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AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 2: The Colonial Era – Powers of the National Government

The Speeches of His Excellency Governor Hutchinson . . . With the Answers of . . . the House of Representatives (1773)[1]

Alarmed by the denials of parliamentary authority being written in Boston and elsewhere, Governor Thomas Hutchinson sought to dampen the radical agitation with a speech to a specially convened session of the Massachusetts General Assembly explaining the constitutional authority of Parliament over the colony. Hutchinson was an eminent Massachusetts leader, having previously served as the speaker of the House of Representatives, a delegate to the Albany Congress, and chief justice of the Superior Court and authored a history of the colony. He hoped to mediate between the colonial radicals and the British government, but he ultimately was loyal to the crown. Instead of correcting the "false opinion" rampant in the colony, he found himself in an extended constitutional argument with the Assembly. The replies of the House of Representatives, advised by future president John Adams, then a young lawyer of growing repute, were widely republished as leading constitutional statements of the revolutionary movement. The replies are particularly notable for developing the argument, later elaborated by Adams and Thomas Jefferson, that the colonies owed allegiance only to the king and that Parliament had no authority in North America. When Hutchinson threw down the gauntlet that Parliament was either the supreme legislature for the colonies or it could make no laws affecting the colonies at all, the House accepted the challenge and threw Parliament out. The House declared that it was loyal only to the Crown in the form of the "person" of the monarch. Hutchinson thought this made no sense. For England's constitutional monarchy, authority and allegiance revolved around the "Crown in Parliament," not the individual who wore the crown.

As you read the exchange, consider the limits of the "no taxation without consent" principle. Is this purely a procedural problem, requiring that the colonists be able to elect the legislators who imposed taxes on them? Could be principle be satisfied by a substantive policy that tax revenues collected in the colonies be spent in ways that directly benefited the colonies?

Speech of Thomas Hutchinson:

. . . .

When our predecessors first took possession of this plantation or colony, under a grant and charter from the Crown of England, it was their sense, and it was the sense of the kingdom, that they were to remain subject to the supreme authority of Parliament. This appears from the charter itself and from other irresistible evidence. The supreme authority has, from time to time, been exercised by Parliament and submitted to by the colony. . . .

So much however of the spirit of liberty breathes through all parts of the English constitution, that although from the nature of government there must be one supreme authority over the whole, yet this constitution will admit of subordinate powers with legislative and executive authority, greater or less according to local and other circumstances. . . .

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It has been urged, that the sole power of making laws is granted by charter to a Legislature established in the province, consisting of the King by his representative the governor, the Council and the House of Representatives—that by this charter there are likewise granted or assured to the inhabitants of the province all the liberties and immunities of free and natural subjects, to all intents constructions and purposes whatsoever, as if they had been born within the Realm of England. . . .

[1] Excerpt taken from *The Speeches of His Excellency Governor Hutchinson, to the General Assembly of the Massachusetts Bay* (Boston: Edes and Gill, 1773).

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I do not find, Gentlemen, in the charter such an expression of *sole* power or any words which import it. The General Court has, by charter, *full* power to make such laws as are not repugnant to the laws of England. A favorable construction has been put upon this clause when it has been allowed to intend such laws of England only as are expressly declared to respect us. Surely then this is by charter a reserve of power and authority to Parliament to bind us by such laws, at least, as are made expressly to refer to us and, consequently, is a limitation of the power given to the General Court. . . .

They who claim exemption from the acts of Parliament by virtue of their rights as Englishmen, should consider that it is impossible the rights of English subjects should be the same, in every respect, in all parts of the Dominions. It is one of their rights as English subjects to be governed by laws made by persons in whose election they have, from time to time, a voice—They remove from the Kingdom where, perhaps, they were in the full exercise of this right to the plantations where it cannot be exercised or where the exercise of it would be of no benefit to them. Does it follow that the government, by their removal from one part of the Dominion to another, loses it's authority over that part to which they remove, and that they are freed from the subjection they were under before . . . ? Will it not rather be said that, by this their voluntary removal, they have relinquished for a time at least, one of the rights of an English subject which they might if they pleased have continued to enjoy and may again enjoy whensoever they will return to the place where it can be exercised?

. . . .

. . . I know of no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies. It is impossible there should be two independent legislatures in one and the same state, for although there may be but one head, the King, yet the two legislative bodies will make two governments as distinct as the Kingdoms of England and Scotland before the union. If we might be suffered to be altogether independent of Great-Britain, could we have any claim to the protection of that government of which we are no longer a part? . . .

Answer of the House of Representatives

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We fully agree with your Excellency, that our happiness as well as his Majesty's service, very much depends upon peace and order; and we shall at all times take such measures as are consistent with our constitution and the rights of the people to promote and maintain them. That the government at present is in a very disturbed state is apparent! But we cannot ascribe it to the people's having adopted unconstitutional principles, which seems to be the cause assigned for it by your Excellency. It appears to us to have been occasioned rather, by the British House of Commons assuming and exercising power inconsistent with the freedom of the constitution, to give and grant the property of the colonists, and appropriate the same without their consent.

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We have brought the first American charters into view, and the state of the country when they were granted, to show that the right of disposing of the lands was in the opinion of those times vested solely in the Crown—that the several charters conveyed to the grantees, who should settle upon the territories therein granted, all the powers necessary to constitute them free and distinct states—and that the fundamental laws of the English constitution should be the certain and established rule of legislation, to which the laws to be made in the several colonies were to be as nearly as conveniently might be, conformable or similar; which was the true intent and import of the words, "not repugnant to the laws of England," "consonant with reason," and other variant expressions in the different charters. And we would add, that the King in some of the charters reserves the right to judge of the consonance and similarity of their laws with the English constitution to himself, and not to the Parliament; and in consequence thereof to affirm, or within a limited time, disallow them.

These charters . . . are repugnant to the idea of parliamentary authority: And to suppose a parliamentary authority over the colonies under such charters, would necessarily induce that solecism in politics *imperium in imperio* [a sovereign within a sovereign] . . . .

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. . . An agreement ought to be interpreted "in such a manner as that it may have *its effect*:" But if your Excellency's interpretation of this clause is just, "that it is a reserve of power and authority to Parliament to bind us by such laws as are made expressly to refer to us," it is not only "a limitation of the power given to

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the General Court" to legislate, but it may whenever the Parliament shall think fit, render it of *no effect*; for it puts in the power of Parliament to bind us by as many laws as they please, and even to restrain us from making any laws at all. If your Excellency's assertions in this . . . were well grounded, the conclusion would be undeniable, that the charter even this clause "does not confer or reserve any liberties" worth enjoying. . . .

. . . It is one of the liberties of free and natural subjects, born and abiding within the Realm, to be governed as your Excellency observes, "by laws made by persons in whose election they from time to time have a voice." This is an essential right. For nothing is more evident, than that any people who are subject to the unlimited power of another, must be in a state of abject slavery. It was easily and plainly foreseen that the right of representation in the English Parliament could not be exercised by the people of this colony. It would be impracticable, if consistent with the English constitution. And for this reason, that this colony might have and enjoy all the liberties and immunities of free and natural subjects within the Realm, as stipulated in the charter, it was necessary, and a legislative was accordingly constituted within the colony. . . . Your Excellency is pleased to ask, "Does it follow that the Government by their (our ancestors) removal from one part of the Dominion to another, loses its authority over that part to which they remove . . . ?" We answer, if that part of the King's Dominions to which they removed was not then a part of the Realm, and was never annexed to it, the Parliament lost no authority over it, having never had such authority; and the emigrants were consequently freed from the subjection they were under before their removal: The power and authority of Parliament being constitutionally confined within the limits of the Realm and the nation collectively, of which alone it is the representing and legislative assembly. . . .

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Your Excellency tells us, "you know of no line that can be drawn between the supreme authority of Parliament and the total independence of the colonies." If there be no such line, the consequence is, either that the colonies are the vassals of the Parliament, or, that they are totally independent. As it cannot be supposed to have been the intention of the parties in the compact, that we should be reduced to a state of vassalage, the conclusion is, that it was their sense, that we were thus independent. "It is impossible, your Excellency says, that there should be two independent legislatures in one and the same state." May we not then conclude, that it was their sense that the colonies were by their charters made distinct states from the mother country?

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Hutchinson's Reply to the House

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. . . [T]he grant is made upon this express condition, which you pass over, that the people remain subject to the Crown of England, the head of that legislative authority which, by the English constitution, is equally extensive with the authority of the Crown throughout every part of the Dominions. . . .

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. . . If you mean that no countries but the ancient territorial Realm can constitutionally be subject to the supreme authority of England, which you have very incautiously said is a rule of the common law of England, this is a doctrine which you will never be able to support. That the common law should be controlled and changed by statutes every day's experience teaches, but that the common law prescribes limits to the extent of the legislative power, I believe has never been said upon any other occasion. That acts of Parliament for several hundred years past have respected countries, which are not strictly within the Realm, you might easily have discovered from the statute books. . . .

. . . .

If then I have made it appear, that both by the first and second charters we hold our lands and the authority of government not of the King but of the Crown of England, that being a Dominion of the Crown of England, we are consequently subject to the supreme authority of England, that this hath been the sense of this Plantation, except in those few years when the principles of anarchy which had prevailed in the Kingdom had not lost their influence here . . . .[2]

Response of the House of Representatives

[2] The "years when the principles of anarchy" prevailed was the time leading up to the Glorious Revolution when King James II was overthrown and parliamentary supremacy was established.

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. . . If . . . we were to recur to . . . opinions and determinations [of the common law] we should find very great authorities in our favor, to show that the statutes of England are not binding on those who are not represented in Parliament there. The opinion of Lord Coke that Ireland was bound by the statutes of England wherein they *were named*, if compared with his other writings, appears manifestly to be grounded upon a supposition, that Ireland had by an act of their own . . . consented to be thus bound, and upon any other supposition this opinion would be against *reason*; for *consent only* gives human laws their force. . . .

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Response of Hutchinson

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. . . I am now obliged to observe that you are again misled by having a general view of this doctrine brought before you, as it respects states or governments under absolute monarchs, and not as it is connected with or grafted upon the English constitution. . . .

Let me then observe to you, that from the nature of government a supreme legislative power must always exist over all the parts and all the affairs of every Dominion—that in absolute monarchies the legislative and executive powers are united in the prince or monarch—that in the English constitution there is, and always has been, a legislative power distinct from the regal or executive power. . . .

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