

ESSAY

THE FOUNDERS' LEGAL CASE: "NO TAXATION WITHOUT REPRESENTATION" VERSUS TAXATION NO TYRANNY

*Judge Grant Dorfman**

TABLE OF CONTENTS

I.	INTRODUCTION.....	1378
II.	PRETRIAL MATTERS	1381
	A. <i>The Historical Debate</i>	1381
	B. <i>A Word About Pamphlets</i>	1386
	C. <i>Samuel Johnson, Counsel for the Defense</i>	1388
III.	THE ARGUMENTS: SAMUEL JOHNSON VERSUS THE CONTINENTAL CONGRESS.....	1394
	A. <i>The American Argument: The Declaration and Resolves of the First Continental Congress</i>	1394
	B. <i>The British Rebuttal: Taxation No Tyranny</i>	1396
	1. <i>Taxation No Tyranny: The Legal Status of the American Colonies</i>	1397
	2. <i>Taxation No Tyranny: Parliament's Authority to Tax</i>	1400
	3. <i>Taxation No Tyranny: All British Subjects Consent Through "Virtual Representation"</i>	1401

* Judge, 129th District Court, Harris County, Texas. A.B., Brown University, 1987; M.St., Oxford University, 1989; J.D., Yale Law School, 1992. This Essay arose out of a paper that the Author originally wrote for the Leonard Theberge Essay Prize competition sponsored by St. Peter's College, Oxford. The Author wishes to express his appreciation to the Editors of the *Houston Law Review* for their research and editorial assistance, and his gratitude to Katie, Emma, and Ryan for their patience, understanding, and support.

IV. THE LEGAL CASE, CONSIDERED.....	1404
A. <i>The Legal Status of the American Colonies, Considered</i>	1404
B. <i>Parliament's Authority to Tax, Considered</i>	1406
C. <i>Virtual Representation, Considered</i>	1407
V. CONCLUSION: LAW VERSUS EQUITY	1412

"The public remembrance of the past . . . is concerned less with establishing its truth than with appropriating it for the present."¹

I. INTRODUCTION

That "no taxation without representation" was the rallying cry of colonists seeking their independence in 1776 is the "mother's milk" of American history education. Generations of schoolchildren have been weaned on it.

The earliest known reference to the idea is believed to have been in a sermon by the Boston preacher, the Reverend Jonathan Mayhew, in 1750.² But it was the Massachusetts lawyer and renowned colonial firebrand, James Otis, who popularized it.³ A fierce opponent of royal prerogative in the Colonies, Otis had first gained fame in 1760 for championing colonial opposition in the Writs of Assistance case,⁴ a dispute that was in many ways a precursor of the coming Anglo-American conflict. Otis was further provoked in April 1764, when the British simultaneously passed the Sugar Act and announced an intent to levy stamp duties that was later codified as the infamous Stamp Act.⁵ He

1. MERRILL D. PETERSON, *LINCOLN IN AMERICAN MEMORY* 35 (1994).

2. See Dr. Jonathan Mayhew, *A Discourse Concerning Unlimited Submission and Non-resistance to the Higher Power*, Sermon before the West Church in Boston (Jan. 30, 1750), as reprinted in *PULPIT OF THE AMERICAN REVOLUTION* 39, 77, 94-95 (Burt Franklin 1970) (1860) (arguing that one is bound by God to pay taxes to the King; that the Lords and Commons are representatives of the people and extensions of the King, so the people are bound by God to pay taxes to them; but when the King or his extension act above the law and infringe on the rights of the people, the people are not bound to the King, and thus no longer must pay him taxes).

3. See EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* 34-35 (1953) (describing the influence of Otis in convincing the Massachusetts House of Representatives to object to taxes imposed by the British Parliament without American representatives).

4. See H. TREVOR COLBOURN, *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* 68-70 (1965) (explaining, in the words of John Adams, that "the child of Independence was born" when Otis argued against the Writs of Assistance, a device that gave customs officials broad search powers).

5. There were many taxes and enactments by the British Parliament, alternating

denounced these tariffs and insisted upon the American colonists' right, as "free born British subjects, and entitled to all the essential civil rights of such," to be free from the imposition of taxes "but by their consent in person, or by deputation."⁶

Unlike Parson Weems's apocryphal tale of a boyhood George Washington chopping down his father's cherry tree, "no taxation without representation" is one piece of elementary school folklore that turns out to have been true—despite the persistence of historical scholarship that insists the Founders deployed the tax and other revolutionary-era controversies as a smokescreen to conceal their true, financial motivations. This Essay briefly addresses that historical debate. Its main concern, however, lies not with the authenticity of the colonists' complaint, but with its legal validity.

While no court case was brought, the colonists' insistence upon "no taxation without representation" was essentially a legal argument brought under the unwritten British Constitution and was consistently advanced in just such terms.⁷ It seems only reasonable, then, to ask, and to answer, the same questions that would be put to any claim for relief urged in court: Is the complaint a valid one? Does it state a meritorious claim for relief under existing law? Or, at minimum, can it be said to represent a "good faith argument for the extension, modification, or reversal of existing law"?⁸

Because there was no actual court case, the controversy played itself out in the Anglo-American court of public opinion and, ultimately, on the field of battle. Thus, there is no brief

between confrontational and conciliatory, that aggravated Anglo-American relations between the conclusion of the French and Indian War in 1763 and the *Declaration of Independence*. For an in-depth discussion of them, see generally PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776* (1991); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 36–44 (1969).

6. James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), reprinted in 2 *COLONIES TO NATION: 1763–1789, A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION* 28, 30 (Jack P. Greene ed., 1967).

7. See, e.g., Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies* (1765), reprinted in 2 *COLONIES TO NATION*, *supra* note 6, at 52–54 ("It is an essential principle of the *English* constitution, that the subject shall not be taxed without his consent, which hath not been introduced by any particular law, but necessarily results from the nature of that mixed government; for, without it, the order of democracy could not exist."); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843, 857 (1978) (characterizing the American objection to taxation without representation as an argument that such action violated the British Constitution).

8. This is the standard that most courts, including those in Texas, use when deciding to impose sanctions for groundless claims. See, e.g., *TEX. R. CIV. P.* 13.

setting forth the colonists' case, and no lawyer to present it. There does exist, however, a voluminous pamphlet literature that records the arguments, pro and con. And it is here that I have found my advocates. The First Continental Congress, selected and empowered by the American colonies for just that purpose, briefed the case in their 1774 *Declaration and Resolves*. The British government's rebuttal appeared shortly thereafter, in a pamphlet authored by the illustrious British essayist and man of letters, Dr. Samuel Johnson, entitled *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress*. I conclude that the colonists' legal argument was not a strong one under the British Constitution. The Americans' embryonic concepts of divided sovereignty, federalism, and actual representation reflected neither the structure nor the practice of British government at that time; nor did they accord with the then-accepted principles of political science. Analyzed as a legal case, the colonists' complaint against British taxation constitutes "fit grist for the summary judgment mill."⁹

Paradoxically, however, the legal insufficiency of the colonists' argument under British law had profound positive consequences when viewed from a historical perspective. The Americans had initially exercised great care to position their appeal within the shared British legal tradition and to forswear any intention to independence.¹⁰ But this availed them little. The implausibility of their case doomed all efforts to gain redress within the system and drove events towards their ultimate impasse. The consequences were historic: a new nation, a novel conception of federalism, and a dedication to direct representation that would ultimately restructure the American political system and provide the world with a universal model no longer limited by its origins in British historical happenstance.

9. See, e.g., *NCNB Tex. Nat'l. Bank v. Johnson*, 11 F.3d 1260, 1264 (5th Cir. 1994) ("[S]uits on promissory notes provide fit grist for the summary judgment mill.").

10. See, e.g., Otis, *supra* note 6, at 28 (lauding the British Constitution); *Exemption from Parliamentary Taxation, a Right, not a Privilege: The New York Petition to the House of Commons* (Oct. 18, 1764), reprinted in 2 *COLONIES TO NATION*, *supra* note 6, at 36 (disclaiming a desire to be independent from Great Britain).

II. PRETRIAL MATTERS

A. *The Historical Debate*

*“The American Revolution has always seemed to be an extraordinary kind of revolution, and no more so than to the Revolutionaries themselves.”*¹¹

We must take up a few “pretrial” matters before entertaining argument. We must first address the historical debate concerning whether the colonists’ legal contentions were sincerely advanced, or were instead a smokescreen concealing their primarily social and economic motivations. If the colonists’ legal claims were not brought honestly and in good faith—and if, in fact, there was no genuine legal “case or controversy”—there is no call upon our jurisdiction and little point in assessing their legal substance.¹²

That said, it could easily be argued that no major revolutionary movement as readily lends itself to legal analysis as the American Revolution. It originated as—and for the most part remained—a British intramural debate over the colonists’ legal status. Taxes may have been the immediate irritant. But the ostensible subject was always the meaning and extent of the Americans’ birthright as free-born English citizens.

This contrasts markedly with other revolutionary movements. The American Revolution was not about factions, parties, or divided loyalties to monarchs or other personages and personalities—as, for example, was the Glorious Revolution of 1688.¹³ It was not about grand ideologies intended to reshape the world—like the French and Russian Revolutions, or the European nationalist movements of the late 1800s.¹⁴ As historian Gordon Wood noted:

11. WOOD, *supra* note 5, at 3.

12. See, e.g., U.S. CONST. art. III, § 2, cl. 1 (providing the “case or controversy” requirement for invocation of judicial power of the U.S. courts); TEX. R. CIV. P. 13 (making punishable by contempt and other sanctions the filing of a fictitious pleading and/or lawsuit “as an experiment to get an opinion of the court”).

13. See 1 CARLTON J.H. HAYES, A POLITICAL AND SOCIAL HISTORY OF MODERN EUROPE 286–87 (1921) (noting that the Glorious Revolution “stirr[ed] up opposition on all sides”).

14. See generally TRYGVE R. THOLFSEN, IDEOLOGY AND REVOLUTION IN MODERN EUROPE 27–153 (1984) (discussing the role the Enlightenment played in the French Revolution, the role Marxism played in the Russian Revolution, and the role fascism played in the European nationalist movements—all of which intended to modify the people’s relationship with government).

It certainly does not appear to resemble the revolutions of other nations in which people were killed, property was destroyed, and everything was turned upside down. . . . There was no reign of terror in the American Revolution and no resultant dictator—no Cromwell, no Bonaparte. The American Revolution does not seem to have the same kinds of causes—the social wrongs, the class conflict, the impoverishment, the grossly inequitable distributions of wealth—that presumably lie behind other revolutions. There were no peasant uprisings, no jacqueries, no burning of châteaux, no storming of prisons.¹⁵

This peculiarity inclined others towards the view that the colonists concealed their true economic and social motivations behind insincere constitutional quarrels.¹⁶ This was the view most famously put forth by the historian Charles Beard and his many followers.¹⁷ Beard's seminal work, *An Economic Interpretation of the Constitution of the United States*, was published in 1913 and initiated a "historiographic explosion."¹⁸ Regarded as "the most influential history book ever written in America," Beard's analysis became the authoritative approach to American Revolutionary history and the origins of the federal Constitution.¹⁹ Beard viewed the founders through a Marxist lens, one tinted still further by his Progressive-era political commitments.²⁰ He proceeded from the assumption "that men's consciousness and ultimately their behavior were the products of their social and economic situation"; he portrayed the founding era as "a deep-seated conflict between a popular party based on paper money and agrarian interests and a conservative party

15. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 3 (1992). A *jacquerie* is "[a] peasant revolt, especially a bloody one." *AMERICAN HERITAGE COLLEGE DICTIONARY* 740 (4th ed. 2002).

16. EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-1789*, at 164 (1956) (discussing Charles Beard's belief that "the Constitution was the successful culmination of a struggle by the rich and well-born to gain control of American society"); GORDON S. WOOD, *THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES*, at vii-viii (Univ. Press Am. 1979) (asserting that Beard and other progressive historians viewed the Constitution as "a reaction by well-to-do elite elements of American society to popular agrarian interests riding the democratic impulse of the Revolution").

17. WOOD, *supra* note 16, at vii.

18. *Id.*

19. *Id.*

20. FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION*, at vii-viii (1958) (observing that some believed Beard's book "was written as a contribution to the cause of the progressive movement"); *see also* WOOD, *supra* note 16, at vi-viii (framing the struggle as one defined by social and economic interests).

centered in the towns and resting on financial, mercantile, and personal property interests generally."²¹

Beard's materialism moved him to view skeptically the colonists' professed constitutional concerns and to assert the view that, as one historian summarized it, the colonists' constitutional claims "were from the beginning merely cloaking under a specious claim of constitutional right in which they did not really believe, a settled determination to be absolutely independent of Great Britain."²² Accordingly, Beard dismissed the colonists' legal claims as high-sounding cover cloaking the unseemly exercise of base economic self-interest. At his crudest, Beard set out to prove his claims more or less scientifically by toting up the investments and debt instruments held by various founding fathers and correlating the results with their support for the Constitution.²³

Ultimately, it was this too-reductive analysis that proved to be Beard's undoing. A scholarly backlash ensued, at first earnestly rebutting and, later, outright parodying Beard's many overstatements and errors.²⁴ In time, Beard and his "Progressive School" were supplanted by a new, "ideological" school of American historians led by Bernard Bailyn of Harvard University and Gordon S. Wood of Brown University.²⁵ Bailyn and Wood did not dismiss the founders' professed motives but took them at their word.²⁶ Their "word" was principally supplied by the over four hundred pamphlets relating to the revolutionary struggle published in the colonies through 1776.²⁷ Professor

21. WOOD, *supra* note 16, at vii.

22. CHARLES H. MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 186 (1923).

23. WOOD, *supra* note 16, at viii.

24. *See, e.g.*, ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* 21 (1956); FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790*, at x-xi (1965); McDONALD, *supra* note 20, at 400; *see also* WOOD, *supra* note 16, at viii ("It seems clear that Beard's interpretation of the origins of the Constitution in a narrow sense—that the Founding Fathers' holdings of securities dictated their beliefs and actions—is dead, and no further time should be spent on it.").

25. *See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 21 (2005) (referring to Bailyn's and Wood's publications as examples of "the now standard historical accounts of the writing of the Constitution").

26. *See* BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, at ix-x (enlarged ed. 1992) (noting that the pamphlets published during the Anglo-American conflict were more than just propaganda; rather "[t]hey reveal[ed] . . . the assumptions, beliefs, and ideas—the articulated world view—that lay behind the manifest events of the time"); *see also* Colin Gordon, *Crafting a Usable Past: Consensus, Ideology, and Historians of the American Revolution*, 46 WM. & MARY Q. 671, 680 (1989) (noting that Bailyn "assumed that the pamphlets were forthright and sincere and that their authors never confused ultimate objectives with rhetorical strategy").

27. BAILYN, *supra* note 26, at ix.

Bailyn credited these pamphlets with providing insight into the ideas, assumptions, and beliefs motivating the colonists: in short, “the[ir] articulated world view—that lay behind the manifest events of the time.”²⁸ As Bailyn described it,

Study of the pamphlets confirmed my rather old-fashioned view that the American Revolution was above all else an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy.²⁹

This ideological focus hearkened back to the early, quasi-hagiographic histories that appeared immediately after the founding moment and, like them, once again presented the revolution as “involving mainly a constitutional argument with Britain over principles and rights.”³⁰ Bailyn and Wood eschewed Beard’s blunt economic determinism and instead accepted “ideas as determinants of historical events.”³¹ Thanks to their efforts, “[i]t now seem[s] that political issues and economic interests [can] no longer be comprehended apart from the larger intellectual and cultural world in which they operated.”³²

Historically speaking, accounting for the American colonists’ seeming hypersensitive reaction and hyperbolic rhetoric in response to British taxes is a fundamental problem of the founding period. After all, the Empire’s expenditures in the French and Indian War had been considerable and had redounded greatly to the colonists’ benefit.³³ To ask them to bear their fair share of the expense hardly seems outrageous. The taxes, as well, were modest and relatively unobtrusive.³⁴ By no means could they be considered “oppressive.” In this respect, the American Revolution appears unique. As Professor Wood noted,

There was none of the legendary tyranny of history that had so often driven desperate people into rebellion. The Americans were not an oppressed people; they had no crushing imperial shackles to throw off. In fact, the

28. *Id.* at x.

29. *Id.*

30. WOOD, *supra* note 16, at xi.

31. *Id.*

32. *Id.*

33. MORGAN & MORGAN, *supra* note 3, at 21–22.

34. *See, e.g.*, BAILYN, *supra* note 26, at 100 (stating that the sums of money involved in the Stamp Act “were in fact quite small”).

Americans knew that they were probably freer and less burdened with cumbersome feudal and hierarchical restraints than any part of mankind in the eighteenth century.³⁵

This paradox did not pass unnoticed at the time, either. Daniel Leonard—who, writing under the pseudonym “Massachusettensis,” engaged John Adams, writing as “Novanglus,” in an exchange of essays during the British occupation of Boston³⁶—complained that history had never seen so much rebellion with so “little real cause.”³⁷ Lord Howe’s private secretary, Ambrose Serle, wrote in his journal: “The Annals of no Country can produce an Instance of so virulent a Rebellion, of such implacable madness and Fury, originating from such trivial Causes, as those alleged by these unhappy People.”³⁸ The British statesman and political philosopher Edmund Burke, a strong supporter of the American cause, praised the colonists’ acute sensitivity to their rights: “[The Americans] augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze.”³⁹

Historians have agreed with this assessment, but have disputed its significance. For Beard and his Progressive school, the gap between the colonists’ rhetoric and reality merely confirmed his expectations. The tax controversy, as he saw it, was merely the instrument at hand to achieve the founders’ hidden economic agenda. But for Bailyn and Wood, the colonists’ distorted perception was deeply revealing and key to comprehending the revolutionary mindset: “It was in the context of the sources and patterns of ideas presented in [the pamphlets],” wrote Bailyn, “that I began to see a new meaning in phrases that I, like most historians, had readily dismissed as mere rhetoric and propaganda: ‘slavery,’ ‘corruption,’ ‘conspiracy.’”⁴⁰ In fact, the colonists honestly experienced these

35. WOOD, *supra* note 5, at 3.

36. *See id.* Jonathan Sewall was originally mistaken as the author of the Massachusettensis papers, but in fact modern scholarship has concluded the true author was Daniel Leonard. *See* Max Savelle, *Nationalism and Other Loyalties in the American Revolution*, 67 AM. HIST. REV. 901, 905 n.12 (1962) (citing JOHN ADAMS & JONATHAN SEWALL, *NOVANGLUS AND MASSACHUSETTENSIS* (Boston, Hews & Co. 1819)).

37. *Id.*

38. *Id.* at 3–4 (quoting THE AMERICAN JOURNAL OF AMBROSE SERLE, SECRETARY TO LORD HOWE, 1776–1778, at 46–47 (Edward H. Tatum, Jr. ed., 1940)).

39. *Id.* at 4–5 & n.5 (quoting Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), in 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 125 (9th ed. 1889)).

40. BAILYN, *supra* note 26, at xii–xiii

trifling taxes as a threat to their freedom.⁴¹ “The more I read,” Bailyn explained,

the less useful, it seemed to me, was the whole idea of propaganda in its modern meaning when applied to the writings of the American Revolution In the end I was convinced that the fear of a comprehensive conspiracy against liberty throughout the English-speaking world—a conspiracy believed to have been nourished in corruption, and of which, it was felt, oppression in America was only the most immediately visible part—lay at the heart of the Revolutionary movement.⁴²

In short, for Bailyn and the ideological school of historians, the revolutionists’ pamphlets revealed “nothing less than the ideological origins of the American Revolution.”⁴³

B. A Word About Pamphlets

“The records of thirteen legislatures, the pamphlets, newspapers in all the colonies, ought to be consulted during that period [1760–1775] to ascertain the steps by which the public opinion was enlightened and informed concerning the authority of Parliament over the colonies.”⁴⁴

Another pretrial matter concerns the significance of revolutionary-era pamphlets generally and of *Taxation No Tyranny* in particular. Such pamphlets were both commonplace and important.⁴⁵ Of their abundance, Bernard Bailyn commented: “Whatever deficiencies the leaders of the American Revolution may have had, reticence, fortunately, was not one of them.”⁴⁶ In 1775, pamphlets supplemented the thirty-eight newspapers in the colonies, and the numerous almanacs that sometimes dabbled in political commentary as well.⁴⁷

41. Why the colonists misperceived British intentions, and exaggerated the threat to their liberties, is itself a fascinating inquiry, and arguably the single greatest insight that Professors Bailyn and Wood have brought to the subject. Unfortunately, it is a topic too large and too tangential to detail in this Essay, but the interested reader should consult Bailyn’s and Wood’s treatment of the subject. See *id.* at 144–59 (describing the evolution of opposition Whig thought, its transmission to the American colonies, and the resulting conspiratorial mindset that viewed with suspicion every extension of British governmental authority over them); WOOD, *supra* note 5, at 3–45 (describing the “Whig Science of Politics”).

42. BAILYN, *supra* note 26, at xiii.

43. *Id.* at x.

44. *Id.* at 1 (quoting an 1815 letter from John Adams to Thomas Jefferson).

45. *Id.* at 1–3.

46. *Id.* at 1.

47. *Id.*

These pamphlets were not altogether different from how we would use the term today: unbound, uncovered printer's sheets, folded into units, and distributed widely and cheaply.⁴⁸ Owing to the expensiveness of books and the scarcity of other media, they had an out-sized impact upon the terms of public debate in the eighteenth century. They were the primary means by which the colonists expressed their opposition to the British tax legislation of the 1760s and 1770s.⁴⁹ Once pressed into this service, the pamphlets became "the distinctive literature of the Revolution . . . reveal[ing], more clearly than any other single group of documents, the contemporary meaning of that transforming event."⁵⁰

The tax controversy with Britain spawned more than 400 such polemical pamphlets between 1750 and 1776.⁵¹ By 1783, over 1,500 pamphlets had been published concerning these events and the resulting revolution.⁵² The majority directly addressed the proposed taxes and related questions of the moral and political authority to impose them. Not infrequently, the pamphlets spiraled into "what might be called chain-reacting personal polemics: strings of individual exchanges—arguments, replies, rebuttals, and counter-rebuttals . . . [that] characteristically proceeded with increasing shrillness until it ended in bitter personal vituperation."⁵³

The most influential pamphlet was Thomas Paine's *Common Sense*, justly celebrated as "the most brilliant pamphlet written during the American Revolution, and one of the most brilliant pamphlets ever written in the English language."⁵⁴ When published anonymously in January 1776, it became the first

48. *Id.* at 2.

49. *Id.* at 8.

50. *Id.*

51. *Id.* at 8.

52. *Id.*

53. *Id.* at 4–5. The modern equivalent might be an internet "flame war." A "flamer" is defined as one who "send[s] an angry, hostile, or abusive electronic message." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 475 (11th ed. 2003).

54. ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 75 (1976) (quoting Bernard Bailyn, *Common Sense*, 25 AM. HERITAGE 36, 36 (1973)); see also COLONIES TO NATION, *supra* note 6, at 268 (noting that *Common Sense* was "[t]he most forceful exposition of this [pro-independence] view and the most widely reprinted and effective tract to come out of the debate with Britain"); DONALD LUTZ & JACK WARREN, A COVENANTED PEOPLE: THE RELIGIOUS TRADITION AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1987) (referring to *Common Sense* as "by far the most influential tract of the American Revolution").

pamphlet openly to advocate the cause of independence—at a time when doing so invited execution for treason.⁵⁵

A typical pamphlet of the time could be expected to sell one or two editions and perhaps a few thousand copies in all. Even the most widely circulated colonial newspapers averaged less than two thousand sold per week.⁵⁶ *Common Sense*, by comparison, went through twenty-five editions, eventually sold at least 100,000 copies, and undoubtedly passed through the hands of several hundred thousand more readers in the months leading up to the *Declaration of Independence*.⁵⁷ On its own it sparked a minor publishing sensation, provoking two lengthy Tory rebuttals and inspiring at least another four firebrand pamphlets that took up Paine's call for independence.⁵⁸

C. Samuel Johnson, Counsel for the Defense

Our last pretrial matter involves the identity of counsel for the defense. The authority and bona fides of the First Continental Congress would seem to be beyond objection. But what of its opposite number? Does he have the legal credentials to argue the case?⁵⁹ Does he have authority to speak for the British government, and can he fairly and adequately represent its interests?⁶⁰ To answer these questions, we must inquire into the ability and legal acumen of Samuel Johnson, the author of *Taxation No Tyranny*.

To our modern ears, the word “pamphlet” connotes disrepute or amateurism. But it was not so in 1775. The unprecedented success of Tom Paine's *Common Sense* illustrates the seriousness with which pamphlets were treated in the revolutionary era. As Bernard Bailyn noted:

These [Revolutionary] pamphlets form part of the vast body of English polemical and journalistic literature of the seventeenth and eighteenth centuries to which the greatest men of letters contributed. Milton, Halifax, Locke, Swift,

55. FONER, *supra* note 54, at 74–75.

56. JOHN HOHENBERG, *FREE PRESS/FREE PEOPLE: THE BEST CAUSE* 48 (1971).

57. A. OWEN ALDRIDGE, *THOMAS PAINE'S AMERICAN IDEOLOGY* 45 (1984); HOWARD ZINN, *ARTISTS IN TIMES OF WAR* 94 (Greg Ruggiero ed., 2003).

58. BAILYN, *supra* note 26, at 5.

59. Texas law prohibits the unauthorized practice of law by nonattorneys and permits nonmembers of the State Bar to practice law under strictly limited circumstances. See TEX. GOV'T CODE ANN. § 81.101 (Vernon 2005).

60. See, e.g., TEX. R. CIV. P. 12 (requiring that an attorney show sufficient authority to prosecute or defend a suit); TEX. R. CIV. P. 42(g)(1)(B) (requiring that to be appointed counsel in class action suit, a proposed attorney “must fairly and adequately represent interests of the class”).

Defoe, Bolingbroke, Addison were all pamphleteers at least to the extent that [the Americans] Bland, Otis, Dickinson, the Adamases, Wilson, and Jefferson were.⁶¹

Samuel Johnson, one of England's most illustrious men of letters and arguably "the foremost literary figure and the most formidable conversationalist of his time," fit comfortably within this long-standing literary tradition.⁶² He had authored several political satires in the early half of his career: *London, Marmor Norfolciense*, and a series of parliamentary reports that appeared in *The Gentleman's Magazine*, all published before 1745.⁶³ In 1756, he wrote two dry and deservedly lesser-known political essays, "An Introduction to the Political State of Great Britain" and "Observations on the Present State of Affairs"—the latter a disquisition on the French and Indian War.⁶⁴ By 1770, Johnson had been long established at the pinnacle of English literary society, principally on the basis of nonpolitical works such as *A Dictionary of the English Language*; a novella entitled *Rasselas*; his poetry; and his literary and aesthetic criticism.⁶⁵ Yet he reverted to politics, publishing four overtly political pamphlets favoring the British government's position on hotly contested controversies: *The False Alarm* (1770), *Thoughts on the Late Transactions Respecting the Falkland's Islands* (1771), *The Patriot* (1774), and *Taxation No Tyranny* (1775).⁶⁶

Johnson's return to the political fray was widely regarded as an unusual, and ill-advised, career move. "He had begun to be regarded as the Grand Old Man of English letters, the great moralist, a landmark of the British cultural scene, expected to pontificate solemnly and judiciously on suitable occasions—the familiar apotheosis of the older writer in Britain."⁶⁷ Johnson's

61. BAILYN, *supra* note 26, at 8. The reader should not be misled by the above quotation. Bailyn believed that the literary talent and imaginativeness evident in the British pamphlets—and in particular in such works as Jonathan Swift's *Modest Proposal*, John Arbuthnot's *Art of Political Lying* and *History of John Bull*, and Daniel Defoe's *Shortest Way with the Dissenters*—far outshone the Americans' efforts. *See id.* at 12–13.

62. *Samuel Johnson*, in 22 THE NEW ENCYCLOPÆDIA BRITANNICA 363 (15th ed. 1998). Scholars have noted the apparent influence of the famous Irish pamphleteer and writer, Jonathan Swift, in a number of Johnson's early political satires, particularly in *Marmor Norfolciense* and *A Compleat Vindication of the Licensers of the Stage*. *Id.* at 365. It was also noted that Johnson's periodical, *The Rambler* (1750–52), was in many ways modeled upon Addison's influential *The Spectator*, published almost forty years earlier. *See* James F. Woodruff, Note, *The Tatler Revived, 1750: A Competitor of the Rambler*, 26 REV. ENG. STUD. 174, 177 (1975).

63. *Samuel Johnson*, *supra* note 62, at 364.

64. 2 THE WORKS OF SAMUEL JOHNSON, LL.D. 392, 395 (1938).

65. *Samuel Johnson*, *supra* note 62, at 365–66.

66. *Id.* at 367.

67. DONALD J. GREENE, THE POLITICS OF SAMUEL JOHNSON 204 (1960).

more sympathetic readers expressed dismay “that the writer of so moral, so elegant, and so valuable a work [as *The Rambler*, a twice-weekly series of essays], was capable of prostituting his talents in such productions as *The False Alarm*, the *Thoughts on the Transactions respecting Falkland’s Islands*, and *The Patriot*.”⁶⁸

Others were less charitable. A recurring accusation was that Johnson had become the North Ministry’s paid political hack. In response to *Thoughts on the Late Transactions Respecting Falkland’s Islands*, the *Political Register* dubbed him “the high and mighty Prince of Pensioners.”⁶⁹ A subtler attack appeared as a mock advertisement, printed by the *London Evening Post*, which featured a “List of Goods for Sale” that included “Manuscripts of all sorts” by Johnson, the “Historiographer to the Ministry.”⁷⁰ Each successive political pamphlet was greeted with similarly inventive phrases: “ministerial writer,” “ministerial drudge,” and “court-pensioner,” to name a few.⁷¹

James Boswell, his good friend and celebrated biographer, speculated that Johnson “may have felt sincere uneasiness that his conduct should be erroneously imputed to unworthy motives, by good men; and that the influence of his valuable writings should on that account be in any degree obstructed or lessened.”⁷² But Johnson, for his part, appears to have taken the vituperation in stride. Of *Taxation No Tyranny*, he told Boswell: “I think I have not been attacked enough for it. Attack is the re-action; I never think I have hit hard, unless it rebounds.”⁷³

Reaction he certainly received. *Taxation No Tyranny* first appeared on March 8, 1775, and within the month was reproduced in twenty-eight extracts appearing in various

68. JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 524–25 (Alfred A. Knopf Everyman’s Library 1992) (quoting from Dr. Joseph Towers’s “A Letter to Dr. Samuel Johnson, occasioned by his late political Publications”).

69. *The Political Register for May, 1771*, in 8 *THE POLITICAL REGISTER AND IMPARTIAL REVIEW FOR MDCCLXXI* 255, 313 (1771). This insult used Johnson’s own dictionary to cut doubly deep—not only did it intimate that Johnson was a paid political hack (Johnson’s dictionary defined a “pensioner” as “a slave of state, hired by stipend to obey his master” and “pension” as “pay given to a state hireling for treason to his country”), but it also characterized him as a traitor for his stance against Britain entering a war with Spain. *Id.* For Johnson’s definitions of pension and pensioner, see SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1755).

70. HELEN LOUISE MCGUFFIE, *SAMUEL JOHNSON IN THE BRITISH PRESS, 1749–1784: A CHRONOLOGICAL CHECKLIST* 89 (1976) (quoting *LONDON EVENING POST*, Aug. 29, 1771).

71. *Id.* at 171 (quoting *Letter*, *MIDDLESEX JOURNAL*, July 11, 1775); *Id.* at 159 (quoting Leechlade, *Impromptu on a Late Pamphlet*, *LONDON EVENING POST*, Apr. 8, 1775); *Id.* at 172 (quoting *CRISIS*, Aug. 9, 1775).

72. BOSWELL, *supra* note 68, at 525.

73. *Id.* at 536.

newspapers in London, Oxford, and Scotland.⁷⁴ Before year-end, eight separate pamphlets were published to refute it, plus eight mostly scathing reviews and numerous angry letters that did not refrain from attacking the author in highly personal terms.⁷⁵ Almost fifty such letters, and several of the pamphlets, railed against Johnson's government pension—one parodically announcing the imminent publication of a sequel to *Taxation No Tyranny*, to be entitled "Bribery No Corruption."⁷⁶

Scholars have debated the fairness of this charge.⁷⁷ Johnson's £300 government pension had indeed delivered him from a life of chronic poverty, but it had been granted to him in 1762—eight years before his first progovernment pamphlet.⁷⁸ Needy though he had been at the time, moreover, Johnson had hesitated before accepting financial assistance.⁷⁹ He had, after all, defined "pension" in his famous *Dictionary*, with characteristic pungency, as "generally understood to mean pay given to a state hireling for treason to his country."⁸⁰ To overcome these scruples, the Prime Minister, Lord Bute, twice assured him that the pension was not being awarded "for anything you are to do, but for what you have done."⁸¹

On the other hand, Johnson's name appears in a ministry-maintained list of "Private Pensions, and Secret Service Money," which catalogued amounts paid from a royal fund set aside for "Writers Political"—an improbable designation if, as Johnson insisted, his pension had been awarded solely for literary merit.⁸²

74. Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress* (1775), in 16 THE WORKS OF SAMUEL JOHNSON 93 (1903); MCGUFFIE, *supra* note 70, at 149–59.

75. MCGUFFIE, *supra* note 70, at 149–59. *Taxation No Tyranny* was published anonymously, but Johnson's handiwork was evident to his contemporaries. *Id.* at 150. One of the opposing pamphlets published in London, for example, was entitled "*Taxation, Tyranny. Addressed to Samuel Johnson, L.L.D.*" *Id.* at 159.

76. *Id.* at 162. Riffs on *Taxation No Tyranny's* title such as "Taxation, Tyranny" and "Resistance No Rebellion" were a staple among the many printed rebuttals. *See id.* at 149–82.

77. *See, e.g.,* GREENE, *supra* note 67, at 216–19 (arguing that Johnson was "clarifying and emphasizing the concept of sovereignty" against American ideas of fully representative government).

78. *Samuel Johnson, supra* note 62, at 366 (noting that after being awarded his pension, "Johnson never again had to write in order to raise funds").

79. PAT ROGERS, THE SAMUEL JOHNSON ENCYCLOPEDIA 292 (1996).

80. DICTIONARY OF NATIONAL BIOGRAPHY 39 (Sidney Lee ed., 1892).

81. BOSWELL, *supra* note 68, at 236 & n.1. Although his impartiality may be suspect, Boswell rebutted these charges in his famous biography, insisting Johnson "neither asked nor received from government any reward whatsoever for his political labours." *Id.* at 526.

82. *See* Paul J. Korshin, *Types of Eighteenth-Century Literary Patronage*, 7 EIGHTEENTH-CENTURY STUD. 453, 470–71 & n.49 (1974) (reporting that the list had been

Lord North's contemporaneous conduct offers additional circumstantial evidence: acting not as the Prime Minister, but in his alternate title of Chancellor of the University of Oxford, North recommended that Johnson be awarded an honorary Doctorate in Civil Law a scant sixteen days after *Taxation No Tyranny's* publication.⁸³

It is not Johnson's literary character but his authority to speak on behalf of the British government that concerns us. And in that respect, the evidence seems clear that Johnson wrote *Taxation No Tyranny* at the behest of the British government. As Boswell reported: "That this pamphlet was written at the desire of those who were then in power, I have no doubt; and, indeed, he [Johnson] owned to me, that it had been revised and curtailed by some of them."⁸⁴ Boswell not only described a specific instance of a passage stricken by the Ministry, but also reprinted five other excerpts deleted "either by [Johnson] himself or those who revised it."⁸⁵ *Taxation No Tyranny* was thus "undoubtedly produced at the request of ministers, [and] was as nearly an official reaction as was possible at that time."⁸⁶

Having established Johnson's authority to speak for the British government, let us now address his ability to do so. Did Johnson possess sufficient understanding of British law capably to rebut the colonists' case? Until recent times, it had been assumed that Johnson's two law degrees had been bestowed upon him in a purely honorary capacity.⁸⁷

drawn up at William Pitt's request to facilitate transfer of private Crown patronage, including literary gifts to the "Civil List").

83. BOSWELL, *supra* note 68, at 533–34.

84. *Id.* at 523.

85. *Id.* at 523–24.

86. CHRISTOPHER C. BOOTH, *TAXATION NO TYRANNY: TRANSACTIONS OF THE JOHNSONIAN SOCIETY* 36–37 (1987). Johnson's own political commitments have been the subject of considerable scholarly debate. See, e.g., GREENE, *supra* note 67, at 204 ("Those who have been deceived by Johnson's anti-Whig outbursts into seriously believing that he could hardly bear the sight of a whig have been the victims of one of the great hoaxes of literary history."). It is an interesting subject, but tangential to the topic at hand. For those seeking a detailed treatment of Dr. Johnson's politics, see generally *id.* at 253–54 (explaining the author's view that Johnson's politics were born of the idea that the happiness of many are worth more than the ambitions of one). A more condensed treatment, including relevant excerpts and quotations from Johnson's works and an analysis of where Johnson would come down in contemporary political controversies, may be found in an online article by Frank Lynch. See Frank Lynch, Was Johnson a Conservative, or a Liberal?, *The Samuel Johnson Sound Bite Page*, <http://www.samueljohnson.com/jpolitics.html> (last visited Oct. 18, 2007).

87. Trinity College, Dublin, had in 1765 bestowed upon Johnson an honorary Doctor of Laws degree in 1765. *Samuel Johnson*, *supra* note 62, at 367. Johnson seldom, if ever, resorted to the honorific, but several of his contemporaries so referred to him. *Id.* Boswell, in particular, called him "Dr. Johnson" throughout his biography—which was originally

It now appears that Johnson may well have earned his Oxford degree. Scholars had suspected his secret involvement in editing the Vinerian Lectures, which were presented by Johnson's good friend, Sir Robert Chambers, the Oxford Professor of English Law, from 1766 to 1773.⁸⁸ But painstaking archival research conclusively confirmed the fact of his collaboration only in the last few decades.⁸⁹

The lectures themselves were a daunting endeavor, ultimately totaling 1,600 pages.⁹⁰ The Vinerian Chair was a prestigious appointment—one of the earliest endowed legal professorships in the world. Its first holder, and Chambers' immediate predecessor, had been Sir William Blackstone, the author of the *Commentaries on the Laws of England*.⁹¹

Johnson's editing of Sir Robert's lectures surely sharpened both Johnson's conceptual approach to, and the presentation of, his case against the American colonists. In the fifteenth Vinerian lecture, for example—a disquisition on the government of Ireland and the American colonies—one may glimpse in embryonic form all the same arguments Johnson deploys in *Taxation No Tyranny*: the concepts of colonies as bound to the sovereign by law; virtual representation; and the power to tax as inhering in the more general grant of legislative authority.⁹² The exercise undoubtedly prepared him well when writing *Taxation No Tyranny* two years later: “Nowhere does the influence of the Vinerian lectures seem more pervasive or profound than in . . . *Taxation No Tyranny*.”⁹³ Indeed, “[t]his fiery pamphlet may even qualify as the culminating product of the collaboration within Johnson's own body of writings.”⁹⁴ In sum, we may conclude that Johnson makes a more than adequate advocate to rebut the case put forth by the First Continental Congress.

entitled “The Life of Samuel Johnson, LL.D.” *Id.* Nonetheless, the degree was purely honorary, as was believed to be the Doctor of Civil Laws degree that Johnson received from the University of Oxford ten years later, in 1775. *Id.*

88. E.L. MCADAM, JR., DR. JOHNSON AND THE ENGLISH LAW 65 (1951).

89. See generally *id.* (presenting “the first attempt to determine the extent and nature of Johnson's contribution” to Chambers's Vinerian lectures on the English law).

90. *Id.* at 73.

91. *Sir William Blackstone*, in 2 THE NEW ENCYCLOPÆDIA BRITANNICA, *supra* note 62, at 263, 264.

92. MCADAM, *supra* note 88, at 105.

93. Thomas M. Curley, *Johnson's Secret Collaboration*, in THE UNKNOWN SAMUEL JOHNSON 91, 107 (John J. Burke, Jr. & Donald Kay eds., 1983).

94. *Id.*

III. THE ARGUMENTS: SAMUEL JOHNSON VERSUS THE CONTINENTAL CONGRESS

“This fiery pamphlet” was first and foremost a response and rebuttal to the *Declaration and Resolves of the First Continental Congress*, issued on October 14, 1774.⁹⁵ The Congress was called in response to rising anti-British sentiment following the Boston Tea Party (December 16, 1773) and Parliament’s angry reaction to it: the adoption of the “Coercive Acts,” intended expressly to punish and isolate the rebellious Massachusetts Colony.⁹⁶ Convened on September 5, 1774, the Congress was attended by delegates from all of the original thirteen colonies except Georgia, and its *Declaration* forms the first written statement of the first assembly authorized to speak on behalf of the American colonies—Georgia’s absence notwithstanding.⁹⁷ Once convened, the Congress’s deliberations quickly took a radical turn.⁹⁸

A. *The American Argument: The Declaration and Resolves of the First Continental Congress*

The *Declaration* faithfully reflected this radicalism in its bold tone and confrontational content. It declared the Coercive Acts illegal and condemned them and all prior revenue acts, the recently enacted Quebec Act,⁹⁹ and various other miscellaneous

95. See *Samuel Johnson*, *supra* note 62, at 367 (noting *Taxation No Tyranny* “summarizes [Johnson’s] position opposing the American Continental Congress, which in 1774 had passed resolutions against taxation by England”); *Declaration and Resolves of the First Continental Congress*, JOURNALS OF THE CONTINENTAL CONGRESS (1774), reprinted in 2 COLONIES TO NATION, *supra* note 6, at 243 [hereinafter *Declaration*] (opposing “the British Parliament” who “hath in some acts expressly imposed taxes on [the people of America]”). A copy of the *Declaration* is also available online. The Avalon Project at Yale Law School, *Declaration and Resolves of the First Continental Congress*, <http://www.yale.edu/lawweb/avalon/resolves.htm> (last visited Jan. 17, 2007).

96. 2 COLONIES TO NATION, *supra* note 6, at 197–98, 242–43.

97. See *id.*

98. See *id.* at 243 (noting the *Declaration* “committed the colonies represented to a nonimportation, nonexportation, and nonconsumption agreement until there was a change in British policy”); MORGAN & MORGAN, *supra* note 3, at 62–65 (noting that the *Declaration* began the divorce of the British Parliament and the Colonies). A prior intercolonial Congress, the Stamp Act Congress, had convened in October 1765, in New York, but was attended by representatives of only those nine colonies that had responded to Massachusetts’s invitation. MORGAN & MORGAN, *supra* note 3, at 23. For an in-depth study of the First Continental Congress, see EDMUND CODY BURNETT, THE CONTINENTAL CONGRESS (1941).

99. The Quebec Act established a civil government for Canada, extended boundaries that encroached upon the American colonies, eliminated representative assemblies, and established special privileges for the Catholic Church—all seen as threatening to American interests and liberties. THOMAS O’GORMAN, A HISTORY OF THE ROMAN CATHOLIC CHURCH IN THE UNITED STATES 250 (1895).

laws as "impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights."¹⁰⁰ Seeing in these acts "a system formed to enslave America," the *Declaration* demanded their repeal as "essentially necessary, in order to restore harmony between Great Britain and the American colonies."¹⁰¹ To hasten that repeal by means of economic pressure, the *Declaration* also announced the Congress's commitment to form a "non-importation, non-consumption, and non-exportation agreement or association."¹⁰²

Two particulars of the *Declaration* merit special mention. First is its finessing of the key controversy: the authority of Parliament to tax and legislate for the colonies. In a resolution drafted by John Adams, the Congress defied Parliament's power "in all cases of taxation and internal polity" but declared, as a conciliatory gesture, its willingness "from the necessity of the case, and a regard to the mutual interest of both countries" to accede to Parliament's "bona fide" regulations pertaining to the Empire's external commerce.¹⁰³ This was a clever hedge, with something to please, and to offend, everyone: "In this somewhat equivocal resolution the members with one breath denied the right of Parliament to legislate for them and with the next volunteered to abide by that wonderful old state of things that existed in 1763."¹⁰⁴

The second noteworthy aspect of the *Declaration* is its ten enumerated articles or resolutions,¹⁰⁵ which were introduced by a ringing preamble:

That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following Rights:

Resolved, N.C.D. 1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

Resolved, N.C.D. 2. 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.

100. *Declaration*, *supra* note 95, at 244.

101. *Id.* at 246.

102. *Id.*

103. *Id.* at 245.

104. MORGAN & MORGAN, *supra* note 3, at 67.

105. *Id.* at 66; *Declaration*, *supra* note 95, at 245. Adams's "equivocal resolution" is the fourth of the ten numbered articles.

Resolved, N.C.D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.¹⁰⁶

These familiar-sounding resolutions obviously anticipate the *Declaration of Independence*. Together with articles five through ten they constitute a precursor Bill of Rights, asserting an entitlement to the English common law and jury trial; to the right to assemble peaceably, to petition the king for a redress of grievances, and to be free from prosecution for all such acts; to be free from the maintenance of standing armies without the consent of their local legislature; and to a certain separation of powers, at least as between “the constituent branches of the legislature”—e.g., prohibiting the Crown from appointing local “councils” empowered to veto the acts of the colonial legislature.¹⁰⁷

These resolutions were closely modeled on the Declaration of Rights presented to William and Mary in 1689 at the conclusion of the Glorious Revolution, with some phrases lifted verbatim from the earlier document.¹⁰⁸ Despite its provocative passages, the *Declaration* was in fact “not a revolutionary document: unlike its English predecessor [and its more illustrious American successor], it did not mark the end of an old regime and the beginning of a new. Instead it sought, like a petition of right, justice under the standing order.”¹⁰⁹

B. *The British Rebuttal: Taxation No Tyranny*

Thus was the table set for Samuel Johnson’s rebuttal on behalf of the British Ministry. After an initial rhetorical display—mainly directed towards assaulting the colonists’ patriotism¹¹⁰—Johnson quickly comes to the heart of the matter:

106. *Declaration*, *supra* note 95, at 244–45 (first emphasis added). “N.C.D.” stands for the Latin phrase, *nemine contra dicente*, and signifies a unanimous vote. Literally translated, the phrase means “no man speaking against.” JACK N. RACKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 63 (1998).

107. *Declaration*, *supra* note 95, at 244–45.

108. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 52–55 (1997).

109. *Id.* at 55.

110. “To love their country,” Johnson writes, “has been considered as virtue in men, whose love could not be otherwise than blind, because their preference was made without a comparison; but it has never been my fortune to find, either in ancient or modern writers, any honourable mention of those, who have, with equal blindness, hated their country.” Johnson, *supra* note 74, at 95. This innuendo is somewhat ironic, given that Johnson’s most famous aphorism may be the one defining patriotism as “the last refuge of

There are those . . . who tell us, that to tax the colonies is usurpation and oppression, an invasion of natural and legal rights, and a violation of those principles which support the constitution of English government. This question is of great importance.¹¹¹

Evoking a courtroom contest, Johnson proposes a trial of the colonists' case:

Let us examine our own claim, and the objections of the recusants, with caution proportioned to the event of the decision, which must convict one part of robbery, or the other of rebellion.¹¹²

Johnson proceeds to examine the competing claims, and outlines three main propositions: (1) the colonies were formed by, and remain subject to, British authority; (2) Parliament's authority to tax is neither different from nor less than its power to enact ordinary legislation; and (3) although legislation requires consent of the governed, that consent is established by the colonists' "virtual representation" in Parliament's deliberations.

Let us take up Johnson's suggestion, and try these points in turn.

1. *Taxation No Tyranny: The Legal Status of the American Colonies.* Johnson opens, as legal briefs often do, with the undisputed issues. The Americans, he says, "have never openly denied" their obligation not only to pay the costs of their own safety, but also to contribute generally to the support of the British Empire.¹¹³ Yet the *Declaration*—and in particular John Adams's "equivocal" resolution—arrogantly assumes the power to delimit these admitted obligations. This is a "wild" claim, Johnson jibes, "which supposes dominion without authority":¹¹⁴

They allow to the supreme power nothing more than the liberty of notifying to them its demands or its necessities They assume the exclusive power of settling not only the mode, but the quantity, of this payment. They are ready to cooperate with all the other dominions of the king; but they will cooperate by no means

a scoundrel." BOSWELL, *supra* note 68, at 543.

111. Johnson, *supra* note 74, at 100.

112. *Id.*

113. *Id.* at 101.

114. MORGAN & MORGAN, *supra* note 3, at 66; Johnson, *supra* note 74, at 102.

which they do not like, and at no greater charge than they are willing to bear.¹¹⁵

To explain the colonists' error, Johnson inquires into the nature of the colonies and how they were constituted: "what are the terms of migration, as dictated by nature, or settled by compact; and what social or political rights the man loses or acquires, that leaves his country to establish himself in a distant plantation?"¹¹⁶ History, he tells us, reveals only two modes of migration. The first is military conquest by roving bands and explorers—as in the examples of the Huns, the Vandals, the Goths, and the Vikings.¹¹⁷ "Sons of enterprise, like these," Johnson explains, left their own country to form another.¹¹⁸ "They looked back no more to their former home; they expected no help from those they had left behind; if they conquered, they conquered for themselves."¹¹⁹ Of this type were all the migrations of peoples of the early world, including those tribes that invaded the Roman Empire "and filled Europe with new sovereignties."¹²⁰

These new sovereignties established fixed boundaries, and in so doing put an end to the old form of migration and conquest. As a consequence, colonial settlements became altogether different: "No man could any longer erect himself into a chieftain, and lead out his fellow-subjects, by his own authority, to plunder or to war."¹²¹ To do so in the modern age, "without the commission of some acknowledged sovereign,"¹²² invited prosecution for piracy. From the time of Columbus forward, all such conquests were now made in the name of the sovereign.¹²³ "To secure a conquest" in

115. Johnson, *supra* note 74, at 101–02.

116. *Id.* at 102.

117. *Id.* at 103–04.

118. *Id.* at 103.

119. *Id.*

120. *Id.*

121. *Id.* at 105.

122. *Id.*

123. Johnson reveals his confirmed anticolonial impulses in this section. Commenting upon the Portuguese and Spanish discoveries of the East and West Indies, he refers to them as having occurred "[i]n the same year, in a year hitherto disastrous to mankind." *Id.* at 106. Of Columbus's efforts to finance his expedition, he opines: "nor has any part of the world yet had reason to rejoice that he found, at last, reception and employment." *Id.* at 105. Much of Johnson's anticolonialism arose from his hatred of slavery, and this undoubtedly contributed to the antipathy he felt for the American cause. His best barb in *Taxation No Tyranny* comes in reply to the *Declaration's* assertion that if Parliament was permitted to subjugate the Americans, then it would in time surely seek to reduce their British compatriots to servility as well. *Declaration, supra* note 95, at 245–46. To which Johnson retorts: "If slavery be thus fatally contagious, how is it that we hear the loudest yelps for liberty among the drivers of negroes?" Johnson, *supra* note 74, at 143–44.

this new time, "it was always necessary to plant a colony, and territories, thus occupied and settled, were rightly considered, as mere extensions, or processes of empire . . . which were kept flourishing and spreading by the radical vigour of the mother-country."¹²⁴

Of such a nature, Johnson continues, are the American colonies. The first discoverers had commissions from the crown; the first settlers obtained charters granted by the king, and built their political and civil society upon it, all the while continuing under British rule and protection. These historical facts are highly suggestive:

Our colonies, therefore, however distant, have been, hitherto, treated as constituent parts of the British empire. The inhabitants incorporated by English charters are entitled to all the rights of Englishmen. They are governed by English laws, entitled to English dignities, regulated by English counsels, and protected by English arms; and it seems to follow, by consequence not easily avoided, that they are subject to English government, and chargeable by English taxation.¹²⁵

Here, Johnson has completed a major rhetorical coup. An American reading along surely would have received Johnson's acknowledgement that the colonists enjoy the rights of Englishmen as a major concession. But in fact, he has turned it against them. For charter rights, like contracts generally, can be a two-edged sword. The Americans, Johnson argues, cannot accept all the benefits of their charters without also assuming the concomitant burdens:

[B]ut when this is granted [that the colonists enjoy "all the rights, liberties, and immunities of natural-born English subjects"], their boast of original rights is at an end; they are no longer in a state of nature. These lords of themselves, these kings of ME, these demigods of independence sink down to colonists, governed by a charter. If their ancestors were subjects, they acknowledged a sovereign; if they had a right to English privileges, they were accountable to English laws; and, what must grieve the lover of liberty to discover, had ceded to the king and parliament, whether the right or not, at least, the power of disposing, "without their consent, of their lives, liberties, and properties."¹²⁶

124. Johnson, *supra* note 74, at 106.

125. *Id.* at 109–10.

126. *Id.* at 114.

Ultimately, for Johnson, all questions of political authority bump up against one—to him, incontrovertible—truth: either the colonies are subordinate to Britain, or the reverse. Between these opposed positions there can be no middle ground. As he expresses it, in *Taxation No Tyranny*'s most memorable passage:

In sovereignty there are no gradations. There may be limited royalty, there may be limited consulship; but there can be no limited government. There must, in every society, be some power or other, from which there is no appeal, which admits no restrictions, which pervades the whole mass of the community, regulates and adjusts all subordination, enacts laws or repeals them, erects or annuls judicatures, extends or contracts privileges, exempts itself from question or control, and bounded only by physical necessity. . . . It is not infallible, for it may do wrong; but it is irresistible, for it can be resisted only by rebellion, by an act which makes it questionable, what shall be thenceforward the supreme power.¹²⁷

This axiom—incontestable as far as Johnson is concerned—compels his conclusion. Britain created the colonies, granted their charters, appointed their officials, protected them from native and foreign foes, and always exercised a dominion never before disputed by the colonists. Nothing has occurred to change this state of affairs; nor have the colonists (yet) asserted their independence from the Empire. Since “[i]n sovereignty there are no gradations,” it must be that the colonies remain subject to British rule and, ultimately, to the power of Parliament.¹²⁸

2. *Taxation No Tyranny: Parliament's Authority to Tax.* Johnson cannot end the inquiry here, however. For “[t]here are some, and those not inconsiderable for number, nor contemptible for knowledge, who except the power of taxation from the general dominion of parliament, and hold, that whatever degrees of obedience may be exacted, or whatever authority may be exercised in other acts of government, there is still reverence to be paid to money, and that legislation passes its limits when it violates the purse.”¹²⁹ This was not, of course, an argument advanced in the *Declaration*, which, led by John Adams, had denied Parliament's authority to act for the colonies in *all* cases. But here Johnson is going beyond the *Declaration* at hand and attempting to address a constitutional argument

127. *Id.* at 107.

128. *Id.*

129. *Id.* at 110–11.

that had been advanced by the American colonists since the Stamp Act crisis.¹³⁰

Johnson quickly dispatches any purported distinction between taxation and other legislation. For one thing, he notes: "The charter of Pennsylvania, where this congress of anarchy has been impudently held, contains a clause admitting, in express terms, taxation by the parliament."¹³¹ That is certainly what one might call a bad fact for the colonists. Johnson, however, must concede a bad fact of his own: that the remaining colonial charters contain no such provision.¹³² But he has an answer. In those instances, "it must have been omitted, as not necessary, because it is implied in the nature of subordinate government."¹³³ The colonists, he insists, cannot separate out taxes from the ordinary run of legislation. Not, at least, without denying the power of Parliament to legislate in any case whatsoever:

He that denies the English parliament the right of taxation, denies it, likewise, the right of making any other laws, civil or criminal, yet this power over the colonies was never yet disputed by themselves. They have always admitted statutes for the punishment of offences, and for the redress or prevention of inconveniences; and the reception of any law draws after it, by a chain which cannot be broken, the unwelcome necessity of submitting to taxation.¹³⁴

3. Taxation No Tyranny: *All British Subjects Consent Through "Virtual Representation."* Johnson next addresses the colonial contention that Parliament's power to tax must be conditioned upon the Commons' consent through their elected representatives. "The Americans, unrepresented," Johnson restates the argument, "cannot consent to English taxations, as a corporation, and they will not consent, as individuals."¹³⁵

Johnson begins by denying that the English experience has ever been as the Americans suppose: "It must always be

130. *Id.*; see also, e.g., MORGAN & MORGAN, *supra* note 3, at 295 ("Consistently from 1765 to 1776 [the Americans] denied the authority of Parliament to tax them externally or internally; consistently they affirmed their willingness to submit to whatever legislation Parliament should enact for the supervision of the empire as a whole.").

131. Johnson, *supra* note 74, at 118.

132. See *id.* at 118 (conceding that other charters may not contain such a clause); see also The Avalon Project at Yale Law School, Colonial Charters, Grants and Related Documents, <http://www.yale.edu/lawweb/avalon/states/statech.htm> (last visited Nov. 17, 2007) (providing online versions of the other colonial charters).

133. Johnson, *supra* note 74, at 118.

134. *Id.* at 111–12.

135. *Id.* at 111.

remembered that [the colonists] are represented by the same virtual representation as the greater part of Englishmen."¹³⁶

In wide extended dominions, though power has been diffused with the most even hand, yet a very small part of the people are either primarily or secondarily consulted in legislation. The business of the publick must be done by delegation. The choice of delegates is made by a select number, and those who are not electors stand idle and helpless spectators of the commonweal, "wholly unconcerned in the government of themselves."¹³⁷

Such virtual representation, Johnson explains, is all that mainland British citizens enjoy. At this time, the apportionment of representation in the House of Commons had gone unchanged for over 150 years.¹³⁸ "For this reason many populous and opulent towns neither enjoy nor desire particular representatives: they are included in the general scheme of publick administration, and cannot suffer but with the rest of the empire."¹³⁹

Only men are permitted the vote, moreover, and strict property qualifications ensure that only a small proportion of them are eligible for either the franchise or elective office. "Of individuals," Johnson notes, "far the greater part have no vote, and, of the voters, few have any personal knowledge of him to whom they have intrust their liberty and fortune."¹⁴⁰ Even the fortunate few electors fare little better than the unrepresented multitude: "They are often far from unanimity in their choice; and where the numbers approach to equality, almost half must be governed not only without, but against their choice."¹⁴¹ Yet despite these imperfections, Johnson contends, "this representation has the whole effect expected or desired, that of spreading so wide the care of general interest, and the participation of publick counsels, that the advantage or corruption of particular men can seldom operate with much injury to the publick."¹⁴²

Johnson does not content himself merely with defending the British system. He also attacks the impracticality of the Americans' position, for colonists cannot participate meaningfully in Parliamentary politics at such a distance:

136. *Id.* at 122.

137. *Id.* at 112.

138. *Id.* at 124.

139. *Id.* at 120.

140. *Id.* at 119.

141. *Id.* at 112.

142. *Id.* at 120.

As man can be but in one place, at once, he cannot have the advantages of multiplied residence. He that will enjoy the brightness of sunshine, must quit the coolness of the shade. He who goes voluntarily to America, cannot complain of losing what he leaves in Europe. He, perhaps, had a right to vote for a knight or burgess; by crossing the Atlantick, he has not nullified his right; but he has made its exertion no longer possible.¹⁴³

As Johnson notes, the Americans' response to this stubborn fact—obvious to all, given the limitations imposed by distance and the time required for travel—was divided: "Some think, that, being unrepresented, they ought to tax themselves; and others, that they ought to have representatives in the British parliament."¹⁴⁴ From this first proposal Johnson anticipates insurmountable obstacles:

If they are to tax themselves, what power is to remain in the supreme legislature? That they must settle their own mode of levying their money is supposed. May the British parliament tell them how much they shall contribute? If the sum may be prescribed, they will return few thanks for the power of raising it; if they are at liberty to grant or to deny, they are no longer subjects.¹⁴⁵

Regarding the second proposal—that the Americans should be rewarded with representation in the British Parliament—Johnson calls the colonists' bluff. "Let us, however, suppose them to send twenty-three [representatives], half as many as the kingdom of Scotland, what will this representation avail them?"¹⁴⁶ Thus out-voted, the colonists would be aggrieved, not appeased, by such taxation *with* representation.¹⁴⁷ Rhetorically, Johnson asks: "What, at last, is the difference between him that is taxed, by compulsion, without representation, and him that is represented, by compulsion, in order to be taxed?"¹⁴⁸ Ultimately the Americans' insistence on actual and direct representation is as impractical as it is unprecedented: "It is the unmeaning clamour of the pedants of policy, the delirious dream of republican fanaticism."¹⁴⁹

143. *Id.* at 114–15.

144. *Id.* at 123.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 124.

149. *Id.* at 113.

IV. THE LEGAL CASE, CONSIDERED

Johnson's arguments in *Taxation No Tyranny* were neither novel nor unique.¹⁵⁰ They are in fact broadly representative of the British side of the debate. But the author's fame and the rhetorical force with which he puts the case make it a particularly compelling exemplar of the British argument. The question before us, however, is a legal and not a literary one: Was Dr. Johnson right on the merits?

A. *The Legal Status of the American Colonies, Considered*

Let us examine the first and principal thrust of his argument: the nature of the American colonies' relationship with the mother country. "All government is ultimately and essentially absolute," Johnson had written.¹⁵¹ And "[i]n sovereignty there are no gradations"—meaning that the colonies were either subject to British control or the reverse; there could be no middle case.¹⁵² This was, as Gordon Wood has written, the question "at the heart of the Anglo-American argument that led to the Revolution. . . . It was the single most important abstraction of politics in the entire Revolutionary era."¹⁵³

Johnson's argument on this point was essentially undisputed. No less an authority on English law than Sir William Blackstone had declared it a fundamental principle that in every form of government there must exist "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside."¹⁵⁴ This power belonged to Parliament, embodying as it did the British Constitution through its inclusion of the King, Lords, and Commons; its enactments, Blackstone declared, "no power on

150. Johnson's arguments in *Taxation No Tyranny* were foreshadowed by two earlier pamphlets solicited by the British government, in 1765, in response to colonial objections to the Stamp Act. See Soame Jenyns, *The Objections to the Taxation of Our American Colonies, by the Legislature of Great Britain, Briefly Consider'd* (1765); Thomas Whateley, *The Regulations Lately Made Concerning the Colonies and the Taxes Imposed upon Them, Considered* (1765); see also WOOD, *supra* note 5, at 173–76 (describing the attempts of Jenyns and Whateley to justify taxation of the colonies in response to colonial opposition).

151. Johnson, *supra* note 74, at 106.

152. *Id.* at 107.

153. WOOD, *supra* note 5, at 345; see also BAILYN, *supra* note 26, at 198 ("But of all the intellectual problems the colonists faced, one was absolutely critical: in the last analysis it was over this issue [of sovereignty] that the Revolution was fought.").

154. BAILYN, *supra* note 26, at 201 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 85 (William Carey Jones ed., 1915)).

earth can undo.”¹⁵⁵ And with the introduction of Blackstone’s *Commentaries* into the colonies in the early 1770s, the doctrine “had gained such overwhelming currency that its ‘truth,’ many Americans were compelled to admit, could no longer ‘be contested.’”¹⁵⁶

At least four of our most thoughtful founding fathers concurred. James Wilson had searched for an exception to Blackstone’s dictum, but ultimately “became fully convinced that such a line does not exist; and that there can be no medium between acknowledging and denying that power [of Parliament] in *all* cases.”¹⁵⁷ Ben Franklin, too, came to believe “that no middle doctrine can be well maintained, I mean not clearly and with intelligible arguments.”¹⁵⁸ There were only two opposed possibilities: “That Parliament has a right to make *all laws* for us, or that it has a power to make *no laws* for us.”¹⁵⁹ John Adams agreed: two supreme, final authorities could not coexist within one state “any more than two supreme beings in one universe.”¹⁶⁰ In short, the doctrine of undivided sovereignty was considered by all—American colonists and English ministers alike—as an axiom supported by the best political science that man had yet contrived.¹⁶¹

So universal, in fact, was this conception that the only tactical gambit left to the colonists was to embrace it:

By 1774 the colonists, like Jefferson, were contending that Parliament’s acts over America were void not because they were unjust, as Otis had argued in the 1760’s, but because “the British parliament has no right to exercise authority

155. *Id.* at 201–02 (paraphrasing BLACKSTONE, *supra* note 154, at 267–68).

156. WOOD, *supra* note 5, at 350. Professor Wood ascribes this idea’s exalted status in the eighteenth century to “the growth of the nation-state with its emphasis on centralization of authority and its obsession with order.” *Id.* at 345.

157. *Id.* at 350–51 (quoting JAMES WILSON, CONSIDERATIONS ON THE NATURE AND EXTENT OF THE LEGISLATIVE AUTHORITY OF THE BRITISH PARLIAMENT (1774), *reprinted in* 3 THE WORKS OF THE HONORABLE JAMES WILSON, L.L.D. 199 (1804)).

158. *Id.* at 351 (quoting Letter from Benjamin Franklin to William Franklin (Mar. 13, 1768), *in* 5 THE WRITINGS OF BENJAMIN FRANKLIN 115 (Albert H. Smyth ed., 1906)).

159. *Id.*

160. *Id.* at 351–52 (quoting John Adams, *Novanglus* (1774), *reprinted in* ADAMS & SEWALL, *supra* note 36, at 83).

161. *Id.* at 348 (referring to the concept of undivided sovereignty as “an axiom of eighteenth-century English thought”); *see also* BAILYN, *supra* note 26, at 198 (noting that indivisibility of sovereignty was “one of the most firmly fixed points in eighteenth-century political thought”). As Professor Bailyn has explained, this doctrine of the essential indivisibility of sovereignty was of relatively recent origin, dating from the Glorious Revolution, and arguably arose out of innocent or possibly willful misinterpretations of Roman law and early British precedents. *Id.* at 198. Nonetheless, by the mid-eighteenth century the notion had unquestionably “hardened into orthodoxy.” *Id.* at 201.

over us." The Americans in effect accepted the irresistible logic of the concept of legislative sovereignty and turned it against the British to justify their legislatures' independence from all parliamentary control. Their connection with the British empire, it was now claimed, was solely through the King¹⁶²

In this way, "[t]he legislative authority of Parliament was disavowed, but the concept of legislative sovereignty was not; it was only transplanted."¹⁶³ The Americans had tirelessly "picked away at the unity of the empire and had sought to make all sorts of exemptions from the imperial power of Parliament,"¹⁶⁴ but without success: "in the end they found the doctrine of sovereignty unassailable and made it in fact a major weapon in their argument."¹⁶⁵ Such rhetorical stratagems may have been clever, but they were insupportable as history. In fact, the American colonial experience had *never* been as this argument suggested; at least up until 1765, Parliament had regulated the colonies' trade extensively and continuously, and without any serious contest to its authority to do so.

RULING: Summary judgment for Dr. Johnson. Or, as a fellow English literary lion might have scored it: "A hit, a very palpable hit."¹⁶⁶

B. Parliament's Authority to Tax, Considered

Given the conclusion that Parliament has plenary authority to legislate for the American colonies, the subordinate question of its taxing need not long detain us. Two prominent politicians on the English side of the Atlantic, Sir William Pitt and Lord Camden, endorsed the view that taxation required representation in all cases.¹⁶⁷ But none of their countrymen joined the chorus.¹⁶⁸ According to Professor Wood, "The distinction between taxation and legislation, which some Americans . . . had earlier tried to maintain, was by 1775 seen to be 'vain and

162. WOOD, *supra* note 5, at 352.

163. *Id.*

164. *Id.* at 353.

165. *Id.*

166. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 5, sc. 2.

167. *See, e.g.,* MCILWAIN, *supra* note 22, at 111 ("The Declaratory Act of 1766 which accompanied the repeal of the Stamp Act, of course, was passed over the bitterest opposition of Pitt and Camden, but their opposition was due solely to the inclusion in the declaration of the Parliament's right to tax.")

168. *See, e.g., id.* at 111-14, 150-51 (detailing the debates surrounding the Declaratory Act); *see also* BAILYN, *supra* note 26, at 202 ("For there were few who would deny that 'a power to tax is a necessary part of every supreme legislative authority.'").

groundless.”¹⁶⁹ This may explain why the First Congress’s *Declaration* had not even ventured the distinction. Here, it appears, Johnson has employed a classic lawyer’s trick; he has conjured, and defeated, a “straw man” argument.¹⁷⁰

RULING: The issue is a moot one: Johnson has succeeded only at winning an argument that his opponent was not making. “Nothing neither way.”¹⁷¹

C. *Virtual Representation, Considered*

The debate over actual versus virtual representation presents a closer question, and a critical one. For the concept of virtual representation “lay at the heart of the Englishmen’s theory of politics, and without it few of their notions of government could have stood for long.”¹⁷² Blackstone had put his imprimatur upon it, insisting that a representative’s deliberations should be directed by the general interest of the whole realm, not by the particular wishes of his constituents.¹⁷³ Even Edmund Burke—who agreed with Samuel Johnson on little else, especially touching upon British relations with the American colonies—sided with him on this. It is Burke who most memorably stated the case for virtual representation in his celebrated 1774 *Speech to the Electors of Bristol*. Opposing his constituents’ blandishments that he adhere to their instructions in his parliamentary votes, Burke stated:

Parliament is not a *congress* of ambassadors from different and hostile interests . . . ; but Parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole—where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *Parliament*.¹⁷⁴

This conflicts rather sharply with modern democratic notions. Certainly no one then clamored for a Parliament that looks like Great Britain, as it might be put today. Underlying the

169. WOOD, *supra* note 5, at 351.

170. See BLACK’S LAW DICTIONARY 1461 (8th ed. 2004) (defining “straw man” as, *inter alia*, “[a] tenuous and exaggerated counterargument that an advocate puts forward for the sole purpose of disproving it”).

171. SHAKESPEARE, *supra* note 166, at act 5, sc. 2.

172. WOOD, *supra* note 5, at 175.

173. *Id.*

174. Edmund Burke, *Speech to the Electors of Bristol* (Nov. 3, 1774), in 2 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE, *supra* note 39, at 96.

concept of virtual representation was the implicit assumption that an Englishman, no matter his rank or station in life, shared common commitments with his compatriots that bound them together with greater force than the centrifugal pull of personal and particularized interests. Thus they were, in effect, “a single people with one definable interest” and “that the Commons was a full and complete embodiment of the people”:

What made this conception of virtual representation intelligible, what gave it its force in English thought, was the assumption that the English people, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, were essentially a unitary homogeneous order with a fundamental common interest. What affected nonelectors eventually affected electors; what affected the whole affected the parts; and what affected the empire ultimately affected every Englishman in it. All Englishmen were linked by their heritage, their liberties, and their institutions into a common people that possessed a single transcendent concern.¹⁷⁵

This was neither an absurd nor an unworkable theory. For the reasons Johnson sketched—the inequalities of apportionment, strict property qualifications, the exclusion of women, and the inescapable fact that the losing coalition had to submit to the successful majority’s will—actual representation constituted a practical impossibility in the Britain of that day. The legitimacy of any member’s vote, and ultimately of Parliament’s deliberations and enactments, simply could not be dependent upon the mere happenstance of election. “If it were otherwise,” Thomas Whately had noted in his 1765 pamphlet, “*Old Sarum* would enjoy Privileges essential to Liberty, which are denied to *Birmingham* and to *Manchester*.”¹⁷⁶ Professor Wood acknowledged: “Whatever one may think of the notion of virtual representation as it pertained to the Americans in 1765, no better justification of majority rule has ever been made.”¹⁷⁷

175. WOOD, *supra* note 5, at 174.

176. *Id.* at 175–76 (quoting Whately, *supra* note 150, at 109). The story of the British “rotten boroughs”—in which some members of Parliament were elected by “constituencies” numbering in the single-digits while heavily populated but recent cities like Manchester, Birmingham, Sheffield, and Leeds went unrepresented—is an oft-told tale. It was recounted in the first U.S. Supreme Court case to hold that state legislative malapportionment stated a justiciable violation of the Fourteenth Amendment’s Equal Protection Clause. See *Baker v. Carr*, 369 U.S. 186, 302–07 (1962) (Frankfurter, J., dissenting). Indeed, the “interesting and enlightening” experience of the modern British electoral reform effort clearly inspired, at least in part, the Court’s enunciation of the “one person, one vote” standard in *Reynolds v. Sims*, 377 U.S. 533, 567 n.44 (1964).

177. WOOD, *supra* note 5, at 176.

In fact, for centuries the Americans had practiced what the British preached. In the colonies, “the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root.”¹⁷⁸ As in Britain, this practice also “resulted in grossly unequal electoral units.”¹⁷⁹ The Americans had their own “rotten boroughs” and partisan gerrymanders, and the persistence and political use and abuse of these malapportionments both predated and survived independence.¹⁸⁰ In short, both the British and American experience circa 1775 was one in which actual representation was an aberrance, and virtual representation was the understood and accepted norm.

To say as much is by no means to conclude that this state of affairs was a just or desirable one. Even the Ministry-paid Stamp Act pamphleteer Soame Jenyns had to concede that virtual representation was an “imaginary” idea contrary to “common [s]ense.”¹⁸¹ And the glaring inequalities of the system of parliamentary representation, in particular the corruption and control that resulted from rotten boroughs and safe seats, had been hotly condemned for decades before the revolution, and continued to be so up until the passage of the Reform Act of 1832, and even after.¹⁸²

178. *Baker*, 369 U.S. at 307 (Frankfurter, J., dissenting).

179. *Id.*

180. *Id.* at 307–09 (chronicling the controversies over malapportionment during the colonial period and into the early years of the Union). Of the practices that post-dated independence, perhaps the most glaring, and certainly the most shameful, departure from the principle of actual representation was explicitly provided for by the text of the federal Constitution: the “three-fifths” clause, which awarded greater representation to states with significant slave populations despite the incontestable truth that slave-state congressmen neither represented the slaves nor defended their interests. U.S. CONST. art. I, § 2, cl. 3. A second fundamental departure was the equal suffrage of the states in the U.S. Senate. U.S. CONST. art. I, § 3, cl. 1. This remains the lone unamendable provision of the Constitution, U.S. CONST. art. V, despite the fact that the Equal Protection Clause’s “one person, one vote” standard has been held to prohibit the States from electing a legislative chamber similarly apportioned upon a geographical basis. *See, e.g., Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 738 (1964) (rejecting Colorado’s defense of its geographically apportioned Senate, and asserting that “any attempted reliance on the so-called federal analogy is factually as well as constitutionally without merit”).

181. WOOD, *supra* note 5, at 173 (quoting Jenyns, *supra* note 150, at 7); *see also* MCILWAIN, *supra* note 22, at 170 (“The whole theory of virtual representation was as empty in law as it was unjust in policy. Of all the arguments urged in England against the American claims it was the least weighty; weak in law, unsupported by fact, and sophistical even had it been valid.”).

182. *See, e.g., Baker*, 369 U.S. at 303 (Frankfurter, J., dissenting) (noting that even the famous Reform Act “effected eradication of only the most extreme numerical inequalities of the unreformed system. It did not adopt the principle of representation based on population, but merely disfranchised certain among the rotten borough and

Furthermore, none of this directly addresses the colonists' true complaint. For the colonists never repudiated the *concept* of virtual representation—that certain individuals could speak for the whole of society, provided that their situations and their circumstances were sufficiently aligned. Rather, the colonists disputed whether they *could be* adequately and “*virtually* represented” in the British House of Commons.¹⁸³ For in Britain, the nonelectors could find protection in ties to kith and kin and the added assurance that any oppressive laws passed by Parliament would bind all equally—representatives, electors, and nonelectors alike. The Americans possessed no such security.

To be sure, the question of independence was a delicate one, and even the most hot-headed of colonial pamphleteers steered clear of it, at least until *Common Sense* debuted in January 1776. But the delicacy of the issue notwithstanding, the Americans did allude on occasion to the ever-widening gulf separating them from their British cousins:

The Americans' objection to parliamentary taxation was “not because we have no vote in electing members of Parliament, but because we are not, and from our local situation can never be, *represented* there.” The Americans were in fact coming to argue that in their clarifying conception of the British empire the mother country and the colonists did not possess an overriding harmony of interest that made Englishmen on both sides of the Atlantic one common people.¹⁸⁴

There was only one problem with this argument. Given the shared Anglo-American belief in the fundamental indivisibility of sovereignty—and its necessary corollary that in any one society there could be but one final and supreme source of political power—the logic of the American argument inescapably led to a signal outcome: independence or, as the British deemed it, treason.

RULING: “A touch, a touch, I do confess[].”¹⁸⁵ This is a close call. As a matter of law, Johnson has the better of the argument, from time-honored custom, practice, statutes, and the considered views of the foremost legal authorities. These

enfranchised most of the urban centers—still quite without regard to their relative numbers. In the wake of the Act there remained substantial electoral inequality” (citations omitted)).

183. WOOD, *supra* note 5, at 176.

184. *Id.* at 177.

185. SHAKESPEARE, *supra* note 166, act 5, sc. 2.

weigh heavily in any consideration of the legal merits of a case. But the equities clearly favor the American colonists. No one convincingly argued that the British system of representation was a good or just one; no one contended that it could not be substantially improved to be more representative and less susceptible to manipulation. Nor does Johnson satisfactorily address, much less refute, the underlying reality that the colonies had matured to the point that their interests could no longer be encompassed within the mother country's parliamentary composition of King, Lords, and Commons.¹⁸⁶

This brings up a controlling legal question: What would a common-law court of the era do when law and equity diverged? Fortunately, we have guidance on this point from no less prominent a source than Thomas Jefferson, who in 1785 described the three then-understood limitations upon a court's exercise of its equity powers:

1. That it cannot take cognisance of any case wherein the common law can give complete remedy.
2. That it cannot interpose in any case against the express letter and intention of the legislature. If the legislature means to enact an injustice, however palpable, the court of Chancery is not the body with whom a correcting power is lodged.
3. That it shall not interpose in any case which does not come within a general description and admit of redress by a general and practicable rule.¹⁸⁷

The second limitation stated above appears tailor-made for our case and plainly prohibits altering the statutory representation established by Parliament based solely upon equitable considerations. Unsatisfying as it may seem, an eighteenth century court of law would have denied the colonists' relief on their plea of "no taxation without representation," and entered judgment in favor of the British government.

186. See, e.g., THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (contending that British malfeasance had made it "necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station" of free and independent states).

187. Letter from Thomas Jefferson to Phillip Mazzei (Nov. 1785), in 4 THE WORKS OF THOMAS JEFFERSON 473, 476 (Paul L. Ford ed., 1904).

V. CONCLUSION: LAW VERSUS EQUITY

*"Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments."*¹⁸⁸

A well-known dictum instructs trial lawyers: "If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell."¹⁸⁹ In some ways the American colonists faced this quandary after *Taxation No Tyranny* appeared on the scene. Johnson had articulated and substantiated the British ministry's contentions that the colonists could not plausibly claim relief under the British Constitution. "In sovereignty there are no gradations," Johnson had told them—meaning the colonists must submit to Parliament, "for it can be resisted only by rebellion, by an act which makes it questionable, what shall be thenceforward the supreme power."¹⁹⁰ Foreclosed in their legal claims, the colonists could only "pound the table" over the inequities of their situation. Henceforward, they would take Johnson at his word; rebellion was their only viable option and their grievances could "be adjudicated only by the sword."¹⁹¹

The *Declaration of Independence* reveals the changed terms of the debate. To the discerning eye, it also discloses the colonists' conversion of their cause from one posed in law to one sounding in equity. The 1774 *Declaration* had been addressed to the Americans' "fellow subjects in Great Britain" and "sought, like a petition of right, justice under the standing order."¹⁹² The *Declaration of Independence* is altogether different. It is directed to the citizenry of the world, and appeals *not* on the basis of traditional English liberties but upon "the Laws of Nature and of Nature's God" and such "self-evident truths" as "the Right of the People to alter or abolish" their government when it threatens "Life, Liberty, and the pursuit of Happiness."¹⁹³ This is a claim sounding in equity if ever there was one.

188. Letter from James Madison to A. Stevenson (Nov. 27, 1830), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 121, 139 (1867).

189. This aphorism is variously phrased, but its original source is a Carl Sandburg poem. CARL SANDBURG, THE PEOPLE, YES 181 (1936).

190. Johnson, *supra* note 74, at 107.

191. MCLWAIN, *supra* note 22, at 198.

192. MAIER, *supra* note 108, at 55; *Declaration*, *supra* note 95, at 246.

193. THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776); see also MCLWAIN, *supra* note 22, at 191-92 (observing that, in the *Declaration of Independence*, "the congressional statesmen appeal no more to their rights as Englishmen. They have perforce become revolutionaries and are no longer constitutionalists. Their many

In this way, the founders' enduring legacy may have originated in the weakness of the colonists' legal case. As the historian H. Trevor Colbourn has noted:

Had the Founding Fathers remained totally true to the English whig historical tradition they would have never produced a revolution

But by the summer of 1776 there seemed no choice but to appeal to the natural rights which the British constitution had once embodied but no longer supported.¹⁹⁴

The break with Britain thus ushered in a wholly new "American Science of Politics."¹⁹⁵ This new "science" did not depend upon the vagaries of British history and an "unwritten constitution." Rather, it universalized the colonists' idiosyncratic understanding of traditional British liberties. These became "self-evident truths" dictated by "the Laws of Nature and of Nature's God," presumptively applicable to all peoples and all times.¹⁹⁶ Thus the American Revolution transcended its origins as a British intramural mutiny of no particular moment outside the Empire. As Thomas Paine reminisced from the vantage point of the French Revolution: "The independence of America considered merely as a separation from England, would have been a matter but of little importance had it not been accompanied by a revolution in the principles and practise of governments."¹⁹⁷

The Americans may have lost their case, but in doing so they found their cause. The American nation did not emerge out of the Revolution in perfected form. It would take several more years before an enduring federal framework could be established. And it took a bloody Civil War, a passel of constitutional amendments and court rulings, and generations of struggle and civil rights agitation before the revolutionary ideals espoused in the *Declaration of Independence* could plausibly claim to have been fulfilled. Nonetheless, "[i]t was the Revolution, more than any other single event, that made America into the most liberal, democratic, and modern nation in the world."¹⁹⁸ At the bar of

constitutional appeals have fallen upon deaf ears. They turn now to another audience and with another appeal.").

194. COLBOURN, *supra* note 4, at 189–90.

195. The phrase is Professor Wood's, and is the title of the concluding chapter of his seminal work, *The Creation of the American Republic, 1776–1787*. See WOOD, *supra* note 5, at 593 (discussing the novel, complex and intricate American system of government that emerged not from reflection and deliberation but as a matter of necessity).

196. THE DECLARATION OF INDEPENDENCE para. 1–2 (U.S. 1776).

197. WOOD, *supra* note 5, at 594 (quoting THOMAS PAINE, THE RIGHTS OF MAN, reprinted in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 354 (Philip Foner ed., 1945)).

198. WOOD, *supra* note 16, at 7; see also *id.* ("These changes were radical, and they

history, one may conclude, perhaps equity does trump law after all.

were extensive. To focus, as we are today apt to do, on what the Revolution did not accomplish—highlighting and lamenting its failure to abolish slavery and change fundamentally the lot of women—is to miss the great significance of what it did accomplish; indeed, the Revolution made possible the anti-slavery and women's rights movements of the nineteenth century and in fact all our current egalitarian thinking.”).