty of the subject, and Zenger was acquitted. The case attracted much attention throughout the country and was continually referred to in the discussions as to seditious libel which went on in England as well as America. The situation in which nobody could criticize the operations of government nor even comment on them was felt to be intolerable. This is the immediate background of the provision as to freedom of speech and of the press in all American bills of rights. The mischief was that the government had complete control over everything in the way of comment upon its operations. The remedy was to free expression of opinion, either in speech or in writing, from any restrictions imposed by the government.

Eight grievances which American lawyers regarded as violations of immemorial rights or liberties secured by the law of the land, as they found them declared in their law books, were: (1) The imposition of taxes on and raising of revenue from the colonies without the consent of the legislative body representing them. (2) The unification of all the powers of government of the colonies in a centralized administration at Westminster which continually neglected or even positively injured the interests of the colonists in the
interest of those who had influence on British politics. (3) Deprivation of jury trial by extending admiralty jurisdiction at the expense of the common law. (4) Providing for trials away from the vicinage so as to put parties to expense and annoyance and deprive them of the advantage of good repute among their neighbors. (5) Infringement of the right to assemble in order to consider grievances and petition the king for redress. (6) Quartering soldiers and keeping a standing army in time of peace without getting the consent of the colonial legislature. This was complained of specially in New England and echoes of the complaint may be seen in the bills of rights in Massachusetts and New Hampshire. It was a method of coercion attempted by James II and was expressly pronounced unlawful in the English bill of rights. (7) Requiring oppressive security from a claimant of seized property before he could claim it and defend his property rights. This practice, which reminds one of the methods of Empson and Dudley denounced by Coke as against the law of the land, was resorted to in enforcing the Navigation Acts by which the British Government sought control of the trade and commerce of the colonies, requiring exports by way of England or in English ships and imports from or by way of England and in English ships. (8) Referring to those laws and to instructions to the royal governors as to industries in the colonies, interference with merchants and traders not in time of war, contrary to the interests of the colonies and without any reference to colonial legislatures.

As to the first, Otis put the matter thus: "Taxes are not to be laid on the people but by their consent in person or by deputy," and cites the Second Institute on impositions "laid by the king's absolute power." Also, in arguing that subjects cannot lawfully be charged for the defense of the realm without their consent through their representatives, he cites cases from the Second Institute. As to interference with the trade and commerce of the colonies, in his tract "The Rights of the American Colonies" he argues from Coke's Second In-
stitute, the commentary on chapter 41 of Magna Carta. The first half of his argument in that tract is based on natural law and natural rights. The second half of his argument proceeds on Coke's Second Institute. In the instructions to the agent for Massachusetts by a committee of which Otis was a member, published as an appendix to his tract, it is said: "The judges of England have decided in favor of these sentiments when they expressly declare that . . . acts against the fundamental principles of the British Constitution are void." He cites *Day v. Savadge*, *City of London v. Wood*, and *Bonham's Case*, and a remark of Powys arguendo in a case in 1712 which, he shows, concedes the doctrine. If many of the American lawyers who cited those cases with assurance for a century after 1688 were trained in the Inns of Court in the eighteenth century, it only shows what one may see in the English reports of the time and in the doubtful language of Blackstone in 1765, that the English lawyers of the fore part of that century who were their teachers had not yet learned what the effect of the English Revolution was to be upon that part of the doctrine they had learned from the century before.

Even before the Revolution, along with the legal theory of the rights of Englishmen, defined by the law of the land and to be given effect by the common-law courts, a philosophical theory of natural rights of man, demonstrated by reason and morally binding on all rulers, began to be urged in America. In 1725, Gridley, the father of the Boston bar, advised John Adams that study of natural, i.e. ideal, law, set forth in the Continental treatises on the law of nature and nations, if unnecessary in England, was important for the American lawyer. After the break with authority at the Reformation, when jurists sought to find some unchallengeable basis for the binding force of law, they turned to reason. The Renaissance had brought in a boundless faith in reason. Where the Middle Ages had found a twofold foundation for truth in revelation and in reason, Grotius in 1625 had pro-
nounced that he could conceive of natural law even if there were no God. In the philosophical jurisprudence of the eighteenth century the idea of natural law was universally accepted. Out of this theory of a universal ideal law grew a theory of natural, that is, ideal rights, demonstrated by reason as deductions from human nature — from the ideal abstract man. Grotius defined a right as the moral quality which made it just and right that a man have certain things or do certain things. Contemporary jurists on the Continent held to four propositions: (1) There are natural rights demonstrable by reason. They are eternal and absolute. They are valid for all men in all times and all places. (2) Natural law is a body of rules, ascertainable by reason, which perfectly secures all these natural rights. (3) The state exists only to secure men in these natural rights. (4) Positive law, the law applied and enforced in the courts, is the means by which the state performs this function and is morally binding only so far as it conforms to natural law.

English lawyers have never had much concern with philosophy and natural law found little place in their books. Chief Justice Hobart in *Day v. Savadge* pronounced an act of Parliament making a man a judge in his own case, contrary both to the law of the land and to natural law, void in law and in morals. Blackstone set forth the theories of Grotius and announced the invalidity of positive laws at variance with natural law, but then set forth the immemorial common-law rights of Englishmen and explained that positive laws contrary to natural law were not binding in *foro conscientiae*. When Americans were beginning to think of independence the transition from the common-law rights of Englishmen, claimed in the Declaration of Rights of the Continental Congress in 1774, to the natural rights of man, claimed in the Declaration of Independence, was an easy one. It is significant that the rights claimed by either title were the same. John Adams in Novanglus, argued that New Englanders derived their laws not from Parliament nor from
the common law but from nature. Jefferson claimed the rights of Americans by the universal title of humanity when the breach with England made it awkward to claim them as Englishmen.

Down to the Declaration of Independence, however, the rights claimed are those of Englishmen. The memorial of the City of Boston when the courts were closed because of the Stamp Act, claims the law as the best birthright of Englishmen. The Declaration of Rights of the Continental Congress claims the rights secured by royal charters and the benefit of the common law. The colonists were asserting something more than moral claims. Theirs were moral claims backed by the law of the land enforceable in the courts.

Moreover, as shown by the prologue to the Declaration of 1774, these rights had always been claimed and set forth in authoritative declarations: Magna Carta and its successive reissues; the Confirmation by Edward I; the Petition of Right; the English Bill of Rights. The words of the Declaration deserve to be quoted: "Whereupon the Deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties declare their claim to the legal rights of free natural born subjects, to the common law, to trial by jury, and to assemble peaceably to consider grievances and petition for redress." This goes back to the articles of the barons, the Petition of Right and the English Bill of Rights.

As the Englishman at home objected to concentration of all political power in the king, so the Englishman in the colonies objected to concentration of all political power over the colonies in the government at Westminster. All acts of colonial legislatures were subject to veto by the Privy Council. They could be "disallowed" within five years, and even if not disallowed, when judgments based on them came to
to the Privy Council on appeal they might be held invalid as not in accord with the common law or in conflict with the colonial or provincial charter. Executive power was in the hands of a governor appointed by the crown. The Board of Trade and Plantations at Westminster sent him full instructions and required reports from him to show that he was carrying them out. The judges in the colonial courts were appointed by the governor and removed by him. In Maryland, says the historian of the courts, "the Governor had complete control over the tenure of office of judges, all holding office at his pleasure, and they came by reason of that fact to be spoken of sometimes as 'minions of power' or 'satellites'." The governor's council, appointed by the crown and holding during the pleasure of the crown, was the upper house of the legislature. It was sometimes the court of equity with wide, ill-defined powers. It was sometimes the ultimate court of review subject to appeal to the Privy Council. What such a polity could mean is illustrated by Zenger's case. It was properly objected to in article 10 of the Declaration of Rights of 1774, following the English guarantee of independence of the judiciary in 1689. Moreover, an appeal lay from the colonial courts to the Privy Council which under the conditions of travel in those days was expensive, dilatory, and vexatious. In one case a colonial legislature voted to pay the expense of a litigant, successful in the colonial court, who had to defend his judgment at Westminster. Colonial legislatures often sought to limit the time for appeals to the Privy Council, or to limit the cases in which they might be brought, or to require leave of the colonial court to bring them. Such statutes were frequently "disallowed." In any event, the Privy Council did not hold itself bound by them and for what it considered good cause would extend the time or grant leave when the colonial court had refused it. The separation of powers, which became fundamental in our constitutional law, was urged already in colonial America as a relief from excessive concentration of political power.
Most significant of all, however, the foundation was laid for a real constitutional law; for a body of precepts enforced by the courts in the ordinary course of ordinary legal proceedings; for guarantees which those aggrieved could invoke in the courts as part of the law of the land which judges were bound to administer, not mere pious exhortations which legislatures and executives might obey or disregard as they liked. American lawyers of the colonial era were brought up on the idea of courts refusing to apply statutes in contravention of the fundamental law or law of the land.

Thus there are three points of origin of what has been called the American doctrine of the power of courts with respect to unconstitutional legislation; a power which it should be said in passing is not peculiar to America but has had to be asserted under written constitutions in Canada, in Australia, in South Africa, and in Eire. One is the idea of the law of the land as expounded in Coke's Second Institute. A second is Coke's doctrine that statutes contrary to common right and reason and so to fundamental law were void, or, as the medieval cases said, impertinent to be observed. The third is the practice, familiar to American lawyers of the colonial era, of appeals to the Privy Council in which statutes enacted by colonial legislatures were held void, i.e. not to be the basis of judicial decision, because in conflict with some provision of the colonial or provincial charter or in contravention of the common law, made by the charter the measure of lawmaking authority. That statutes could be scrutinized to look into the basis of their authority and if in conflict with fundamental law must be disregarded was as much a matter of course to the American lawyer of the era of the Revolution as the doctrine of the absolute binding force of an act of Parliament is to the English lawyer of today. American lawyers were taught to believe in a fundamental law which, after the Revolution, they found declared in written constitutions. After 1688 there was no fundamental law superior to Parliament. But the law of the land still restrained the action of the crown and of officials.
In 1761, James Otis in Paxton’s Case, arguing against the writs of assistance, relies on Bonham’s Case, Day v. Savadge, and City of London v. Wood, quoted from Viner’s Abridgment (1742-1753) a twenty-three volume digest of English case law from the Year Books and the reports, the proceeds of which endowed Blackstone’s professorship at Oxford. As Gray (afterwards Justice of the Supreme Court of the United States) says in his note to Paxton’s Case in Quincy’s Reports, the doctrine laid down by Coke in Bonham’s Case “was repeatedly asserted by Otis and was a favorite one in the colonies before the Revolution.” In John Adams’ Diary he tells us of a number of suits brought in 1762 for penalties under a statute of the Province, and of the argument of Jeremy Gridley, then leader of the bar. The words of the Diary are: “Authorities from Hobart’s and Coke’s Reports were produced . . . that a man shall not be judge in his own cause, and that an act of Parliament against natural equity, as that a man shall be judge in his own case would be void.” After the Long Parliament ordered the publication of the Second Institute, Coke’s teachings became commonplaces in New England. As far back as 1688 we are told in the Lambert MS that “the men of Massachusetts did much quote Lord Coke.” Later, Hutchinson, speaking against the Stamp Act in 1765, says: “The prevailing reason . . . is that the act of Parliament is against Magna Charta and the natural rights of Englishmen,” and therefore, “according to Lord Coke, null and void.” Likewise, in a letter of that year Hutchinson writes: “Our friends to liberty take advantage of a maxim they find in Lord Coke, that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is void.”

In 1765, the effect of the Stamp Act, which required the papers necessary in carrying on the work of the courts in Massachusetts to be stamped, was to close all the courts for want of the required stamped paper. As this had a paralyzing effect upon business, the citizens of Boston, in town meeting,
addressed a memorial to the Governor in Council praying the Governor to give directions to open the courts. John Adams and James Otis argued for the memorial. Adams' argument went on two propositions: (1) that the statute was against common right and reason in that it imposed a tax without the consent of the people or their representatives, and (2) that it contravened chapter 40 of Magna Carta by denying or delaying justice. Otis also argued from the guarantee against denying or delaying justice and cited Coke.

Perhaps the most striking example of the general opinion of American lawyers in the colonies as to the power of courts with respect to statutes contrary to fundamental law is to be seen in the action of the County Court of Northampton County, Virginia, in 1766. The court was confronted with the same situation that had closed the courts in Boston. The Stamp Act required the use of stamped paper for legal proceedings and no stamped paper was at hand. If the act was followed the business of the courts must stop. The County Court in Virginia at that time was a superior court of record with jurisdiction of all cases at law and equity involving more than twenty shillings. It was held before the magistrates of the county and the decisions of a bench of seven were binding upon all the other county courts. Accordingly, a petition to open the court was presented and special justices were added to the regular bench of five. The court held that the Stamp Act did not "bind, affect, or concern the inhabitants of this colony," or, in other words, that it was impertinent to be observed, and that public business could go on without the officials incurring penalties under the act. Repeal of the statute prevented the matter from going further, but the assurance with which the matter was determined shows how firmly the idea of judicial power in such cases was rooted in the mind of the profession.

If anything more had been needed to familiarize Americans with judicial scrutiny of the validity of legislation, re-
view by the Privy Council of judgments of colonial courts based on colonial statutes sufficed. The charters of Massachusetts, Virginia, and Georgia allowed enactment of laws “not contrary to the laws of England.” The charters of Rhode Island, Pennsylvania (1681) and Maryland permitted legislation “not repugnant to the laws of England.” The Frame of Government of Pennsylvania (1683) provided that no laws should be enacted “repugnant to the charter.” The charter of Delaware contained a short bill of rights taken from the Charter of Privileges of Pennsylvania (1701). The charter of Carolina, serving for both North and South Carolina, allowed enactment of “laws agreeable to the laws and customs of England.” Thus in each of the colonies there was from the beginning a legal measure of the validity of legislation enforceable by appeal to the Privy Council. This power was exercised in some notable instances, as where colonial legislation providing for descent of land to all children equally, instead of to the eldest son as at common law, was held invalid and settlement of an estate in conformity to that legislation was set aside.

Thus the lawyers of America were well prepared for a written constitution and bill of rights such as was adopted in Virginia just before the Declaration of Independence.

IV

THE REVOLUTION TO THE CONSTITUTION

Before the Declaration of Independence the Continental Congress had recommended to each colony to form independent state governments. Virginia was the first to do so by a written constitution. New Jersey, Pennsylvania, Delaware, Maryland, and North Carolina followed the same year. In 1776, Connecticut declared independence but went on under its charter till 1818. Before the close of the Revolutionary War, all the states except New Hampshire, Rhode Island and Connecticut had adopted constitutions. In New
Hampshire, the constitution first submitted failed of adoption, but a new draft was adopted in 1784. Rhode Island went on under its colonial charter as a constitution till 1842. The idea of a written constitution had the Instrument of Government under the Commonwealth for a precedent, but it was familiar to the lawyers of the Revolution both from the charters they had read of in their law books and from the charters under which the colonial and provincial governments had been operating, and to which they had been accustomed to refer the powers of magistrates and legislatures. The province was governed under a charter issued by the king. The state was to be governed by a charter promulgated by a sovereign people.

Six of these constitutions adopted before 1787 contained full bills of rights, of which that in Virginia was the first. The other five put from one to four guarantees of particular rights in the text, just as the original federal constitution contained no bill of rights but did include a certain number of provisions of that nature. The idea of a separate declaration of rights, prefixed or appended to a constitution as a part thereof, came to prevail throughout the land. Since the federal Constitution was amended in 1791 to include a bill of rights, every subsequent state constitution has contained one. The idea goes back to the Articles of the Barons and Magna Carta, the Petition of Right, the English Bill of Rights of 1688, and the Declaration of Rights of the Continental Congress.

Bill of Rights in state constitutions, since the federal Bill of Rights, have generally followed that model. But there was not a little diversity of items in those which came first. No less than thirty-three items are to be found, seven of them, however, only in one, and five more only in two. Those which appear in less than half of the first bills of rights are not all of them of slight importance. Two of them found a place in the federal Bill of Rights and have appeared generally in state constitutions since, namely, that no one is to
be twice in jeopardy for the same offense and that no one is to be held for an infamous crime except upon indictment or presentment of a grand jury. The principle of three more found a place in the original Constitution of the United States, namely, the provision in Massachusetts and Maryland that no one was to be declared guilty of treason or felony by the legislature (in the form of prohibiting to the states enactment of bills of attainder or of pains and penalties), the provision in New Hampshire and Pennsylvania that private property was not to be taken for public use without compensation (in the form of prohibiting such taking without consent), and guarantee in Pennsylvania of the right to emigrate to another state (taken care of in the federal Constitution by the clause as to privileges and immunities of citizens). Of the others to be found in less than half, New Hampshire and Massachusetts guaranteed impartial judges while Maryland guaranteed the independence of judges. In the federal Constitution this appears in a provision that the salaries of judges shall not be diminished during their term. State constitutions have generally adopted this. It comes from the English Bill of Rights and was the subject of a characteristically vigorous statement by Mr. Justice McCardie some years ago when Parliament disregarded it. New Hampshire and Massachusetts, which had had experience of the particular abuse on the eve of the Revolution prohibited quartering of soldiers in private houses in time of peace. This was an abuse practised also by Charles I and James II and was denounced by the Petition of Right and by the English Bill of Rights which also denied the king an army without the consent of Parliament. Quartering of soldiers is also forbidden by the federal Bill of Rights. Maryland and North Carolina, following the Second Institute, prohibited monopolies. South Carolina had claimed the common-law guarantees in 1712 and they were established in the first constitutions in New York and Delaware. New Hampshire required penalties to be in proportion
to the offense, something with which the recent theories of penal treatment adjusted to the offender rather than to the offense, do not entirely agree, but which was suggested by such things as the intolerably excessive fine and bond exacted of the Earl of Devonshire at the instance of James II. Georgia, in its first constitution, prohibited excessive fines.

Of the provisions to be found in more than half of the first bills of rights, three are in all of them, namely, guarantee of jury trial, of freedom of the press, and that the accused be informed of the charge against him and be confronted with the witnesses against him; something by the way that does not always happen in administrative proceedings today. Jury trial was especially insisted on because when judges were appointed and removed by the royal governors in order to secure judgments which the governors desired, the jury, even when chosen by a sheriff who was an appointee and tool of the governor, was the only assurance of a fair trial open to an accused or a litigant. It was for this reason that wide extensions of admiralty jurisdiction, since courts of admiralty proceed without juries, were so strongly objected to. Freedom of the press had attracted attention at the time of the trial of Zenger and was much in the public eye because of contemporary political prosecutions in England. The procedure in criminal trials which had come down from the Middle Ages was excessively hard upon accused persons prosecuted at the instance of the crown, and under the Stuarts the chances of the most innocent were often slender when the king was bent on conviction. The English Bill of Rights stressed the fundamental safeguards of accused persons and they have been provided for in all American constitutions from the beginning.

Next to these, the first bills of rights provided for the separation of powers, required by specially strong and strict provisions in Massachusetts, but put as fundamental also in New Hampshire, Maryland, Virginia, and North Carolina, and made the basis of the constitutional frame of govern-
ment elsewhere, though not included in the bills of rights. Experience of centralization of all the powers of government in the Privy Council and Board of Trade and Plantations at Westminster had convinced the lawyers of the era of the Revolution that there was here something more than a political philosophical theory. The unanimity with which the idea was put into practical effect on the morrow of the Declaration of Independence shows that much more was behind it than a fashion.

Security of life, liberty, and property stand next, guaranteed in the bills of rights in New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, and North Carolina, and by provisions in the first constitutions in Connecticut, South Carolina, and Georgia. Georgia adds a provision as to habeas corpus. I put these here as one, as in the federal Bill of Rights, but they stand as two, one of life and liberty and one of property, in New Hampshire and Massachusetts and in the constitution of Connecticut, while only life and liberty appear in the Bill of Rights of Virginia.

Five of the first bills of rights require that the accused have witnesses on his behalf. That he could not as government prosecutions were sometimes conducted was a shameful abuse. This abuse was forbidden in New Hampshire, Massachusetts, Pennsylvania, Maryland, and Virginia, and in the constitution in New Jersey. We are witnessing a return to this abuse in the denial of process for witnesses by administrative agencies which have the power of subpoena for their own case but refuse or hamper attempt to secure witnesses or documents on behalf of those against whom they are proceeding.

General warrants were forbidden in the first bills of rights in New Hampshire, Massachusetts, Maryland, Virginia, and North Carolina. This guarantee was put also in the federal Bill of Rights.

Five states secured the accused against being compelled to give evidence against himself, another provision incor-
Constitutional Guarantees of Liberty

Glorified in the federal Bill of Rights and caused by experience of serious abuses. Nowhere, perhaps, does the difficulty of maintaining a just balance between the general security and the individual life make so much trouble for the administration of criminal justice as at this point. The pressure to get convictions, which has made the third degree a well understood incident of criminal investigation, requires the maintenance and enforcement of this provision. It was contained in the first bills of rights in Massachusetts, Pennsylvania, Maryland, Virginia, and North Carolina.

Cruel and unusual punishments were forbidden by the first bills of rights in New Hampshire, Massachusetts, Maryland, Virginia, and North Carolina. The political and religious prosecutions in the seventeenth century in England had seen some horrible examples of the most cruel punishments, such as whippings at the tail of a cart from Newgate to Tyburn, a distance of two miles and one half, and the memory of them was still green. This provision also was incorporated in the federal Bill of Rights. It may be said that we do not do such things now and hence such provisions in bills of rights are no longer needed. We do not do such things officially. But brutal treatment of suspected persons in time of crimes arousing public indignation, and the most cruel lynchings and whippings by white caps and night riders, have not been unknown in this country in recent times. If they could have the sanction of legality or be authorized officially, in times of great excitement, they might revive.

In five states also exaction of excessive bail was forbidden in the original bills of rights. This was a serious abuse under James II and also under royal governors in the colonies. Indeed, it is a well known phenomenon today when a certain type of publicity-cultivating magistrate attracts attention by fixing extravagant bail in case of some sensational crime. It was forbidden in the English bill of rights and the federal bill of rights. New Hampshire, Massachusetts, Maryland, Virginia, and North Carolina secured against it in the first
bills of rights. In all common-law jurisdictions the remedy of habeas corpus is available to secure a reasonable bail whenever some magistrate fixes it unreasonably.

New Hampshire, Massachusetts, Maryland, Virginia, and North Carolina, provided that laws were not to be suspended. These provisions were directed at executive suspensions on the model of royal dispensings under the Stuarts, carried to the extreme by James II. But in this country in our formative era after the Revolution the legislatures at times sought to exercise such a power, for instance, in one case, suspending the statute of limitations for a particular party as to a particular claim against a particular person. The courts have refused to give effect to such statutes.

Four states, New Hampshire, Massachusetts, Maryland, and North Carolina guaranteed against retrospective or ex post facto laws. These were forbidden to state legislation by the original federal Constitution as to ex post facto laws and restrospective laws affecting property have been regarded as deprivations without due process of law. The same four provided also in the words of Magna Carta that justice was not to be sold, denied, or delayed; an excellent ideal but as to delay very hard to enforce by legal machinery. In one state recently, however, the highest court found it possible to remedy an intolerable condition of delay in one locality by exercise of one of its common-law powers.

New Hampshire, Pennsylvania, Maryland, and Virginia provided that the military was to be in “strict subordination to the civil power,” New Hampshire adding “at all times.” South Carolina put a similar provision in the constitution of 1778. New Hampshire, Massachusetts, Maryland, and North Carolina provided also against levies, taxes or imposts except by authority of the legislature. These provisions grew out of bad practices of Stuart kings and royal governors and did not become general.

Three bills of rights, those of New Hampshire, Pennsylvania, and Maryland, guaranteed counsel to accused persons.
This was denied in treason cases in England until after the Revolution of 1688. In the state bills of rights and in the federal bill of rights it is guaranteed for all criminal prosecutions. In recent years abuses in criminal investigation and in procuring pleas of guilty have made our highest court very insistent upon this right. New Hampshire, Massachusetts, and Maryland also provided for trials in the vicinage, generally regarded as included in the guarantee of jury trial, since a jury is a body of twelve good and lawful men of the vicinage. The federal Bill of Rights, however, provides for trial by a jury of the state or district wherein the crime was committed, which district must have been previously ascertained by law, thus preventing legislative setting up of arbitrary districts after the event in order to try particular accused persons away from the neighborhood.

Unreasonable searches and seizures were forbidden by New Hampshire, Massachusetts, and Pennsylvania. This provision was incorporated also in the federal Bill of Rights and has been general in state bills of rights since.

One of the most interesting of the guarantees in the first bills of rights is the right to bear arms, secured to the king's Protestant subjects by the English Bill of Rights since James II had sought to hold down a Protestant majority by disarming them while allowing a hostile minority to bear arms. It was guaranteed in Massachusetts, Pennsylvania, and North Carolina, and is provided for also in the federal Bill of Rights. James Wilson, one of the signers of the Declaration of Independence and framers of the Constitution, and one of the first Justices of the Supreme Court of the United States, in his lectures on law in Philadelphia in 1791, said: "A revolution principle certainly is, and certainly should be taught as, a principle of the Constitution of the United States and of every State in the Union." His editor, writing in 1900 tells us of a "natural right of revolution" and that a "minority may as justifiably rebel as a majority," and obviously if either majority or minority are not permitted to
bear arms they are in no position to exercise this natural right. This idea has a long history. Chapter 61 of Magna Carta recognizes a right of revolution or rebellion and provides for an orderly exercise of it in case the promises in the Great Charter are not kept. If the Puritan Revolution did not proceed after legal forms, the Revolution of 1688 at least sought to, and the Declaration of Independence set forth a case under natural law. Such things as the disarming of Uitlanders by the South African Republic before the Boer War, while the burghers were well armed, reminds us that the problem involved is not an easy one. A legal right of the citizen to wage war on the government is something that cannot be admitted; yet the provision in the Bill of Rights stands among legal provisions and could be given legal effect by the courts if the purpose was one which could be entertained by them. The eighteenth-century jurist conceived that a moral right because it was moral was therefore legal. As there were cases in which rebellion was morally justified, therefore there must be cases in which it was legally justified. If so, fundamental law must secure to individuals the means of asserting the right. But bearing arms today is a very different thing from what it was in the days of the embattled farmers who withstood the British in 1775. In the urban industrial society of today a general right to bear efficient arms so as to be enabled to resist oppression by the government would mean that gangs could exercise an extra-legal rule which would defeat the whole Bill of Rights. In 1833, Judge Story in his Commentaries on the Constitution said: "The right of the citizen to keep and bear arms has justly been considered the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them." He has in mind the situation of the English kings who till the eighteenth century had no standing army of consequence and so were restrained by an
armed body of subjects. But he has to admit the inadequacy of militia even in his day to meet the military needs of a great government and gives the subject up. Here is the one provision of the Bill of Rights that seems to have been able to achieve nothing for us.

Along with bills of rights, the separation of powers, the putting of legislative, executive, and judicial functions in distinct departments by a fundamental law, binding each and requiring each to keep within its legal bounds, is specially characteristic of our first constitutions and of American constitutions ever since. Analytically, the bills of rights are bills of liberties. They define circumstances and situations and occasions in which politically organized society will keep its hands off and permit free spontaneous individual activity; they guarantee that the agents and agencies of politically organized society will not do certain things and will not do certain other things otherwise than in certain ways. But those liberties are hardly less secured by the separation of powers, as any one who studies the operation of administrative agencies in present day America becomes acutely aware. During the seventeenth century many of the colonies were proprietary. The Lord Proprietor or the Proprietors were owners, and supreme legislative, executive, and judiciary. Thus Georgia was owned and governed by trustees and we have full records showing how the trustees governed. For example, a man who had been defeated in litigation in the Town Court at Savannah wrote a letter to the trustees complaining about the judgment. The records show that the secretary read the letter to the trustees and without anything more they directed that a letter be sent to the Governor at Savannah to order the court to reverse the judgment. Throughout the seventeenth century the colonies were struggling to establish their own lawmaking bodies. After local legislatures were well established there was a still a complete centralization of power at Westminster. Legislation was subject to a final veto by the Privy Council within
five years and this power kept Pennsylvania without an adequate system of courts for twenty-one years because the Pennsylvanians would not provide for a separate court of equity. Also, as has been said above, the ultimate control of administration was at Westminster through instructions to the governors, and the Privy Council was the ultimate court of appeal. Moreover, within the province the government was practically in the hands of the Governor and Council. Bad results followed this complete centralization as they had followed from centralization of power in the king in England. It is easy to assume that such things as happened in England when the king could control the judges and in colonial America when the royal governor could control them, would not happen in the improved world in which we live. But only the other day the Stavisky scandal in France showed what may happen where the judiciary is under the control of the executive. Moreover, it was not a matter only of independence of the judiciary. The provincial legislatures had exercised undistributed powers with no limitation beyond disallowance of laws by the Privy Council, or, if some one had sufficient means to appeal, reversal of judgments by the Privy Council where based upon a statute. They granted continuances in particular cases, granted particular litigants in particular cases exemption from particular provisions of the statute of limitations, granted probate of particular wills rejected by the courts, directed details of administration of particular estates, foreclosed particular liens by legislative acts, and enacted title to land out of one party and into another by what amounted to a legislative ejectment. It is no wonder that our first constitutions insisted upon the separation of powers much more than upon the details of political organization. Often the latter were left much as they were or were committed to legislation. We must remember the experience that led up to this.

A proposition has been urged that the decisive reason for the separation of powers is specialization; that it is not "the
practical security of civil liberty but the organic reason that every function will be better fulfilled if its organ is specially directed to this particular end than if quite different functions are assigned to the same organ." Hence, it is argued, efficiency being the end, if the separation of powers stands today in the way of efficiency, the reason for it has ceased to exist and it should be discarded. But too high a price may be paid for efficiency, and experience had made Englishmen of the seventeenth and Americans of the eighteenth century well aware of this. As Mr. Justice Brandeis put it, "the doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

For the most part, our difficulties with the doctrine in the present generation have arisen from nineteenth-century analytical attempts to maintain theoretical absolute lines. It was assumed that every power and every type and item of governmental action must of necessity be referable once for all, exclusively and for every purpose, to some one of the three departments of government so that it could be exercised by no other. The sound legal political sense of John Marshall saw long ago that there were powers of doubtful classification; that there were powers which analytically and historically or from both standpoints might be assigned to either of two departments. In such cases he saw it was a proper legislative function to assign exercise of the power to an appropriate department. But the state courts went rigidly on an extreme analytical theory and it was not till the second decade of the present century that Marshall's solution became established in the face of analytical attempts to put everything for all purposes and exclusively in one place. We were awakened to the impossibility of the rigid analytical theory by the exigencies of rate-making for public
utilities. When the Intermountain Rate Cases decided that the Interstate Commerce Commission could be given power to fix rates, a power which might well be classified either as legislative or as executive, the occasion for most of the attack upon our constitutional regime had passed. The courts and the profession came to see that many things such as regulation of procedure, of legal education, and of admission to the bar, if analytically they might be held legislative in nature, were historically judicial, and that application of standards, if historically judicial might analytically be held executive in nature. Hence legislation turning the former over to the courts and the latter to administrative agencies did not derogate from the constitutional separation of powers. But the older analytical logical idea long hampered administration and led to dissatisfaction with the constitutional regime, where it was enough to do away with the mistaken application.

As a result of dissatisfaction with the bad adjustment between adjudication and administration which existed, especially in the state courts, a generation ago, writers on political science have attacked severely what had been a cardinal tenet of our constitutional law. Teachers have been telling us that the separation of powers was only a fashion of eighteenth-century political thought, derived from a forecast made by Aristotle, for there was nothing of the sort in his time, and a mistaken interpretation of the British polity of his time by Montesquieu. We are told that it is outmoded and ought to give way to the exigencies of efficient administration. Recently this has spread to at least one of the courts which intimates that this fundamental principle of our constitutions should not be taken too seriously under the conditions of the time. Nothing could be more mistaken. When in the controversies which led to the Declaration of Independence, hostility to things English led to finding a philosophical basis for the rights which lawyers had learned as the rights of Englishmen, natural rights were put as the
ground of what the English had learned from experience. The separation of powers was no more derived from political philosophy than the rights secured by the Bill of Rights. It was taken up as the result of experience and reinforced by reference to Montesquieu. Whether put as common-law rights or as natural rights, the liberties claimed by generations of Englishmen and insisted on by the colonists as their birthright were seen to be incompatible with unlimited centralized power.

Another characteristic idea of our American constitutional polity is expressed in the clause of the Constitution, repeated in constitutions in the states, that it is the supreme law of the land. This idea, which goes back to the medieval teaching and decision as to the law of the land and due process of law, as developed by Coke, has made the Bill of Rights an effective instrument for its purpose. The idea of judicial application of constitutional provisions and of judicial refusal to give effect to legislation repugnant to the Constitution or to official action in excess of powers provided by the Constitution, goes back to refusal of the common-law courts to give effect to acts of Parliament “impertinent to be observed” because dealing with matters beyond the reach of temporal power, to the doctrine of seventeenth-century common-law courts as to acts contrary to common right and reason, to a provision in the Instrument of Government in 1653, and to colonial experience of reversal of judgments based on colonial statutes contrary to the common law. There is a perfect continuity between these cases and those decided after 1789 in the Supreme Court of the United States and in the state courts. This is abundantly shown by a line of decisions between the Declaration of Independence and the Constitution.

First in order of time is the case of *Holmes v. Walton*, decided in New Jersey in 1780. One of the rights most prized and most insisted upon by Americans was trial by jury. It was guaranteed in emphatic language by the Constitution
of New Jersey in 1776. But just as the king disliked juries where he was anxious to get results in disregard of liberties, the newly established states, when the legislature was eager to force compliance with an unpopular statute, showed a tendency to avoid jury trial or commit cases to small more easily managed juries. *Holmes v. Walton* arose under such a statute. Trade between New Jersey, occupied by the Continental Army, and New York City, occupied by the British, was objectionable from a military standpoint but was very profitable. It was prohibited by a New Jersey statute of 1778 which provided for seizure of goods brought in in contravention of the statute, and to insure speedy disposition allowed a hearing before a justice of the peace and a jury of six. Under the act defendant seized goods in the possession of the plaintiff, as being brought from within the enemy lines, and on trial to a justice of the peace and six jurors there was a judgment of condemnation. The plaintiff then brought a writ of certiorari in the Supreme Court setting up that the judgment was contrary to the Constitution since a jury meant a common-law jury of twelve. The judgment was reversed and it was ordered that possession be restored to the plaintiff. In other words, the state court refused to apply the state statute because it was in conflict with the state constitution.

Next in order of time is *Commonwealth v. Caton*, decided in Virginia in 1782. Down to 1776, the governor’s council was part of the Legislative assembly. The Constitution of 1776 provided for a Senate and a House of Delegates and that the Senate could concur in, reject, or amend measures passed by the House. It also provided that the governor should “with the advice of the Council of State, have the power of granting reprieves or pardons, except where the prosecution shall have been carried on by the House of Delegates [i.e. impeachment] or the law shall otherwise particularly direct, in which case no reprieve or pardon shall be granted but by resolve of the House of Delegates.” Caton
CONSTITUTIONAL GUARANTEES OF LIBERTY

and others were convicted under a statute which provided that the governor should not have the power to pardon persons convicted of treason under the act, but might suspend execution under the act till the General Assembly should determine whether they were proper objects of mercy. The House of Delegates passed a resolve granting a pardon but the Senate refused to concur, and the Attorney-General moved for execution. Counsel for the defendants argued (1) that the statute providing for pardon by the General Assembly was unconstitutional; and (2) that under the Constitution the pardoning power was in the House of Delegates in cases where the Governor was not allowed to pardon. As to the first point the Attorney-General argued that the court was not authorized to hold the Act of Assembly void. On this point all of the seven judges but one agreed that they could refuse to follow an act of the legislature in conflict with the Constitution. One judge did not consider it necessary to pass on that question. All agreed, however, that because of the words above underscored the statute did not contravene the Constitution. On the second point it refused to adopt the construction argued for and held that the House of Delegates could not pardon in cases under the statute. Among the judges was George Wythe, one of the great judges in the judicial history of Virginia, who pronounced vigorously for judicial power as to unconstitutional legislation and John Blair, afterwards one of the framers of the Constitution of the United States and Justice of the Supreme Court of the United States, who agreed with him.

In 1785, the question came up in Connecticut in the Symesbury Case and the Superior Court held that the proprietors of Symesbury could not have their grant from the colony taken from them or curtailed "even by the General Assembly" without their consent. The Supreme Court of the State used the same language. The statute was enacted before the Revolution. But the court considered it void under
the charter as contrary to Magna Carta and so contrary to the common law.

A statute of Rhode Island after the Revolution made paper money issued by the state legal tender and provided a penalty for refusing to accept it in payment for goods offered for sale; the statute to be enforced summarily by a special court of at least three judges, without a jury, "according to the laws of the land" with no continuance, "protection, privilege, or injunction" or appeal. In *Trevett v. Weeden* (1786) on an information for refusing to accept paper bills of the state in payment for meat, the five judges unanimously refused to act under the statute. Counsel for the defendant cited Bacon's Abridgment for the proposition taken from Coke in Bonham's Case that if a statute is repugnant the common law will control it and hold it void. The colonial charter which then stood as the state constitution required that statutes should not be "repugnant to the laws of England." Hence two of the judges spoke out plainly that the statute was unconstitutional in providing for trial without a jury. A third relied on the repugnancy in the words of the statute, which called for trial without a jury according to the laws of the land. The other two judges agreed in refusing to act under the statute but gave no reason. But the only reasons that could be urged were those given by their colleagues. The judges were sent for by the legislature after the manner of the Stuart kings and examined as to the ground of their action, but after a bold and convincing statement by one of them and advice that the judges could not be impeached, since lawyers took the same view of their duty, the matter was dropped.

Another case (*Bayard v. Singleton*) was decided in North Carolina in 1787, the very year in which the constitutional convention sat. The action was brought to recover a house and lot which had been conveyed to the defendant by a commissioner of forfeited estates of those who had taken the British side in the Revolution. A statute of 1786 required the
courts in all cases where it was shown on affidavit that the defendant held under a sale from the commissioner to dismiss the suit summarily on motion. This had the effect of making the commissioner's deed reciting a sale conclusive and cutting off all inquiry as to the validity of the proceedings behind it. The bill of rights in the state constitution required trial by jury. Thus the statute not only cut off all inquiry as to whether the plaintiff had been lawfully deprived of his property but it cut him off from trial of the facts by a jury. The highest court of the state overruled the motion to dismiss, saying that no act which the legislature could pass could repeal or alter the constitution and used the traditional phrase, fundamental law of the land.

This line of cases may be closed with one decided in South Carolina in 1792; after the Constitution of the United States, but showing how the matter was understood at the time the Constitution was adopted. In 1712, the legislature undertook to “confirm” a disputed title to a large tract of land in one of the claimants, and the question was whether the statute barred the claim of the adverse party. The court said that the statute was against common right and Magna Carta and *ipso facto* void. The bill of rights in the state constitution (1776) guaranteed against deprivation of property otherwise than by the “law of the land.” But in 1712 the colonial charter required legislation to accord with “the laws and customs of England.”

It will have been noticed that in three of these six cases the legislature undertook to provide for summary disposition of certain cases without trial by jury. In two others it undertook to take property from one and give it to another summarily. In another the lower house, thinking of itself as the “representatives of the people,” undertook to act without the concurrence of the Senate. In other words, the legislatures in the formative era of our political institutions were found doing the same things that the Stuart kings had been doing in England. If the bills of rights were to be any-
thing but empty exhortations, it was necessary for the judges to give the words "law of the land" in the constitutions their traditional meaning and hold the legislative acts contrary to the constitution "impertinent to be observed."

For historical reasons the Constitution of the United States is both a political and a legal document. Under it, political questions are often legal and legal questions to some extent political. In this respect our polity retains a prime characteristic of the English constitution from which it was largely derived. In the English polity there was no special public law differentiated from the ordinary law. Questions of the power and authority of those who acted as the agents of government were and still are dealt with by the ordinary courts, in ordinary legal proceedings, on the principles of law applicable to every one. Hence the legal side and the political side of the Constitution are not wholly separable. But a happy balance between the specific and the general, between the redress of specific grievances and guarantee of specific rights, after the manner of Magna Carta, and general declaration of fundamental liberties, after the manner of the eighteenth-century publicists, keeps these two sides in equilibrium. Very likely we do not justify an institution merely by showing that it is the culmination for the time being of a long line of continuous historical development. Yet intuition, on which today it is the fashion to rely rather than upon history and reason, is likely to be crude reason applied to partial and limited experience. Experience developed by reason and reason working on and tested by experience have made and shaped our legal institutions.

Three types of ideas entered into the Constitution. The political ideas are largely those of the Puritan Revolution. The legal ideas are those of the seventeenth-century contests between the English courts and the crown. The philosophical ideas are those of the eighteenth century which culminate in the French Declaration of the Rights of Man. There is a close kinship of these ideas. The political ideas
are those of an era of revolt from authority; of individual interpretation of the Bible and nonconformity in religious organization, and of consociation rather than subordination in government. They are ideas of the primacy of the individual man as the moral and so the political unit. The legal ideas are those of the relationally organized society of medieval England, in which the king was a great landlord in relation with his tenants, involving reciprocal rights and duties, as defined in Magna Carta, but reshaped and restated by the courts and lawyers of the seventeenth century to the exigencies of a polity in which the king was governor rather than landlord. The idea of legal limits to the authority of those who wield governmental power, enforced as the law of the land in ordinary legal proceedings in the courts, had become basic in the English polity and was claimed by the colonists in America as no less a heritage than their English speech. So, too, the idea that the acts of those who wield governmental power must be reasonable, not arbitrary and unreasonable, as a legal requirement, given effect in the course of ordinary proceedings in the courts, had been taken to be the law of the land or due process of law, and was held firmly by the common-law lawyers and courts in the seventeenth century. We retained the two ideas as they came to us from Coke, confirmed by experience of centralized government at Westminster, the conduct of affairs by royal governors, and the arbitrariness of legislatures.

Turning to the development of the Constitution after its adoption, we have to notice that it contains three types of provisions. It prescribes the framework of government and prescribes limits of the lawful authority of the several organs and agencies of government. It guarantees certain rights to the individuals subject to the authority of government and defines and protects liberties, that is, areas of non-restraint of men’s natural faculties of action. Also it contains what are in effect exhortations as to how government ought to be carried on.
Of the provisions as to the framework of government, those which define authorities and spheres of action involve legal conceptions, legal principles, and sometimes rules of law. Both these and the primarily legal precepts which guarantee rights and secure liberties call for judicial interpretation and application. Thus even the political side of the Constitution requires constitutional law. There are laws in the text of the Constitution, but it is law that gives life to the laws and to the text. It is important to bear this in mind because interpretation and application are not the same thing and much misunderstanding of our constitutional law arises from confusing them. Laws call for interpretation and law determines how that interpretation shall proceed. As to many laws the main difficulty is interpretation, finding the limits and content of the rule, and when interpreted, application is a simple matter of logical fitting of facts to rule. As to many others, however, interpretation is a simple matter and the whole difficulty is in application, which is not and cannot be wholly logical but demands a certain moral, or in case of constitutional standards, a certain political judgment. It cannot be emphasized too strongly that even the strictly legal precepts of the Constitution are not all of one kind, and do not admit of precisely the same treatment by the courts. Thus the task of constitutional law is by no means an easy one which may be understood offhand even by the lawyer.

Of the legal precepts in the Constitution, some are rules, making definite detailed provisions for definite detailed states of fact. Most of these are prohibitions either expressly or in effect guaranteeing certain liberties against impairment by government or safeguarding them by certain limitations of governmental power or certain prescribed modes of governmental interference. As soon as it was settled, under the leadership of Marshall, that a liberal interpretation of these grants of power, subject to the principles established by the ninth and tenth amendments, was to prevail, interpretation ceased to give much trouble since most of the provisions had
a well recorded history which made their legal import fairly clear. But it should be borne in mind that the prescribings of limits and the guarantees would be nugatory if treated only as pious exhortations or appeals to the forbearance and good judgment of legislature or executive. This is shown amply, if it needed to be shown, by the fate of the declarations of the rights of man in Continental constitutions.

Another type of legal precept establishes principles. That is, it lays down authoritative premises for legal reasoning rather than making definite detailed provisions for any definite detailed states of fact. Such principles are to be found, for example, in the ninth and tenth amendments. They do not call for interpretation. But when the court is called on to interpret a rule, especially a rule defining the limits of state and national power or the limitations on governmental authority, they furnish authoritative starting points from which the court's reasoning may proceed.

Still another type of legal precept establishes legal conceptions, that is, authoritative categories to which questions may be referred with the result that certain rules, principles, and standards become applicable. Such are interstate commerce, full faith and credit, obligation of contract, privileges and immunities of citizens, equal protection of the laws. These categories are left undefined. They are not historically given nor are they common-law categories. They have required judicial ascertainment of their limits and their content. Indeed, judicial development of these categories could not have been avoided if they were to mean anything as preserving a balance between state and nation. To leave them to legislative and executive definition for each case of controversy for the time being would put this balance at the destructive mercy of politics, the very thing against which they were intended to guard.

In addition, some, and not the least important, of the legal precepts in the Constitution lay down standards to which governmental action is to be held to conform. An example is
the standard of due process of law established by the fifth and fourteenth amendments. History makes the interpretation clear enough. Governmental action is not to be arbitrary and unreasonable. But the reasonable is not defined by any rule or principle of law. Due process of law is a standard to be applied according to the ever-changing circumstances of time and place, like the legal standard of due care, or of fair conduct of a fiduciary, or of reasonable service and reasonable facilities of a public utility in private law. It involves all the difficulties involved in application of the latter standards and indeed more, because it calls for a measure of political judgment also. It is here that most of the complaints as to our Constitution and our constitutional law have arisen, and it is here, too, that they have had their chief justification. In the last third of the nineteenth century reasonableness was looked at in the abstract rather than concretely. The change from demanding abstract reasonableness to looking to concrete reasonableness in 1916 was a significant advance in our constitutional law and was in the spirit of the common law.

A few provisions in the original Constitution were in the nature of a bill of rights. One of them, namely, the provision against suspension of the writ of habeas corpus goes back to Coke's Commentary on Magna Carta. Another, the prohibition of bills of attainder and bills of pains and penalties grew out of experience of what have been aptly called legislative lynchings during and after the Revolution. In the excitement of the time statutes convicting of crime and imposing punishment of death (bills of attainder) or of imprisonment or forfeiture of property (bills of pains and penalties) were enacted capriciously and were procured on grounds of ill will in relatively trivial cases as well as in the grave cases involving danger to the Commonwealth for which they were supposed to be reserved. The historian of these acts tells us that "the passion and prejudice of the populace failed, at times, to distinguish between mere political senti-
ment and giving aid and comfort to the enemy." Tucker, writing in 1803, when the memory of such acts was fresh, said that an act of attainder was "a legislative declaration of the guilt of a party without trial, without a hearing, and often without the examination of witnesses."

No bill of rights was included in the original constitution. But people were justly fearful that the new strong central government they were setting up would do the things or some of the things they had endured from centralized government at Westminster and from central governments in the provinces. Hence the Constitution was only ratified on assurance that a bill of rights should at once be added. In comparison with the earlier state bills of rights, the first nine amendments are more concise and compact. They deal with the more vital points, with less detail than many of the state constitutions, but leave out nothing of real importance. One provision, however, not contained in the first state constitutions is an everyday safeguard of property, namely, the provision that private property is not to be taken for public use without just compensation. This has been included in the state bills of rights ever since. It runs back to Magna Carta. In the articles of the barons they asked that the constable or other bailiff (i.e. agent) of the king should not take grain or other chattels without paying cash down therefor, nor the sheriff or bailiff of the king take horses or carts of any free man for carriage on the king's account, without the owner's consent, nor the king or his bailiff take another's wood for his castle or other affairs without consent, and it was so provided in chapters 29, 30, and 31 of Magna Carta. In the reissue of the Great Charter later it is provided that no sheriff or bailiff of the king shall take the horses or carts of any man to make carriage unless he pays the customary price. Fortescue tells how in fifteenth-century France private property was continually taken for the king's soldiers with no compensation, whereas in England of that time the king could only take necessaries for his household at a reasonable price. Apparent-
ly the Stuarts sought only to compel forced loans of money and impose taxes and levies under claim of prerogative, but not to take property in specie. So Coke's commentary on the relevant chapters of Magna Carta is very brief. But the principle behind the specific provisions was clear, and experience of impressments of property during the Revolution led to putting the principle in the federal Bill of Rights.

Nowadays in a time of the cult of absolutism, reliance on force rather than reason, and of current philosophies which disparage liberty and rate satisfaction of material wants as the highest good and the end of government, those who write on the science of government are prone to speak lightly of these constitutional provisions. To some they are inconsistent with democracy. It is assumed that democracy must be an absolute rule of a majority for the time being, and the idea of limitations on those who exercise the powers of a politically organized society under a democracy is rejected. In the same way, under the Tudors and Stuarts many thought that monarchy must be the absolute rule of an autocratic king and that limitations on what his agents could do were obsolescent remnants from the feudal regime. But, as Mr. Justice Miller put it, the spirit of our government is opposed to the deposit of unlimited power anywhere. Democracy does not require that its agents have absolute power and be, like the Eastern Roman emperor, free from the laws. A generation which is willing to give up the legal inheritance of Americans and set up a regime of absolute rule of a majority may find that in the event it is under the absolute rule of a leader of the majority.

Other ideas urged recently are that to those who drafted the constitutional provisions liberty meant only freedom from imprisonment and due process of law meant only procedural regularity. But the terms liberty and due process were legal terms with well understood meanings known to lawyers; and when one notes the names of the great lawyers who signed the original Constitution — one future Chief Justice and
two future Justices of the Supreme Court of the United States, a Chief Justice of New Jersey, and many who were then accounted leaders of the profession, it is idle to assume that they did not know the significance of the words they used.

Again, we hear many urge today that judicial power as to unconstitutional legislation is something never intended and its exercise is a judicial usurpation. But the clear understanding of American lawyers before the Revolution, based on the seventeenth-century books in which they had been taught, the unanimous course of decision after independence and down to the adoption of the Constitution, not to speak of the writings of two of the prime movers in the convention which drafted the instrument, are abundant proof to the contrary. Moreover, to those lawyers the result was involved in the pronouncement that the Constitution was the supreme law of the land. Again, a written constitution, according to the ideas of the English-speaking world, means a body of law enforceable as such. The Judicial Committee of the Privy Council had to come to this as to the Constitution of Canada. The courts of Canada, Australia, and Eire find themselves called on to decide constitutional questions, and the highest court of the South African Republic held a legislative act contrary to the grondwet or fundamental law invalid upon reasoning derived from the authorities of the Civil Law. A tyrannical executive removed the court in the latter case. But the oppressions which the decision of the court held unlawful brought on the Boer War, the disappearance of the South African Republic, and a written constitution for the Dominion of South Africa.

Our constitutional government, founded in the experience of English-speaking peoples, has survived transition from thirteen states along the Atlantic to a continental empire, survived the struggle between a society of planters and one of traders and manufacturers, survived civil war and came out stronger, survived entry into world affairs, survived
transition from a homogeneous folk of one stock to a melting pot of races and peoples. Not only has it survived, it has made a land to which people from every part of the world have sought and seek to come to enjoy liberty and opportunity under law. Unless the nature of man has greatly changed, there is no good reason why it should not survive the struggles incident to modern industrial development and economic unification.

English constitutional monarchy, based on the idea of legal limitation of governmental action, legal responsibility of officials, and judicial securing of the rights of individuals against arbitrary action, survived from the Middle Ages, through the sixteenth and seventeenth-century era of centralization and the eighteenth-century era of absolute governments, into the nineteenth century, and in the twentieth century its latest form of a constitutional administrative regime has grown strong while much of the world was turning to dictators and administrative absolutism. Our constitutional democracy may survive this era of centralization and economic unification for like reasons. Whether rule is borne by Rex or by Demos, a ruler ruling reasonably under God and the law founds his kingdom on a rock.

Roscoe Pound.*

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