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Disputes on Sovereignty During the American Revolution

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Abstract

Britain's commercial and taxation policies in the early 1760s provoked resentment in the country's American colonies, but the deeper issue in debate was based on disputes about the nature and location of sovereignty in the British empire. The Westminster parliament claimed absolute sovereignty over the American colonies, but the Americans insisted that the sovereign authority over their internal affairs lay in each colony's provincial legislature. To resolve this increasingly bitter dispute, both sides put forward suggestions that attempted to reconcile the differences between them. These suggestions failed because neither side was prepared to sacrifice its vital interests. When the American colonies achieved their independence from the British parliament these new states had to decide the question of the nature and location of sovereignty for themselves. Their first solution, the Articles of Confederation, proved unsatisfactory. The

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Federal Constitution made an impressive attempt to divide sovereignty between the national government and the governments of the individual states, but this did not prevent a civil war in the 1860s and there is still an open question whether sovereignty ultimately lies in the people, the written constitution or the Supreme Court.

Key Words: sovereignty, Westminster parliament, colonial legislatures, states' rights, Federal Constitution

At the end of the Seven Years' War in 1763 most Britons and most white American colonists rejoiced in victory over the French in North America and took great pride in living in an empire of free-born men, who possessed a wide range of civil liberties and lived under the rule of law. They attributed this success to the strength and virtues of the British constitution that had achieved the twin objectives of stability and liberty, while the French lived under an absolute monarchy. The British constitution was based on the principles of mixed government and a balance between the executive, legislative and judicial branches of government. A limited monarchy or mixed government had been achieved, after more than a century of disputes between crown and parliament, that combined the virtues of monarchy (decisive action), aristocracy (talented leadership) and democracy (a concern with civil liberties), while avoiding the vices of these three forms of government in their pure form, namely tyranny, selfish factionalism and mob rule, by locating ultimate power in the kingdom in the combined institutions of crown, House of Lords and House of Commons. Since 1689 parliament had been summoned every year to pass laws and raise taxes. These three institutions together controlled the legislative, executive and judicial powers of the kingdom. Whenever they were in sufficient agreement in this combined legislature, these three branches of government could raise the substantial loans and taxes needed to make Britain a much stronger state and to pass any law.

Since 1688 parliament had met every year, but this development increased rather than diminished the power of the monarch. The crown accepted limits on its prerogative powers, but gradually learned how its immense patronage could be exploited to influence the composition of the two houses of parliament and to influence the laws parliament would pass and the taxes it would raise. The crown's executive officers sat in one of the two houses of parliament and the kingdom's senior judges and the bishops of the Church of England sat in the House of Lords. To maintain the balance between these three institutions, each had a particular

strength. The crown was the head of the executive and appointed all holders of important public office; the House of Lords provided the crown with most of its senior executive, judicial and ecclesiastical officers and acted as the highest court of appeal in any judicial dispute; while the House of Commons was regarded as the representative of the people, the principal defender of their civil liberties and initiated and had the prime role in deciding what revenue should be raised to support the objectives of the executive (Dickinson, 1977: 64-65, 101-103, 143-159, 272-280). Although only a minority of adult males, owning particular forms or amounts of property or paying particular taxes, could vote for the people's representatives in the House of Commons, it was widely believed, even by most Britons and by many of those elected, that they virtually represented all the crown's subjects. The people's willingness to support the raising of large loans and to pay high taxes was secured by ensuring that they benefited from living under the rule of law and enjoyed greater civil liberties than any other people in Europe (and indeed, beyond). The British people might be subjects of a monarch, but they prided themselves on being free-born Britons. They enjoyed freedom of speech, an uncensored press, freedom of movement, the right to petition crown or parliament for the redress of grievances, and the freedom of association to keep themselves informed of the actions of parliament and to express their demands peacefully should their representatives not defend their liberties. They could not be imprisoned without charge, they could not be subjected to judicial torture, and they could not be convicted of a serious criminal offence without a trial by a jury made up of ordinary fellow-subjects (Dickinson, 1995: 161-189).

Most British colonists in North America believed that they were also free-born subjects of the English crown. They had migrated across the Atlantic to improve their economic fortunes or to safeguard their religious liberties. The crown had permitted them to leave the country and had granted them royal charters, which gave them the right to establish legislative and judicial institutions to

establish stability and order in these new settlements. They were allowed to make their own laws, provided these did not undermine the laws of England or damage its commercial interests. They adopted institutions similar to those in England; with a governor acting in the crown's role as head of the executive, with a Royal Council acting as the upper chamber of the colonial legislature and as adviser to the governor, and with a lower house of representatives, elected by colonists with the requisite qualifications and with the power to initiate revenue bills. The colonists believed that they should benefit from the same civil liberties as those British subjects who had not migrated. Their legal system was modelled on that of England and they strongly endorsed the limits that the Westminster parliament had placed on the royal prerogative by the English Bill of Rights of 1689 (Lovejoy, 1972: 235-293).

The English government and parliament had placed limits on the political and economic activities of the colonists, though these were not as restrictive as they appeared to be. Between 1651 and 1673 the Westminster parliament passed Navigation Acts that required the inward and outward commerce of the American colonies to be carried in English (later British) ships with English (British) crews, but the colonists and their ships qualified under these restrictions. The Navigation Acts also stimulated shipbuilding in the Colonies and the provision of naval stores. Britain placed restrictions on some colonial manufacturing ventures, but the owners of tobacco plantations, for example, found a ready market for their products in Britain and, via British ships, to Europe. They and other exporters also benefited from the supply of financial credit from London and the provision of insurance. The colonial assemblies had to have their legislation approved by the Board of Trade and Plantations in London, but over the period before independence only 469 out of 8563 colonial bills were rejected by the Board. The colonists were required to pay customs duties for the benefit of the Westminster government, but these revenue raising measures from Westminster never raised as much as 2000 pounds in

any one year (LaCroix, 2011: 39). There can be no doubt that the colonies enjoyed a rapidly growing population and an impressive economic expansion in the decades before independence (McCusker & Menard, 1985).

The American colonists admired the English Bill of Rights of 1689 and readily accepted the Hanoverian succession to the British throne in 1714; both were regarded as safeguards of their civil liberties and of the limited monarchy under which they were prospering. Under the first two Hanoverian monarchs they experienced little interference from the British government or parliament and prospered under this salutary neglect (Henretta, 1972). What strained British-colonial relations after 1763, ironically in the wake of the great success against French power in North America, was the gradual recognition on both sides that the relationship, despite appearances, was far from satisfactory (Tucker & Hendrickson, 1982). The Seven Years' War left Britain with an alarming National Debt, a conviction that the American colonies had not taken a fair share of the fighting or the financial costs of the war (Rogers, 1974: 70-120), and the fear that the colonies might be less amenable to any British control since the French threat to the colonies had been eliminated (Beaumont, 2015).

British ministers were becoming conscious that Britain had too little not too much control of its American colonies when it was engaged in an expensive and bloody conflict around the world with its greatest European rival. Travel across the Atlantic was slow and hazardous. No important cabinet minister had any direct experience of life in the American colonies. British army officers, who served in America, often had a poor view of the fighting qualities of the colonial troops. The American colonists often engaged in smuggling to avoid customs duties and the restrictions imposed by the Navigation Acts. British efforts to increase the country's control over the American colonies met with stiff and often successful resistance (Greene, 1994: 48-77). It gradually became apparent to British ministers that the country had no coordinated or effective system of

imperial government. There was as yet no Secretary of State for Colonial Affairs. The colonies came under the remit of the Secretary of State for the Southern Department, who was also responsible for Britain's more important and difficult relations with France and Spain. Britain had no unified or effective imperial administration in the colonies. Commercial aspects of colonial affairs fell under the control of the Board of Trade and Plantations (Basye, 1925). The Privy Council vetted colonial legislation. The Admiralty had insufficient ships to curb the smuggling that took place along America's eastern seaboard. Efforts to appoint an Anglican bishop to oversee ecclesiastical affairs, where the clergy of the Church of England dominated, were successfully resisted by the colonists (Taylor, 1993: 331-356). No major politician in Britain was ever appointed as a governor in the American colonies. The responsibilities of these different agents of the British government overlapped and were rarely well-coordinated.

While British governments were becoming all too aware of their lack of control over the internal affairs of the colonies in North America, the colonists there were becoming more confident of their ability to manage their own internal affairs. At the beginning of the eighteenth century the British American colonies were still a collection of small faction-ridden societies with little in common. By the 1760s they had developed into quite mature and sophisticated political societies capable of challenging decisions taken at Westminster.

The rapid growth in population and demographic expansion, and the rise of an educated and prosperous colonial elite, were developments that were accompanied by a desire of this elite to acquire political influence and social status. They soon held most of the administrative and judicial positions in the colonies (Daniels, 1986), but there were not enough government positions to satisfy their ambitions, and so they sought election to the colonial legislatures. Those who voted for members of the colonial assemblies had to have qualifications in the form of property or the

payment of certain taxes (Dinkin, 1977; McKinley, 1905). To win their support the local colonial elite formed clubs and societies, held town and election meetings, and exploited the expanding free press that had grown up in the colonies (Bailyn & Hench, 1980). By the early1760s the disputes between Britain and the American colonies were heightened by the fact that the legislatures on both sides of the Atlantic were stronger and more popular with their constituents than ever before (Johnson, 1987: 338-362).

These legislative bodies increasingly copied the procedures and practices developed by the Westminster House of Commons to manage elections, conduct debates, levy taxes and enact bills into law. By the 1760s, these legislative assemblies could make it difficult for governors to execute their duties, especially as the governors had little patronage to dispense, certainly compared to the king's ability to influence the composition and actions of both houses of parliament back in Westminster (Greene, 1969: 337-360; Labaree, 1930: 172-217; Tully, 2000). The governors of Rhode Island and Connecticut were elected by those who elected their legislatures, in Pennsylvania and Maryland much power still resided in the hands of the original proprietors, the Penn and Calvert families, while even those royal governors appointed by the crown lacked a regular salary and were dependent on financial support from their assemblies to maintain the dignity of their office and to meet the expenses of their executive decisions (Greene, 1963; Labaree, 1930). An examination of the press campaigns and the political debates conducted by the colonial political elites has revealed how often these men feared the patronage and corruption they believed operated in the British parliament and elections and how much they feared the growth of executive power and financial interests in London that seemed to endanger Britain's cherished balanced constitution to threaten the people's liberties both in Britain and in the colonies. Even before the constitutional crisis in the empire began in the 1760s, the colonial elites in America had long been fed a diet of Patriot or Country ideology and propaganda very like that which had been created by the political opponents of the king's English ministers at Westminster (Bailyn, 1967). The more radical colonists insisted that

they had migrated as free men and had carried with them across the Atlantic the historic and prescriptive rights of free-born Englishmen. These rights and privileges had been guaranteed by the terms of their royal charters and they could defend them with appeals to the common law, immemorial customs, Magna Carta, England's ancient constitution, the law of God and nature, and eventually to the universal rights of man (Goldsworthy, 1999: 204-213; Grey, 1978: 843-893; Reid, 1976: 177-215; Reid, 1986-1993: I, 159-167). These various appeals were rarely seen as competing alternatives, but rather were regarded as mutually reinforcing defenses of the sovereignty of the law (Reid, 1976: 177-215; Reid, 1986-1993: III, 79-86, 107-125).

I. Critical Differences About Sovereignty

Within a mere two years after victory over France had been achieved in the Seven Years' War a serious political and constitutional dispute arose between Britain and its mainland American colonies over the decision by the British government and parliament to produce a Stamp Act, that imposed an internal revenue-raising tax on the colonies for the first time. As a tax on the paper used in press publications and legal contracts and documents, it was seen as an attack on liberty and one that could prove costly to avoid. There were other lesser reasons for the friction between Britain and these American colonies, such as an amendment to the trade in sugar, but fundamental to all of these was the disagreement about the nature, extent and location of sovereignty within the British empire. William Blackstone, in his immensely influential first volume of his Commentaries on the Laws of England, stressed the importance of an accepted sovereign authority in any state that valued its authority and the liberties of the people. No matter what form of government a state might possess and however it originated, "there must be in all of them a supreme, absolute, irresistible and uncontrolled authority, in which . . . the rights of sovereignty reside"(Blackstone, 1765-1769: I, 49).

Blackstone insisted that this sovereign power in Britain resided in the combined legislature of crown, House of Lords and House of Commons, due to the fact that the people had, for centuries, implicitly and sometimes explicitly accepted it as the most important part of their ancient constitution. To achieve stability and to protect civil liberties, and to avoid either tyranny or mob rule, this legislature had to be absolute, even arbitrary, and superior to any other force or institution in the kingdom. It had to possess the authority to regard overt resistance to its powers as illegal and unconstitutional, and it needed to exercise judicial sanctions to punish breaches of its laws and, if required, to deploy sufficient power to suppress open rebellion (Blackstone, 1765-1769: I, 49-53). Within months of the appearance of Blackstone's first volume, Lord Lyttelton was declaring in the House of Lords:

> There cannot be two rights existing in government at the Same time, which would destroy each other; a right in government to make laws a right in the people, or any part to oppose or disobey such laws. . . . in all states one government must rest somewhere, and that must be fixed. Or otherwise, there is an end of all government. (Cobbett, 1806-1820: XVI, 166)

By the time Blackstone published the first volume of his Commentaries a clear majority of the political elite in Britain had accepted that the Westminster legislature could pass, amend or repeal any law, even those like Magna Carta that had previously been thought to be fundamental laws of the constitution. No parliament could circumscribe what laws a subsequent parliament might pass. Many men in America regarded this claim as making parliament as absolute and arbitrary as any monarchical tyrant (Dickinson, 1976: 189-210; Goldsworthy, 1999: 192-204; Reid, 1986-1993: III, 63-78).

The American colonists, initially, did not challenge the notion that there needed to be a sovereign power in any well-regulated state. Most would have agreed with Alexander Hamilton's

acknowledgement, in a criticism of British policies, that: "In every government there must be a supreme absolute authority lodged somewhere . . . to which all members of that society are subject, for, otherwise there would be no supremacy, or subordination, that is, no government at all" (Hamilton, 1775: 16). The more radical Sam Adams expressed a similar view during the War of Independence: "I believe that in every kingdom, state, or empire there must be, from the necessity of the thing, one supreme legislative power with authority to bind every part in all cases the proper object of human laws" (Cushing, 1908: IV, 37).

British imperialists and American patriots agreed that a stable state needed to be governed by an agreed sovereign power, but they increasingly differed profoundly over the extent and particularly over the location of this sovereign power. When the Westminster parliament passed the Stamp Act in 1765 American critics promptly raised the alarm and insisted that Britain had no constitutional right to impose such an internal tax on the colonies because once accepted as a constitutional exercise of power by the Westminster parliament, the colonies could never be sure that it would not be followed by many other acts that would destroy their ability to exercise authority over their internal affairs through the powers they believed were vested in their local legislative bodies. In their view, the power to levy an internal tax on the American colonies was a prerogative that belonged to the colonial assemblies because only in these legislatures were the colonists represented and any tax raised was a voluntary gift of the people. Hence, "No Taxation without Representation" became a powerful rallying cry across the colonies. Nine colonies sent delegates to a Stamp Act Congress in New York and a flood of pamphlets and newspaper articles, and public resolutions insisted that only their own assemblies could impose an internal tax on the colonists. In order to bring pressure to bear on Britain, there were outbreaks of attacks on Stamp officers and joint decisions taken by colonial assemblies to boycott imported British goods (Weslager, 1976). Even while the Stamp Act was merely under discussion at

Westminster, Richard Bland had maintained that only the colonial legislatures "have a right to enact ANY law they shall think necessary for their INTERNAL government" (Bland, 1766: 22-23).

Blackstone and most British imperialists in parliament claimed that the British legislature could exercise unlimited sovereignty over the British colonies in North America just as much as it did over Britain (Blackstone, 1765-1769: I, 105). They repeatedly protested that American resistance to the colonial policies, that had been initiated by British ministers and passed by majorities in parliament, were unlawful and unacceptable challenges to the cherished constitution that did so much to preserve both liberty and stability within Britain. There were frequent complaints in Britain that the American colonists were seeking complete independence from a mother country that had created them and had often expended blood and treasure to defend them from internal and external enemies (Anonymous, 1769: 40-43; Ray, 1766: 5; Robinson-Morris, 1774: 22; Roebuck, 1776: 39; Wheelock, 1770: 45). British imperialists therefore felt justified in mounting a fierce and formidable defense of their concept of sovereignty (Dickinson, 1998: 64-96). During the debate on the repeal of the Stamp Act in February 1766 Alexander Wedderburn wanted to make it a criminal offence to dispute parliament's authority in books or pamphlets (Thomas, 1975: 239). At the same time, William Blackstone himself proposed in the House of Commons that the offer to repeal the act should be made only to those colonies whose legislative assemblies agreed to expunge from their records any resolutions challenging the sovereign authority of parliament (Thomas, 1969: 314). William Knox, a British government official, published his views that sovereignty was indivisible and was located in the Westminster legislature (Bellot, 1977; Knox et al., 1769: 50-51). Thomas Whately, an adviser to George Grenville, the chief minister who secured the passing of the Stamp Act in 1765, concluded that: "all [colonists] who took those grants [of royal charters] were British subjects inhabiting British dominions, and who at the time of taking

[them] were indisputably under the authority of parliament" (Whately, 1765: 111). British imperialists maintained that the American colonies had been established, nursed and protected by Britain and hence they remained subjects subordinate to the sovereign authority in the British state. The colonists had left England as the subjects of the king-in-parliament and they remained subject to that sovereign authority even though they now lived across the Atlantic. In February 1766, when discussing the repeal of the Stamp Act, Lord Lyttelton declared in the House of Lords: "They [the colonists] went out the subjects of Great Britain and unless they can show a new compact made between them and the parliament of Great Britain (for the king alone could not make a new compact with them) they still are subject to all intents and purposes whatsoever. If they are subjects, they are liable to the laws of the country" (Cobbett, 1806-1820: XVI, 168). On the same occasion, Lord Mansfield and other law lords maintained that there were many precedents to demonstrate that parliament had repeatedly legislated for the colonies and raised revenue from them (Anonymous, 1775d: 27; Cobbett, 1806-1820: XVI, 173; Roebuck, 1776: 15; Thomas, 1969: 254-255).

British imperialists insisted that the colonies did not possess their legislative assemblies as of right. These were a gracious grant by the sovereign authority in England. In the press and in parliament dozens of earlier acts were cited as proof of the Westminster legislature's authority over the colonies, so that:

> no doubt can remain that the [British] legislature considered them [the American colonies] as subordinate and dependent parts of the English empire, subject to commercial regulation, and liable to be modelled and governed, in all respects as the wisdom of parliament should, from time to time, think proper to direct. (Anonymous, 1774b: 18-19)

Colonial assemblies could not claim to possess sovereignty because they were more like town councils in Britain that could pass by-laws and raise local taxes, but they were still subject to being

over-ruled at any time by the sovereign and therefore superior legislature. The British legislature possessed the right to levy external and internal taxes upon the colonies and could legislate for them on any matter whatsoever:

> For without a right to tax, there can be no sovereignty—Sovereignty comprehends legislation, and government; without which, it cannot exist. And wherever the right of legislation and government is, there alone, exists the supreme right to tax. Wherefore, to have a right to sovereignty, and yet no right to tax, is a political absurdity. (Anonymous, 1768: 5)

The Westminster parliament repealed the Stamp Act in early 1766, although much to the alarm of the American colonies, the Rockingham ministry secured on exactly the same day, the Declaratory Act that laid down that parliament could legislate for the colonies "in all cases whatsoever." For expedient reasons, perhaps, no explicit reference was made to parliament's right to levy another internal tax on the colonies (York, 2009: 341-374). Believing that the colonists would accept the imposition on them of external customs duties, as they had often done in the past, the Chatham government in 1767 passed the Townshend duties, levying duties on a range of imports from Britain. These duties were not conceived, however, to regulate the Atlantic trade in the interests of all parties. Instead, they were designed to raise revenue to be used to help pay the salaries of royal officials in America; so not only saving Britain administrative expenses, but making royal officials less dependent on money provided by the colonial legislature. Recognizing the threat to their influence over the royal executive power in the colonies, the colonial elite again led a formidable challenge to this provocation. This provoked another strong challenge from the colonies in defense of the authority of their own legislatures over all matters of taxation. When parliament considered repealing the Townshend duties of 1767, Lord Hillsborough, the Secretary of State responsible for American

affairs, warned his fellow members that the colonists were focusing on the assertion of Britain's sovereignty rather than on Britain's right to regulate the Atlantic trade: "it was not the amount of the duties . . . that was complained of, but the principle upon which the laws were founded, the supremacy and legislative authority of Parliament—a principle essential to the existence of empire" (Reid, 1986-1993: III, 288).

In 1773, Governor Thomas Hutchinson challenged the General Court of Massachusetts with the claim: "I know of no Line that can be drawn between the supreme Authority of Parliament and the total independence of the Colonies: It is impossible there shall be two independent Legislatures in one and the same State" (Reid, 1981: 20). On behalf of the colonists, James Bowdoin protested that "if Supreme Authority includes unlimited Authority, the Subjects of it are emphatically Slaves" (Reid, 1981: 34). John Adams added that the governor's opinion on sovereignty would make the Massachusetts legislature "a mere Phantom; limited, controulled, superceded and nullified at the Will of another" (Reid, 1981: 143). When defending the Coercive Acts of 1774, punishing Massachusetts in particular, Earl Gower informed the House of Lords: "the great question in issue is, the supremacy of this country and the subordinate dependence of America" (Cobbett, 1806-1820: XIX, 320-321). In March 1774, Lord North, the head of the British ministry, made the constitutional nature of the crisis very clear when he asserted:

> We are now disputing . . . with those who have maintained that we have as a parliament no legislative right over them. That we are two independent states under the same Prince . . . we are not entering into a dispute between internal and external taxes, not between taxes laid for the purpose of revenue and taxes laid for the regulation of trade, not between representation and taxation, or legislation and taxation. But we are now to dispute the question of whether we have or have not any authority in that country. (Thomas, 1991: 51)

During their disputes with Britain, the American critics of Britain's imperial policies insisted that the sovereignty of the Westminster parliament did not extend to the constitutional authority to impose taxes of any kind on the colonies if the money was to be used to reduce Britain's administrative expenses. They were quite willing to accept that the Westminster legislature was fully sovereign over the internal affairs of Great Britain, though they were concerned that the Westminster parliament was being corrupted by excessive crown patronage, that the House of Commons was not sufficiently representative of the British people and that these failings were enabling British ministers to embark on a conspiracy against liberty in both Britain and America (Bailyn, 1967: 94-159). They were also willing to acknowledge that Britain had a right to regulate the Atlantic trade between itself and its American colonies, provided these regulations could be seen to be serving the best interests of the king's subjects on both sides of the Atlantic. They furthermore acknowledged the leadership and costs that Britain bore in defending the American colonies from Native Americans and foreign enemies, but they maintained that they did, in fact, contribute men and money to meet the costs of defending their colonies and they stressed that they made a financial contribution to imperial defense costs because the Atlantic trade strengthened the British state and helped significantly to promote the prosperity of many Britons as well as many colonists. What these American critics would not concede to British imperialists was the constitutional principle that Britain could exercise full sovereignty over the internal affairs of the colonies. These critics were determined to ensure that only their own legislative assemblies could exercise sovereign authority over the laws and taxes in their colonies. Samuel Adams claimed that each colony was a separate body politic, whose inhabitants had "a right equal to that of the people of Great Britain to make laws for themselves and are no more than they, subject to the control of any legislature but their own" (Gazette, 1771). Writing to the inhabitants of Massachusetts, in

March 1775, his more conservative cousin, John Adams insisted that "our provincial legislatures are the only supreme authorities in our colonies" (J. Adams, 1819: 83).

In reply to the British imperialists, who had claimed that the colonies had always been subordinated to the Westminster parliament, leading colonists correctly maintained that their charters had been grants from the crown alone and not from the British legislature. They claimed, with some justice, that parliament was acting against precedent and long-established constitutional practice in claiming always to have had sovereign authority over the American colonies. They sought safety from the intrusion of parliament into their internal affairs by seeking the protection of the royal prerogative. They were willing to be the subjects of King George III, but not of the British legislature (Bancroft, 1769: 40-47; Greene, 1987: 94-95, 118-119, 127-128; Nelson, 2014: 86-107; Wilson, 1774: 33-34). They were sorely disappointed when George III preferred to align himself to the claims of parliament rather than protect the rights, liberties and privileges of his American subjects. They became alarmed when, in November 1774, the king reassured parliament of his "firm and steadfast resolution to withstand every attempt to weaken or impair the supreme authority of this legislature over all the dominions of my crown" (Cobbett, 1806-1820: XVIII, 34; O'Shaughnessy, 2004: 1-46; Thomas, 1985: 16-31). He rejected soon after the Olive Branch Petition, sent from the Continental Congress, which indicated a willingness to negotiate an accommodation of the imperial dispute with him, while resisting the authority of parliament. Thoroughly disillusioned, in their Declaration of Independence the American colonists not only renounced all subordination to Great Britain, but also placed a great deal of the blame on the king personally for supporting the actions and policies of British ministries and parliament (Maier, 1997: 77-91, 105-123, 138-143, 145-148; Marston, 1987: 13-34).

It took a decade of firm, continuous, and increasingly united resistance to Britain's exertion of its constitutional claims to

sovereign authority over them before the American colonists took up arms to protect what they regarded as their legitimate rights, liberties and privileges. The American Declaration of Independence in July 1776 was drafted because the colonists had come to regard British sovereignty over the whole empire as completely unacceptable and so, with some reluctance and trepidation, they proposed to sever all political subordination to the British legislature of king and parliament and planned to establish sovereignty over their own affairs.

While it is clear why Britain and its American colonies differed over the existence and application of the British legislature's full sovereign authority, it remains important to understand why a variety of proposals, advanced by anxious men of goodwill on both sides of the Atlantic, who wished to avoid their disputes leading to armed conflict, failed to resolve this constitutional crisis. They also failed, despite their best efforts, to establish agreed constitutional principles on the nature and location of sovereignty that would avoid dangerous future disputes on this vexed question.

II. Considering Colonial Representation at Westminster

From the first disputes about the Stamp Act of 1765 leading American colonists insisted that many English constitutional precedents, from numerous confirmations of Magna Carta in the middle ages to the English Bill of Rights in 1689, had repeatedly established the principle that taxes on the crown's subjects could not be collected without the consent of the taxpayers themselves or that given by their elected representatives in the House of Commons. Since the colonists were represented in their own local legislatures, but not at Westminster, then, in their opinion, only these provincial assemblies had the constitutional authority to levy a tax within the colonies. Moreover, they pointed out that they knew better than any British Member of Parliament [MP] what tax burden the colonists

could reasonably bear and what means of raising any revenue would prove most acceptable to the colonists. By contrast, they pointed out that British MPs would be willing to gain credit from their own constituents by imposing taxes on the American colonists in order to reduce the financial burden placed on those who elected these British representatives to the House of Commons. It was in the selfish interest of British MPs to be willing to be disliked in America, but admired in Britain, since American voters could not defeat them at a future general election in the way that British voters could (Anonymous, 1766a: 1-18; Anonymous, 1767; Bland, 1766: 2-6; Dulany, 1765: 31-32; Hopkins, 1766: 4-5, 11-121; Otis, 1764: 35-37; Otis, 1765: 14-19).

Many petitions setting out American grievances were sent to George III and to parliament. In response to these arguments many British politicians and commentators raised counter arguments, which carried great weight with both ministers and a majority of politicians in both houses of parliament. They claimed that the American colonists had voluntarily given up their right to be represented in parliament by deciding to emigrate to improve their economic circumstances or to secure greater religious toleration in America (Anonymous, 1769: 13-15). They insisted that the colonial charters granted by the king had only allowed the colonists to establish legislative corporations, which could make local by-laws for individual colonies not legislative assemblies free from subordination to the Westminster parliament. Judging the dispute from the perspective of the 1760s, rather than from the period when the colonists first migrated to America, British imperialists insisted that the colonists emigrated as subject to the sovereign legislature and not just subject to the monarch alone (Whately, 1765: 109-111). While the colonists were allowed a range of civil liberties, they had not been granted the constitutional authority to make laws or raise taxes independent of the wishes of the British executive or legislature. Parliament virtually represented all British subjects and not just the small minority of adult males within Britain who

possessed the property qualifications, which allowed them to vote in British parliamentary elections. The majority of men living in Britain did not possess the vote and were not directly represented at Westminster, but this did not mean that they were exempt from the taxes levied by parliament or free to ignore the laws passed by parliament. If the American claim of "no taxation without representation" was taken literally, in the way the colonists interpreted this constitutional principle, then a great many towns in Britain and a majority of the population in the kingdom could claim that, since they did not elect representatives to the House of Commons, they did not need to pay the taxes or obey the laws passed by parliament (Anonymous, 1766b: 19; Knox et al., 1769: 86-90; Whately, 1765: 108-109). The acceptance of such a conclusion would destroy the effective sovereignty of parliament even within Britain.

This clear disagreement about whether or not the American colonists were represented at Westminster convinced the colonists that their agents in London were not sufficiently powerful to influence decisions taken at Westminster (Kammen, 1968: 219-281). They therefore began suggesting that the dispute about sovereignty might be resolved by granting the colonists some direct and hence more effective representation at Westminster. James Otis of Massachusetts, for example, claimed that it was only just and equitable that American representatives should be allowed to sit in parliament so that the legislators would be drawn from both sides of the Atlantic and so would acquire a better understanding of each other's interests and would be better prepared to promote the interests of the empire as a whole. He pointed out that many eminent Americans spent a considerable time in London and could provide British ministers and parliament with better advice about the situation in their home colonies than could any Briton, even those serving as agents of the colonies. Otis had no wish, however, to undermine the authority of any colonial legislature, which would always be a better judge of what taxes, trade regulations or local laws

best served the interests of those it directly represented (Otis, 1764: 35-37, 44). Some British political commentators also advocated that allowing the colonists representation at Westminster would improve relations between Britain and America. Thomas Crowley, a Briton writing as "Amor Patriae," was the most consistent advocate of this concession. He suggested that the American and West Indian colonies might be allowed to elect fifty representatives to the House of Commons and ten to the House of Lords (Crowley, 1774: 3-6; Crowley, 1776: 77-82; York, 2002: 1-19). Another British commentator suggested that each colonial assembly might be allowed to send only one or two representatives to sit in the House of Commons, but even these men would only be allowed to offer their views on legislation directly affecting the American colonies and would not even be allowed to vote on such measures (Anonymous, 1768: 13-14). The British radical, James Burgh, was prepared to allow a small number of American representatives in the House of Commons to vote, but only on the subject of what quota of taxes should be raised on the American colonies as their contribution to the costs of imperial defense (Reich, 1998: 127-138). Sir Francis Bernard, the British governor of Massachusetts, was one of the first men of influence to advocate such a concession in order to improve Britain's relations with its American colonies. As early as 1765 he advised ministers back in Britain to allow the American colonies to send thirty representatives to parliament (along with a further fifteen representatives from the West Indies) so that they could join in parliament's deliberations on imperial issues. He hoped, however, that once these American representatives were accepted in the House of Commons then the colonies would acknowledge the sovereign authority of parliament over the whole empire (Bernard, 1774: 33-40, 54-57; Channing & Coolidge, 1912: 137-139, 180, 245-252).

From the beginning of the discussion on allowing American representatives to sit in parliament doubts about such a strategy began to be expressed both in the colonies and in Britain and these

soon became so serious that the proposal never had any chance of being accepted. Many colonists soon began voicing concern about the difficulties of implementing such a scheme (Anonymous, 1766a: 16; Anonymous, 1777: 27, 32, 52-53, 117, 181-182, 184, 186, 188, 190, 192, 218; Bancroft, 1769: 16-18; Mather, 1775: 14-15; Weslager, 1976: 201). They pointed out that their representatives in their own colonial assemblies would be better informed about current attitudes in the colonies than American representatives spending months of the year in Britain. They often referred to the distance between Britain and the American colonies and stressed that travel between them was both slow and hazardous. Information about imperial issues under discussion in parliament would take a long time to reach the colonies and the colonial response might reach Britain too late to affect the debate there or arrive after the situation had significantly changed. It would also be very expensive for any colonist to spend months each year in London as an unpaid representative sitting in the House of Commons. The expense would not be justified during those parliamentary sessions when imperial issues were not even raised for discussion (Fothergill, 1765: 27-29; Langford et al., 1981-2015: II, 177-181). A growing number of colonists also appear to have shared John Cartwright's objection to sending representatives "to reside in a luxurious, extravagant country, immersed in dissipation and corruption, and exposed to every temptation to betray them"(Cartwright, 1775: 19)! Far more intractable, however, was the difficulty in finding the appropriate number of American representatives that would give the colonies sufficient influence in the House of Commons to satisfy their concerns. The role granted to American representatives in parliament was either too restricted or the number of full representatives suggested by British commentators was far too low to be accepted by the colonists. Francis Maseres was prepared to allow eighty American and West Indian representatives to sit in the House of Commons, which had 558 British members, but he still thought so little of the colonial elite that he believed that the colonial

assemblies might prefer to ask British former governors, judges and military officers who had served in America, or even well-disposed English country gentlemen, to represent their interests in the House of Commons (Maseres, 1770: 10-13, 27-66). Even as late as 1778 one British advocate of reconciliation thought it would be a sufficient concession to grant each American colony between three and five representatives to sit in the House of Commons so that they could offer information and advice on the laws and taxes which parliament was proposing to lay on the colonies (Anonymous, 1778a: 86-89). Moreover, the colonists soon recognized that, even if they were given a number of representatives relative to their population or wealth or contribution to imperial costs, this total would be much smaller than the large number of representatives that Britain would deserve to have in the House of Commons based on the same criteria. If they accepted a numerically inferior number of representatives, even if these men had full debating and voting rights, the colonists would be unable to prevent a determined majority of British MPs imposing on the colonies high taxes and oppressive laws which the colonies would bitterly resent (Bernard, 1774: 39-40; Howard, 1765: 12-13; Otis, 1765: 40-45; York, 2001: 155-179).

Writing as "Novanglus" in 1774-1775, John Adams insisted that the colonies must have complete control of their own internal affairs. He maintained that the colonists were now agreed that all proposals for allowing the colonies representation in the British parliament had been shown to be impractical. Had such a suggestion been approved earlier, he would have expected population size to have been the guide as to the number of representatives to be granted to the American colonies. This would have meant granting the colonies about 250 MPs currently. With the American population growing so fast, this number would need to rise to one thousand in the foreseeable future. Once the population of the colonies was greater than that of Britain, the crown and imperial legislature would need to migrate to America (C. F. Adams, 1851:

101, 119). No doubt Adams raised such a possibility in order to convince British politicians to abandon any suggestion of granting the colonies a significant number of representatives in a vastly enlarged House of Commons.

Although a few British commentators supported the idea of allowing the American colonists some representation in parliament, most British politicians with influence were not disposed to support any such suggestion. When, in 1765, Governor Bernard raised the possibility with Lord Barrington, the Secretary at War, his lordship replied that such an expedient would not be acceptable because "no influence could make ten Members of either House of Parliament agree to such a remedy" and hence Bernard should leave such a proposal entirely out of the question (Channing & Coolidge, 1912: 140, 150). Apparently, George Grenville, the minister who promoted the Stamp Act, claimed that he personally would have considered a request for representation from the colonies, though he feared that it would meet universal opposition from his fellow MPs (Knox, 1768: 80-82; Knox, 1789: II, 31, 33, appendix 14). Certainly, many prominent British commentators regarded even elite American colonists as lacking the temperament, ability and status to be acceptable as representatives in parliament. One advocate of allowing each American colony to send one or two representatives to the House of Commons, just to offer advice on any proposed American legislation, feared that, if the colonies were allowed to elect representatives in proportion to their numbers or wealth, the House of Commons would be transformed into "a numerous, tumultuous, unwieldy, and unmanageable body" (Anonymous, 1768: 13-14, 50).

Worse, still, since the population and wealth of the colonies were advancing so fast "This representation of America, would, therefore in a very short time, overbalance the national representation of Great Britain; the interest of America would preponderate; and that of the mother country would be lost" (Anonymous, 1768: 58). Even Isaac Barré, an MP well-disposed to

the colonies, expressed his concern over the rate of demographic growth in the colonies and the impact this would have on the number of representatives the colonies would deserve to have in parliament: "The idea of representatives from that country is dangerous, absurd and impractical. . . . They will grow more numerous than we are, then how inconvenient and dangerous would it be to have representatives of 7 millions there meet representatives of 7 million here" (Simmons & Thomas, 1983: 144). Josiah Tucker opposed granting the American colonists direct representation at Westminster because he feared that their presence in the chamber would lead to interminable and irreconcilable disputes. He believed there would be frequent disputes over which issues were matters of concern to the whole empire and which were problems that should be left to the colonial assemblies, and he could see no satisfactory way to arbitrate over such disagreements (J. Tucker, 1774: 164-180). Soame Jenyns dismissed the idea of admitting American representatives into the House of Commons with the sarcastic comment "that the sudden importation [of] so much eloquence at once, would greatly endanger the safety and government of this country" (Jenyns, 1765: 18). Adam Smith was not personally opposed to allowing the American colonists to send a considerable number of representatives to the House of Commons, in proportion to the amount of revenue they contributed to imperial costs, but he recognized that most British MPs were opposed to any such suggestion. He knew that they feared that the Americans would introduce too great a democratic element in the chamber and he himself believed that the colonies were developing so fast, both demographically and economically, that within a century they might produce more in taxation than Great Britain and the seat of empire would need to move across the Atlantic (A. Smith, 1786: II, 456-458).

Given all the threats that the proposals for sending American representatives to Westminster presented to their notion of parliamentary sovereignty it is not surprising that they never won much support in Britain. Thomas Pownall, a former governor of

Massachusetts and an MP, initially favored admitting such representatives in the early editions of his book, The Administration of the Colonies, but by the time he produced the fifth edition, in 1774, he recognized that neither the Americans nor the British had any interest in having colonial representatives in the House of Commons (Guttridge, 1969: 31-36; Schutz, 1951: 81-194, 204-212, 238-239; Shy, 1970: 172-177). While in exile in Britain, the American loyalist, Joseph Galloway, tentatively raised the suggestion that the Americans might be allowed to send representatives to parliament, but his proposal was ignored (Boyd, 1941: 133-137). Given the views expressed on both sides of the Atlantic, Benjamin Franklin was justified in claiming, as early as 1766, that for too long parliament had thought too highly of itself to admit colonial representatives to its deliberations and he prophesied that by the time parliament was likely to change its mind the colonists would think too highly of themselves to accept such a belated offer (Labaree et al., 1959-2018: XII, 269).

III. Proposed Reforms of the Constitution of the Empire

The American crisis produced a number of proposals for reforming the constitution of the British empire in order to reconcile the serious differences that developed between Britain and the American colonies about the nature and location of sovereignty in the years after 1763. These suggestions show that the dispute over sovereignty produced a variety of possible political solutions to the crisis, but their failure to resolve the disputes between British imperialists and American patriots demonstrate how much each side feared making concessions that would seriously undermine their vital interests. Most of these proposals were produced by men who lacked real influence with the leading politicians on both sides of the Atlantic and not one of these suggestions was ever taken up for serious consideration (W. A. Brown, 1941: 9-94; Mullett, 1930: 548-579; York, 2002: 1-19). These suggestions for creating new

political institutions were rejected by leading British politicians because they undermined the sovereignty of parliament. Few of them were advanced by leading Americans because, from the Stamp Act crisis onwards, the majority of colonial politicians and propagandists were determined to defend the authority of their provincial legislatures and constantly advocated a return to the pre-1763 situation when British ministers and politicians appeared to accept that the Westminster parliament had no right to interfere in the internal government of the American colonies.

The political leaders in the American colonies grew increasingly adamant that their local legislative assemblies were the true representatives of the people and must be accepted as the sovereign authority over the internal affairs of their individual provinces. This determination was first shown in the Stamp Act Congress of 1765, which helped to persuade the new Rockingham administration at Westminster to secure the repeal of the act. This colonial success led to further efforts to find ways of uniting American opposition to subsequent British efforts to exert legislative or financial control over the internal affairs of the colonies. In 1769, Edward Bancroft advised Britain to abandon its constitutional claim to interfere in the internal affairs of the colonies. He proposed that each colonial assembly, according to their wealth and population, should appoint a number of commissioners each year to meet with the royal governors or other representatives of the crown in order to decide whether to accept any request from the king for revenue or supplies and to decide how these might be raised in each individual colony (Bancroft, 1769: 119-123). In the same year, William Smith, a New York lawyer, presented a more detailed proposal. He advised that parliament should abandon any attempt to impose even external taxes on the colonies that were designed to raise revenue so that the imperial costs, that Britain was struggling to meet, could be reduced. He proposed that the king should create a new American parliament with elected members representing all the British colonies in North America from Quebec to Florida. This parliament was to have a

lower house elected by the provincial legislatures in each of these colonies, an upper chamber of twenty-four members chosen for life by the crown, and a Lord Lieutenant appointed by the crown to preside over its meetings. The king would present this new American parliament with an annual requisition requesting a specified amount of revenue to be raised in North America to help meet imperial expenses. The American parliament would then decide how best to apportion this sum among the various colonies, whose individual legislatures would then decide the appropriate ways these sums could be raised. The Westminster parliament would have no authority to raise revenue in the colonies, but it would retain its responsibility for regulating imperial commerce and managing the defense policies of the empire (Calhoun, 1965: 105-118; Klein, 1972: 343-380).

Leading American patriots were not prepared to take up such a proposal, because they were wary of taking any control over colonial taxation out of the hands of their local legislatures. By the time the Americans were sending delegates to the First and Second Continental Congresses of 1774-1776 the leading patriots were now reluctant even to allow parliament to exercise sovereign power over the Atlantic trade or over the defense of the colonies. Instead, they concentrated their efforts on coordinating their responses to parliament's recent coercive legislation. They resolved to oppose these efforts by the Westminster parliament to impose its legislative authority on the colonies and insisted that their sole connection with Britain was through their willingness to accept George III as their shared monarch.

Only the moderate Loyalist, Joseph Galloway, endeavored, though in vain, to persuade the First Continental Congress to offer a plan for reforming the constitution of the empire. He proposed that each colony should retain its own legislature with authority over internal affairs, but a Grand Council should be elected every three years by the members of these assemblies to regulate matters of imperial concern (such as commercial relations with Britain and

defense issues) and under an executive President General appointed by the king. The Grand Council would conduct its business in the same manner as the House of Commons, while the President General would have the right to accept or reject the measures proposed by the Council (Newbold, 1955; Shannon, 2002). This new legislative body, however, could be regarded as an inferior and distinct branch of the sovereign British parliament. Proposals affecting imperial relations could be initiated in either the Grand Council or the Westminster parliament, but both legislative bodies would be required to approve all general acts or statutes affecting the empire, except that revenue-raising measures in wartime could be approved by the Grand Council and President General, without the agreement of parliament. Thus, no imperial action could be taken without the consent of the American representatives in the Grand Council (Boyd, 1941: 112-114; Galloway, 1775: 53-55). Galloway laid this proposal before the First Continental Congress in 1774, but it was not accepted by his fellow delegates, who took a harsher attitude towards expressions of goodwill emanating from British ministers.

Congress preferred to accept a report prepared by Thomas Jefferson that asserted that "nothing but our own exertions may defeat the ministerial sentence of death or abject submission" (Ford, 1904-1937: II, 4). On 6 July 1775, Congress prepared a declaration for taking up arms because: "We are reduced to the alternative of chusing between an unconditional submission to the tyranny of irritated ministers, or resistance by force. The latter is our choice" (Ford, 1904-1937: II, 128-257). On 21 July 1775, Benjamin Franklin laid before the Second Continental Congress his proposals for adopting "Articles of Confederation and Perpetual Union" so that the colonies would find it easier to cooperate in defense of their rights and liberties, without declaring complete independence (Burnett, 1938: 1-29; Marston, 1987: 188-192). Franklin wished to make the Continental Congress part of the imperial structure by suggesting that the American colonies, the West Indies and Ireland

should form a legislative union under the crown that would be either temporary or permanent, depending on Britain's response to the kind of grievance being raised in America.

Jacob Green had earlier proposed a compact with Britain that would grant the colonies virtual independence. He proposed that parliament should be denied any right to intervene in the internal affairs of the colonies and any right to impose taxes upon them. While Britain might still be allowed a role in regulating the Atlantic trade, it should not be allowed to impose heavy duties on American commerce in order to raise revenue. Moreover, any duties raised should be handed over to the relevant colony. Britain could only be allowed to impose a low duty on goods imported into the colonies from foreign countries. The king might still be allowed to appoint colonial officials, but these would serve only during good behavior and would be paid by the colonies. The colonial assemblies would control all the internal affairs of their province and would raise their own permanent defense forces. The assemblies, or the colonists directly, would choose representatives to a General Convention or Congress to regulate such inter-colonial matters as the postal service, currency, and the distribution of defense forces. Green was typical of those American patriots who preferred to move towards independence because he believed that all proposals ever made by Britain required the Americans to surrender their most essential and cherished interests (Burnett, 1941: 60-102; Green, 1776: 33-40; Marston, 1987: 68-99; Montross, 1950: 67-86; Mullett, 1931: 238-244).

Rather more British than American politicians and commentators grappled with the problem of how to produce closer and more harmonious relations between Britain and the American colonies, but their proposals never went far enough to satisfy American grievances because there was no willingness to relinquish Britain's domination of the decision-making processes of the empire. They considered and proposed a variety of constitutional reforms, which might help parliament and the colonial assemblies to work

more effectively together for the benefit of the whole empire. One early suggestion, put forward in an imaginary dialogue, proposed that a sovereign council might be elected from all parts of the British empire, in proportion to the contribution each made to meet imperial expenses. This council would decide issues of war and peace and would be able to decide how much each colony should contribute to the costs of imperial defense, while leaving the means of collecting this revenue to be decided by the individual colonial legislatures (Steele, 1766: 25). Another underdeveloped suggestion proposed that a fixed, though unspecified, number of delegates elected by each colonial assembly should meet at regular intervals a fixed number of British MPs and peers, chosen by the two houses of parliament, to decide how the burden of imperial defense might be fairly distributed (Anonymous, 1775c: 13, 28).

A more detailed proposal suggested that a "Supreme Council of the Colonies and Commerce" should be established to replace the existing Board of Trade and Plantations as the body responsible for approving or amending trade regulations and for settling disputes between Britain and the American colonies. Ex-officio members of the Board would continue to serve on this Supreme Council and other deputies should be elected to this body from the Privy Council, both houses of the Westminster parliament and from all the legislative assemblies in North America and the West Indies. The exact number of delegates to be elected from each legislature was not specified, but it was suggested that the number should be proportionate to the number of inhabitants being represented, a policy which would undoubtedly give Britain a majority on this Supreme Council. Furthermore, all the laws initiated by this Supreme Council would have to be sent for possible amendment to the Westminster parliament. While the Supreme Council could reject any amendment suggested by parliament, the king would have to be notified of this disagreement and the crown would retain its right of veto. These concessions were enough to damn the bill in the eyes of most colonists (Anonymous, 1775a: v-xviii).

A more conservative suggestion for the reorganization of the constitution of the empire was proposed as late as 1778, after the Americans had already declared their independence. It suggested that all legislative and revenue-raising measures put forward by the American assemblies should first be approved by parliament. New committees of parliament, however, should be established to deal with imperial affairs such as trade and defense, and the colonial assemblies should be given the right to send delegates to attend these committees and also to offer written information about colonial attitudes towards the issues under discussion. No mention was made of the number of delegates the colonies would be able to send to these parliamentary committees. Worse still, the author of this proposal wanted Britain to be free to appoint and pay the salaries of the officials serving the civil administration within the colonies (Anonymous, 1778a: 153-157, 163). A similar proposal made in the same year for setting up a central body to discuss imperial affairs among representatives elected from Britain and all the colonies gave this body no absolute authority, but left it subordinate to the sovereign authority of the Westminster parliament (Anonymous, 1778b). These suggestions had nothing substantial to offer to the colonies.

A more liberal and specific proposal, put forward by an anonymous pamphleteer, closely followed the suggestions previously advanced by the American lawyer, William Smith. This suggested that all the colonies in North America should be united under one legislature, which would be modelled on the Westminster parliament. The American colonies would elect the deputies to sit in the lower house of this legislature in proportion to their "weight and importance." The crown would appoint a new Council of State, which would have the same constitutional powers as the Westminster House of Lords. The members of this Council of State would be chosen from among those colonists distinguished by their family, fortune and influence, and hence be a virtual American aristocracy. These men would serve for life and receive a salary from

the crown. The executive would be headed by a Lord Lieutenant or Viceroy, again chosen by the crown, who would possess the right to veto policies proposed by the legislative assembly. All laws and taxes would require the approval of all three parts of the combined legislature (Anonymous, 1774a: 40-45). The author of this pamphlet certainly had no influence on the British government or parliament since his suggestions threatened to weaken the authority of parliament and to give the king too much influence over this new political institution. The American Loyalist, Joseph Galloway, when in exile in Britain, put forward a similar proposal to British ministers several times between 1779 and 1788, but with no more success (Boyd, 1941: 115-177).

None of these schemes of constitutional reform emerged from ministerial or parliamentary discussions. Nothing was offered by these proposals that was likely to convince the colonists that their interests would be safe under any such scheme of constitutional reform. These proposals were not only too vague, especially about the size of the colonial representation on such bodies, but these came far too late to be acceptable on either side of the Atlantic (Cawthorne, 1774: 25-30, 35-43). The authors of these proposals hoped that the Americans might accept a relationship with Britain similar to that which Britain had with Ireland. Despite the concessions Britain was making to Ireland in 1780-82, with regard to the legislative independence of the Dublin parliament, it was much too late to expect American patriots to accept the kind of subordinate relationship that the Anglo-Irish elite were being granted by these particular concessions (Dickinson, 2013: 18-19, 155-180).

IV. British Proposals for a Divided Sovereignty, Home Rule or Complete Independence

As the American crisis grew more serious some Britons were prepared to discuss major concessions that might conciliate the

American colonists without abandoning parliament's sovereign authority within Great Britain or its leading role within the empire. Although they were ready to cede control over the internal affairs of the colonies to their provincial legislative assemblies, very few of them were willing to reduce parliament's authority over the Atlantic trade or to surrender Britain's right to be in control of imperial defense policies. They were particularly conscious of the important contribution that the Atlantic trade made to Britain's power, prestige and prosperity and they therefore believed that retaining control over, and imposing customs duties on, this commerce would always reap greater economic benefits for Britain than could be gained by any internal tax levied on the American colonies. They therefore found it extremely difficult to conciliate American grievances when the colonists moved from a rejection of the internal tax levied by the Stamp Act of 1765 to attacks on the Townshend duties of 1767-1770 and the surviving tea duty of 1770-1773. These were external customs duties of the kind often levied in the past, but they were now seen by the colonists as blatant attempts to raise revenue from America in order to reduce the tax burden on Britain rather than as measures to regulate the Atlantic trade in the interests of both Britain and the American colonies.

William Pitt the Elder (Earl of Chatham), and his closest political allies, supported the repeal of the Stamp Act in 1766 and endorsed the American claim of "no taxation without representation." They believed that this constitutional principle was enshrined in the British constitution and even in the law of nature and so it ought to be extended to the American colonists. Pitt attempted to draw a clear distinction between an internal tax imposed on the colonies by parliament in order to raise revenue to meet imperial expenses and external duties passed by parliament in order to regulate the Atlantic trade. He proclaimed:

> It is my opinion, that this kingdom has no right to lay a tax upon the colonies. At the same time, I assert the authority of this Kingdom over the colonies to be sovereign and

> supreme, in every circumstance of government and legislation whatever. . . . Taxation is no part of the governing or legislative power. . . . The distinction between legislation and taxation is essentially necessary to liberty. . . . The Commons of America, represented in their several assemblies have ever Been in possession of the exercise of this, their Constitutional right, of giving and granting their own money. They would have been slaves if they had not enjoyed it. (Cobbett, 1806-1820: XVI, 99-100)

In the debates on the Declaratory Act, being rushed through parliament at the same time as the repeal of the Stamp Act, Pitt's friend and political ally, Lord Camden insisted the House of Lords:

> The sovereign authority, the omnipotence of the legislature, my lords, is a favourite doctrine, but there are some things they cannot do. . . . when the people consented to be taxed they reserved to themselves a power of giving and granting by their representatives. . . . even supposing the Americans have no exclusive right to tax themselves, I maintain it would be good policy to give it to them. (Cobbett, 1806-1820: XVI, 168-170)

When challenged on expressing these views, he retorted:

> My position is this—I repeat it—I will maintain it to my Last hour,—taxation and representation are inseparable;—This position is founded on the laws of nature; it is more, It is an eternal law of nature; for whatever is a man's own, Is absolutely his own; no man hath a right to take it from Him without his consent, either expressed by himself or representative; whoever attempts to do it, attempts an injury; whoever does it commits a robbery; he throws down and destroys the distinction between liberty and slavery. Taxation and representation are coeval with and essential to this constitution. (Cobbett, 1806-1820: XVI, 178)

Pitt and his closest allies held a view about a divided sovereignty, in which the Westminster parliament was sovereign over Britain's internal affairs and about imperial issues of defense

and commerce, but not over the internal taxes or laws that were the constitutional responsibilities of the colonial legislatures. This was a standpoint that could have resolved the dispute over sovereignty with the American colonies and, if followed through, it would certainly have delayed any breach between Britain and its American colonies. Unfortunately, Pitt was poor at building up support within parliament and, even when he briefly led a new administration at Westminster (Brooke, 1956; Thomas, 1987), he unwisely endorsed the decision of his Chancellor of the Exchequer, Charles Townshend, to pass a new set of customs duties in 1767 that were designed to raise revenue from the American colonies as well as to regulate their external trade. Pitt may have believed that the principal purpose of these duties was to regulate commerce, but many American critics agreed with John Dickinson of Pennsylvania, that the revenue that the Townshend duties was designed to raise was to be used to pay the salaries of royal officials in the colonies and so render them independent of the legislative assemblies (Dickinson, 1768: 7-13). Pitt always hoped that the colonies would voluntarily raise taxes through their own legislative assemblies in order to meet some of the costs of imperial defense (Peters, 1994: 393-431). When that was not forthcoming and these new duties produced a spirited reaction in the American colonies, Pitt responded that, should the colonies persist in their resistance to parliament's rightful authority, he would "give his vote for employing the last ship and the last man in this country to force them to perfect obedience" (Thomas, 1969: 308). Years later, on 1 April 1775, with war imminent, Pitt advanced conciliatory proposals to prevent the impending clash of arms. He wanted British troops withdrawn from America, but he still maintained that parliament had full authority to legislate on matters concerning the whole empire, to regulate the Atlantic trade, and to control imperial defense. He evidently still saw the American colonies existing primarily for the economic and strategic benefit of Great Britain and he was prepared to restrict the colonists' freedom of action in order

to strengthen Britain against the greater natural resources of France. Since the American delegates at the Continental Congress were still not making any specific proposal of financial support to meet imperial costs, Pitt could enlist little support in parliament for his conciliatory proposals (Cobbett, 1806-1820: XVIII, 198-215, XIX, 1022-1023).

The Rockingham Whigs, and Edmund Burke in particular, made greater efforts to conciliate the American colonies, but, when repealing the Stamp Act in early 1766, they felt compelled to pass the Declaratory Act at exactly the same time. This act stated explicitly that parliament had the constitutional authority to legislate for the American colonies "in all cases whatsoever," though no mention was made of the constitutional right to levy any internal tax on the colonies. Burke never sought the repeal of this act and never subsequently denied that parliament was sovereign over the American colonies (Cobbett, 1806-1820: XVI, 605-725; Langford et al., 1981-2015: II, 47-52, 61-64, 96, 178-181, III, 105-169, 185-200). The growing American crisis did inspire him in 1774-75 to deliver three great speeches in the House of Commons suggesting ways of resolving the constitutional dispute with the American colonies (Langford et al., 1981-2015: II, 408-462, III, 105-169, 185-200). These have been criticized, however, as inadequate responses to a profound constitutional crisis which even the well-informed Burke did not fully comprehend. Burke was willing to abandon any attempt to impose parliamentary taxes on the colonies and wished to repeal the Coercive Acts of 1774, but he studiously avoided any attack on the sovereignty of parliament. Instead, he tried to divide parliament's authority into two: an absolute legislative authority over the internal affairs of Great Britain and in its "imperial character" a superintending power over all the inferior provincial legislatures, whose power parliament could guide and control, but not destroy (II, 458-460). The colonial legislatures should be left as free as possible to exercise authority over internal

affairs, but parliament could interfere if these assemblies acted unjustly or were in dispute with each other or alienated the colonists they were supposed to represent. Furthermore, should the colonial assemblies refuse to tax their constituents in order to contribute towards the costs of imperial government and defense, then parliament would retain the constitutional authority to compel them to do so.

Burke was groping towards a notion of divided sovereignty, but his arguments seemed unclear and were unpersuasive to his fellow MPs. One leading critic outside parliament, Josiah Tucker, castigated him in print for offering to concede too much to the American colonies (J. Tucker, 1775a: 44-45). By this stage, however, most American patriots were not prepared to acknowledge any exercise of parliamentary authority over the colonies. They had come to recognize fully how dangerous parliamentary sovereignty might be to their rights, liberties and vested interests. They were now fully aware that the doctrine of parliamentary sovereignty as understood by most British politicians meant that no parliament could bind what its successors could do. Parliament could solemnly and truthfully make concessions to the colonies in one session, but a subsequent parliament could later vote to renege on them. By 1778, even Burke and his Rockingham Whig colleagues had accepted that there was no solution to the crisis, but to accept the independence of the American colonies (Dickinson, 2012: 156-167; O'Gorman, 1973: 67-79; Richeson, 1976; Stanlis, 1997: 24-38). David Hartley, an MP and ally of the earl of Shelburne, persisted with his efforts to persuade parliament to make an effort to conciliate the American colonies, but his arguments went little further than those of Burke. He avoided any discussion of parliamentary sovereignty, but he accepted that all British political influence on the internal affairs of the colonies must be surrendered and he was even prepared to consider surrendering parliament's control over the Atlantic trade. He still desperately hoped, however,

for some kind of federal union with America which might not only promote stronger trade links but might lead to some kind of common nationality and a common defense policy (Cobbett, 1806-1820: XVIII, 552-571, 1042-1052, XIX, 1068-1080, XX, 901-915, XXII, 336-357; Guttridge,1926: 230-340; Reich, 1998: 127-138). His proposals came too late to persuade parliament or the Americans to take his suggestions seriously.

Leading British radicals outside parliament were prepared to make greater concessions to the colonies than Burke was offering in 1774-75, but they still hoped to maintain the commercial and defense links between Britain and America. John Cartwright never believed in the doctrine of parliamentary sovereignty, was willing to cede complete control over the internal affairs of the colonies to their local legislatures, and was even prepared to surrender parliament's authority to regulate the Atlantic trade. He wanted all of Britain's North American colonies from Quebec to Florida to be recognized as separate states loosely linked with Britain in the "Great British League and Confederacy," but with Britain acting as the arbiter in any dispute between these states. The imperial experts administering this confederacy were to be based in London and Britain was to be the leading voice in decisions over defense and relations with foreign powers (Cartwright, 1775; Reich, 1998: 15-19; Toohey, 1978: 36-52). Richard Price was another radical who had no commitment to parliamentary sovereignty and who was willing to cede full control over internal affairs to the colonial legislatures, but he too favored the establishment of a Senate, elected by Britain and the colonies to arbitrate when any dispute arose in relations between Britain and these semi-independent states. He never explained how this Senate would be elected, how many representatives would be allocated to each constituent part of this confederated empire, exactly what powers it would have, or how it would impose its authority (Reich, 1998: 90-104; Toohey, 1978: 100-102).

The two greatest British economists of the age, Adam Smith and Josiah Tucker, were prepared to go much further in order to resolve the American crisis without embarking on a war to bring the colonies to submission. They were both supporters of parliament's sovereign authority within Britain, but to avoid war they were ready to abandon Britain's claim to exercise parliamentary sovereignty over the colonies. Moreover, they believed that Britain's economic interests did not require any formal political, commercial or defense links with America. Adam Smith pointed out that the American colonies cost Britain immense sums in administering and defending them and he recognized that they could not be compelled by parliament to make a significant contribution towards these costs. He also believed that the commercial regulations, which parliament regularly passed to control the Atlantic trade, distorted Britain's commercial activities and did not bring enough revenue into the British treasury (A. Smith, 1786: II, chap.7). He recognized that the British nation's sense of honor and prestige would not let it grant the colonies independence voluntarily, but this was the policy he personally favored (Smith, 1786: II, 443). He saw no benefits accruing to Britain by coercing the Americans into accepting parliamentary sovereignty and he concluded that the better solution was to let them freely secede from the British empire. He showed great foresight in believing that a peaceful resolution of the crisis would probably result in increased trade between Britain and an independent America (Benians, 1925; Skinner, 1990). Josiah Tucker had hoped to delay American independence for some time, but, as the crisis grew, he concluded that, while Britain was probably strong enough to coerce the Americans into submission, it would be better advised not to waste so much blood and treasure on such a hazardous enterprise. Convinced that Britain and the American colonies were natural trading partners, because each produced what the other wished to buy, and only Britain could provide the credit needed to fund this trade, he preferred a peaceful end to their political connection so that even stronger commercial links could develop in future when they were separate states (Shelton, 1981: 182-213; J. Tucker, 1766, 1774: 151-224, 1775b, 1783: 7-10).

V. Seeking to Re-Define and Re-Locate Sovereignty

From the Stamp Act crisis onwards, many leading colonists firmly rejected parliament's claim to exercise sovereign authority over them "in all cases whatsoever," but they only slowly and reluctantly took the steps that led them to complete independence. No American leader, however, took positive and constructive steps to meet the British demand that the colonies should make an explicit financial contribution to the costs of imperial governance and defense. They never drew up precise proposals of how much they would contribute to such costs, how this sum would be divided between the colonies, and how exactly the money so promised would be collected. Instead, they concentrated on resisting British policies and demanding the redress of their various grievances. Even when they sent the Olive Branch Petition to George III in 1775, while offering to remain his loyal subjects, they refused to accept that they were under the authority of the sovereign British legislature. When it appeared that they might offer to raise revenue to be paid to the king and not to parliament, this was resented and firmly rejected as a solution by both king and parliament (Thomas, 1991: 250). The possibility that the revenue raised by the growing wealth of the colonies might at some future date make the monarch financially independent of the British parliament was understandably seen in Britain as a major threat to parliament's power and constitutional authority (Brown, 1941: 24-57).

For their part, British ministers tried to resolve the crisis by reducing the extent of parliament's authority over the American colonies. In late 1774, Lord North proposed that Britain should abandon any direct attempt to tax the colonies. He was prepared to put this offer to the American colonies, however, only if they would make financial arrangements to meet the costs of the imperial government in America and to share the costs of imperial defense in wartime. He also made it clear that parliament would have to decide

how much revenue the colonies should raise, approve any colonial plan for raising this revenue, and control how this revenue was spent (Thomas, 1991: 178-179). He was not therefore prepared to abandon the constitutional doctrine of parliamentary sovereignty and he refused to negotiate directly with the Continental Congress. Even so, many MPs feared that the prime minister was conceding too much, but Benjamin Franklin probably represented the American attitude to these concessions when he observed: "I cannot conceive that any colony will undertake to grant a revenue to a government that holds a sword over their heads, with a threat to strike the moment they cease to give or do not give so much as it is pleased to expect" (Labaree et al., 1959-2018: XXI, 510). When these proposals were considered by the Second Continental Congress, in July 1775, the Americans insisted that "the colonies of America are entitled to the sole and exclusive privilege of giving and granting their own money; that this involves a right of deliberating whether they will make any gifts, for what purpose it shall be made, and what shall be the amount" (Anonymous, 1775b: 17; A. S. Brown, 1977: 20-26; Jefferson, 1775: 2).

In late 1775, an increasingly desperate Lord North offered to repeal the Coercive Acts and "to suspend every exercise of the right of taxation, if the colonies would point out any mode by which they would bear their share of the burden and give their aid to the common defense" (Thomas, 1991: 299). Admiral Richard Howe and General William Howe were charged with the task of presenting Britain's new conciliatory proposals to Congress. In their final orders, issued in May 1776, the colonial legislatures were to be allowed to submit advice to parliament on any imperial issue and were also offered wide powers of discretion over how to raise the money needed as the colonial contribution to imperial defense (Cobbett, 1806-1820: XVII, 319-358). These terms might have been accepted if offered earlier, but, by the time the Howe brothers reached New York on 12 July 1776, the Americans had already issued their Declaration of Independence. Congress had finally

decided to reject any exertion of British sovereignty over the American colonies (W. A. Brown, 1941: 75-139; Gruber, 1972; McGuire, 2011; Richeson, 1954: 200-208).

With France about to enter the war on the American side, Lord North made one last effort to keep the American colonies within the British empire. In March 1778, parliament formally renounced its claim to impose internal taxes on the American colonies and repealed both the Tea Act of 1773 and the Massachusetts Bay Regulating Act of 1774. The Carlisle Commission was instructed to inform the Americans that their charters would not be altered in future, except with the consent of the colonists, and their legislative assemblies were to exercise very considerable control over internal finances, the colonial judiciary and any military forces stationed among them. They could also retain their Continental Congress and might even be allowed some representation in the Westminster parliament. Once hostilities ceased, all restraints on American trade would be rescinded. There would be no need for the Americans to make a formal renunciation of their Declaration of Independence, but they would need to accept parliament's right to regulate imperial trade, pay pre-war debts to British creditors, and compensate American Loyalists for their losses (Cobbett, 1806-1820: XIX, 762-815, 834-879; Flavell, 1992: 302-322). These concessions show how far Britain had retreated from its earlier insistence on exercising sovereign authority over the American colonies. Congress responded by simply demanding that Britain withdraw all her forces from America and recognize the country's independence (Amoh et al., 2007; W. A. Brown, 1941: 205-292; Richeson, 1954: 234-285).

VI. Sovereignty in the New Republic

The American colonists had rejected the sovereign authority of parliament by taking up arms and declaring their independence, but these actions faced them with the problem of defining and locating sovereign authority within their new states. In 1775-76 Britain's control over large parts of North America collapsed and,

encouraged by the Continental Congress, each colony made efforts to erect new governments within their boundaries with the right to exercise sovereign powers. On May 10, 1776, John Adams proposed a resolution in the Continental Congress recommending to the former colonies that they "adapt such government as shall in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general" (Marston, 1987: 107). The Declaration of Independence on July 4, 1776, declared the former colonies to be "FREE AND INDEPENDENT STATES," and, as such, "they have full power to levy War, conclude Peace, control Alliances, establish Commerce, and to do all other Acts and Things which independent states may of right do." In most of these new states Constitutional conventions were elected by those previously qualified to vote for members of the colonial legislatures in order to draft written constitutions making each new state a distinct and independent polity. Years of protesting against bad government by British ministers and royal governors and defending the claims of their provincial assemblies resulted in most of these constitutions granting very substantial powers to their legislatures and to leaving the executive with limited powers. Elected state governors were prevented from appointing executive officials and they were allowed limited or no power to veto the actions of the state legislature (Main, 1973: 143-221; Marston, 1987: 281-297). No explicit references were made to the nature and location of sovereignty, but, in practice, control of taxation was granted to the elected state legislatures, Declarations of Right defended the rights and liberties of the inhabitants, and men with the required qualifications could vote for their legislative representatives and hold them to account. As early as January 1776, the Massachusetts General Court proclaimed: "It is a Maxim that, in every Government, there must exist, somewhere, a supreme, sovereign, absolute, and uncontrollable Power; but this Power, resides, always in the body of the People, and it never was, or can be delegated, to one man or a few" (Handlin & Handlin, 1966: 65).

The Virginia Declaration of Rights of June 1776 declared: "All power is vested in, and consequently derived from, the people" (Main, 1973: 159). Similar claims were made in Pennsylvania and North Carolina, while it was declared in New York state that "no authority shall, on any pretense whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them" (W. P. Adams, 1980: 136-137). Although there was no actual constitutional mechanism created in order to place ultimate sovereignty in the hands of the people, the principle that the people were sovereign was to be advanced through a range of political developments during the early years of independence. The frequent use of extra-legal conventions, the ratifications of the written constitutions that the new states drafted, the sending of instructions to elected representatives, the extension of the franchise in most states to adult white male Christians, who paid taxes or possessed a modest amount of property, the participation of large numbers of citizens in town meetings and out-of-doors political activities, and the frequent appeals made to the people by competing politicians, all meant that the governing elite could be held to account and also promoted the belief that the people were the sovereign authority in these newly-independent states (Wood, 1969: 383).

Throughout the American crisis, most Americans had maintained that their individual colony or state was a distinct and separate polity with full control over legislation and taxation within its boundaries. From 1774, each had been in the practice of sending delegates to a Continental Congress in order to coordinate resistance to the sovereign authority of parliament (Rakove, 2019). The propertied elite, however, continued to hold considerable power in each state, but they had not established this Congress as a national sovereign authority representing the United States as a whole. It was the need to fight Britain in the War of Independence that forced these distinct and separate states to cooperate more than ever before in order to survive (van Tyne, 1907: 529-545). Years of

resisting the authority of parliament had ensured that the Americans would be reluctant to subordinate their particular state's interests to a powerful national government (Greene, 1987: 136-165). On the other hand, years of maintaining that the colonies had divided sovereignty with Britain, surrendering control of imperial issues to Britain while claiming full authority over their internal affairs for each distinct American polity, meant that they had some experience of dividing sovereignty according to the use that this power was applied (LaCroix, 2011: 126-131). They therefore resorted to a division of sovereignty between Congress and the state legislatures, that did not entirely satisfy those who wished to create a stronger national government or those determined to safeguard the sovereign power of each individual state, but it was the latter who prevailed during the efforts at greater cooperation during the War of Independence.

In their efforts to achieve a measure of unity during the war, no effort was made to incorporate the thirteen states into a single state with a strong national executive and legislature. Each state retained full control of its own internal affairs and could legislate, raise taxes, and regulate its own commercial activities. Each state did, however, continue to send delegates to Congress, which, in turn, could exercise some executive responsibilities to help win the war (Greene, 1987: 253-309). It was Congress that urged each state to draw up a new constitution. Congress claimed the right to make war and peace, to form alliances with foreign powers, to negotiate with Native American tribes, and to settle boundary disputes between the states. Congress was also responsible for directing the military operations of the war and for paying the army and navy, but it was the responsibility of each individual state to provide the money, men and supplies to maintain these forces. No state could maintain an independent standing army, though they were able to raise local militias for defense against internal disorder and a possible British invasion (Marston, 1987: 253-309).

To establish agreed relations with the individual states Congress

began to draft Articles of Confederation as early as July 1776, but an approved version was not sent out to the individual states for ratification until November 1777 (Jensen, 1948, 1950). Under the terms of these Articles, Congress could only recommend policies and actions to the states. It lacked the constitutional right and political power to coerce any state into accepting its decisions because the second article of this new constitution expressly stated: "Each State retains its sovereignty, freedom, and independence, and every Power, jurisdiction, and right which is not by this confederation expressly delegated to the United States, in Congress established" (Jensen, 1948: 175). Despite this considerable concession to the states, the Articles of Confederation did not come fully into effect until March 1, 1781, when the last state, Maryland, finally ratified it. Agreement proved so difficult because the Americans did not see themselves as a united people, but as citizens of the thirteen states that differed from each along regional, economic and cultural lines. There were unresolved disputes over how many delegates each state should be allowed to send to Congress, between those states with claims to extensive territory to the west and those without such a claim, between those states with many slaves and those with few, and over how much each state should contribute in men, money and supplies to the Continental Army and Navy (Greene, 1987: 180-205; Jensen, 1948: 138-160). Conservative opinion wanted a centralized government that could regulate both internal and external trade, control the distribution of western lands, and settle disputes between one state and another. Fearing mob rule and anxious to protect property, conservatives wanted a national government with the power to act coercively, even within the individual states. By contrast, radical opinion believed that liberty was the most important objective and their recent relations with Great Britain led them to fear a strong national government and to support the sovereign rights of the individual states (Jensen, 1948: 161-176).

The principal problem which the Congress had to address, was

whether to place sovereignty in Congress or in the state legislatures. The Articles of Confederation enumerated the explicit, though limited, powers that Congress could exercise in future. These were largely the powers it had been struggling to exercise since independence had been declared. Congress was granted the rights and authority to determine war and peace, to raise, equip and regulate a continental army, to make alliances with foreign powers and Native American tribes, and to arbitrate the disputes between the individual states. Congress was also permitted to establish a national currency, a national post office, and a system of weights and measures. It could borrow money and emit bills to pay for the armed forces, but Congress could not impose taxes on the states so it had to hope that the states would eventually redeem these debts in a shared and equitable manner. Congress could pass resolutions, but not laws that impinged on the internal affairs of any state and it had no power to veto the political decisions of any state or to coerce its citizens to accept actions which Congress wished to see adopted.

The exigencies of the war with Britain persuaded the states to accept a degree of national authority exercised through various committees that Congress established, but the delegates sent by the states refused to allow Congress to interfere with the internal affairs of their states. Congress was an executive body, not a legislative, tax-raising or supreme judicial power. It was the agent of the states, who created it. It was not, moreover and most importantly, established or regarded as a government representing the interests of the American people as a whole, but as one representing the particular interests of the states. The delegates to the Congress were chosen, paid, instructed and subject to recall by the legislatures of each state, except Rhode Island and Connecticut, where they were appointed and accountable to the state's electorate as a whole (Morgan, 1988: 264). To guarantee the equal power of each state in the affairs of Congress, the Articles of Confederation granted each state one vote. Each state could send between two and seven delegates to the meetings of Congress held in Philadelphia, but between them they

could not cast more than a single vote. Moreover, any proposed amendment to the Articles required not just the approval of Congress, but the unanimous support of the states (Marston, 1987: 195-202; McDonald, 2000: 20).

Once victory in the War of Independence was assured, political influence drained away from Congress and there was a strong reassertion of states' rights. This development alarmed leading conservatives for whom the framing of a new constitution settling the nature and location of sovereignty became the most pressing political issue. They became increasingly concerned about violent popular resistance to rule by men of property, the potential for boundary disputes between the states to lead to armed conflict, and the lack of a strong central government capable of defending American interests against the ambitions of foreign states. To justify their demands for a stronger national government those American politicians, later labelled Federalists, exaggerated the failings of the Articles of Confederation and urged the need for a Constitutional Convention that might seek to remedy its defects. To ease the fears of the radical defenders of states' rights, support was expressed for a written constitution that could not be undermined or infringed by the executive and legislative powers that it created. Thomas Tudor Tucker, for example, proposed that:

> The Constitution should be the avowed act of the people at large. It should be the first and fundamental law of the state, and should prescribe the limits of all delegated power. It should be declared to be paramount to the acts of the Legislature, and irreplaceable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular modes as may be therein provided. (T. T. Tucker, 1784: 30-31)

When the Constitutional Convention was eventually convened in Philadelphia, in 1787 (Beeman, 2009), to remedy the defects of the Articles of Confederation by drafting a new constitution, there were some issues that were not in serious dispute. The United States

would remain a republic, with no titles of nobility and no established national church. The delegates accepted that they would need to divide sovereignty, but there was no easy solution, however, about how precisely this could be done. In prolonged and heated debates, the representatives from the states, explored a range of possibilities. The most serious problem was how to create a stronger national government without destroying the sovereign powers of the individual states (Onuf, 1988: 79-98). A compromise was eventually negotiated by which the individual states were subordinated to some extent to a national Federal government, without destroying the authority of the states over their own internal affairs or endorsing an incorporating union of the kind England and Scotland had negotiated in 1707 or Britain and Ireland would soon do in 1800. In seeking to meet the desires of those wanting a stronger central government and to calm the fears of those determined to safeguard states' rights it was explicitly accepted that sovereignty could be divided in a manner not too dissimilar from what the colonists had earlier hoped to achieve in their relations with Great Britain.

Unlike in Britain, where executive ministers and senior judges and government law officers sat in the legislature, the new Federal constitution established a stricter separation of powers with no citizen allowed to serve in more than one of the three branches of government: the executive, the legislature or the judiciary. The executive was to be headed by an elected President, who had the authority to appoint senior executive officers and the judges of the Supreme Court, but these appointments had to be approved by the Senate, the upper chamber of Congress. Judges were appointed for life and their independence was further secured because no system was devised for their removal. The President was expected to be an energetic leader and Commander-in-Chief of the armed forces, but he was elected for a four-year term, could be impeached for abusing his powers, and he was given only a qualified veto over the measures passed by the legislature. The President could not himself declare war or raise armies. To govern effectively the President needed to

work with Congress, a two-chamber legislature. The powers of the Federal executive and legislature were clearly defined. Congress could regulate commercial relations between the American states and with foreign countries. It could raise a national army and navy, and for the first time, Congress could lay and collect customs and excise duties to pay for these forces and to meet any other government costs. Congress could also continue to maintain a range of services for the benefit of all states, including a national currency, a national postal service, and an agreed standard for weights and measures.

Each state legislature could choose to send several representatives to the Constitutional Convention to represent their state's interests; only Rhode Island failed to send anyone to attend its meetings. Each state delegation had one vote when a decision on any issue was required (McDonald, 2000: 16). From the outset there were differences between large and small states, free and slave states on how any new proposal might impinge adversely on particular states. The slave issue was not directly tackled in the new constitution. To convince the smaller states, in particular, that their interests would not be ignored or overborne by a Congress that might be dominated by the populous or prosperous states, the new Federal Constitution was established that each state legislature would elect two members to serve six-year terms in the Senate, the upper chamber of the newly constituted Congress. The lower chamber, the House of Representatives, was to have its members elected to represent the states for two-year terms. Their number was to be proportionate to the population of each state (with slaves counted as three-fifths of a person). These Representatives considered themselves as delegates of the states. Despite serving for only short terms and having less prestige than Senators, they initiated all finance bills needed to fund the national government. Each state was to decide on the constituency boundaries of its allotted number of state representatives and to decide which citizens were qualified to elect them. In addition, each state was to retain its

own executive, legislature and judiciary, so that these bodies could exercise sovereignty over all the purely internal affairs of the state and control all powers not expressly delegated to the national Federal government. Each state could raise taxes within its own territory (though not issue its own coinage or emit bills of credit) and they could maintain a militia for internal police duties, but not raise a separate army. Alexander Hamilton soon after claimed that each state therefore retained "all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States [government]" (Hamilton et al., 1787-1788: no. 40). Two major constitutional innovations also allowed each state legislature to elect special conventions for the purpose of ratifying the Federal Constitution and, in future, in order to propose and ratify any amendment to it, three quarters of the state legislatures had to support the suggested change.

The proposed new Federal government was not to be invested with the absolute and arbitrary powers that the British legislature had endeavored to exercise. Its new powers were clearly defined in the written Federal Constitution. The national government, incorporating both the President as the executive head and Congress as the legislature, could declare war and conduct relations with foreign powers. It could regulate commercial relations between the American states and between the United States and foreign countries. It could raise a national army and navy and, for the first time, Congress could lay and collect taxes, duties and excises to pay for these forces and any debt incurred in raising such forces. Congress could also establish a range of services to benefit all the states, over for example a national currency, postal system, and standard for weights and measure. In its first session under the new Federal Constitution, Congress set up several executive departments, including those of state, war and treasury (McDonald, 2000: 27).

Each state, however, could retain its own separate and distinct government and political system and could exercise all powers not

explicitly delegated to the Federal government. To prevent the national government becoming a threat to the individual states it was agreed that its powers should be limited through the strict separation of the powers and also the personnel of the executive, legislative and judicial branches of the new Federal government (Erler, 1987). Thus, for example, the President could appoint men to executive and judicial offices, but his choices had to be approved by the Senate. Judges were appointed for life and their independence was further secured because no system was devised for their removal. The President was expected to be an energetic leader, but he was elected for a fixed four-year term, could be impeached, could not himself declare war or raise armies, and was given only a qualified not an absolute veto over bills passed by Congress (Best, 1987).

To secure popular endorsement of the Federal Constitution the draft of it was sent out to all the states for ratification. Each state summoned specially elected conventions elected by the people in order to take the new proposed constitution under consideration. This process of ratification, through which the terms of the new constitution were intensely and widely debated, gave the Federal Constitution greater legitimacy than those state constitutions that had not been so thoroughly discussed and approved before being adopted. The Federal Constitution also gained greater legitimacy when, during the ratification process, the anti-Federalists protested that the draft constitution did not do enough to protect the civil rights and liberties of the people. Ten amendments to the draft constitution were proposed, widely supported and eventually ratified (Beeman, 2009: 369-411; Maier, 2010; Rutland, 1966). These ten amendments guaranteed the people extremely important civil liberties, including the right to free speech and free assembly, a free press, freedom of religion, trial before an impartial jury, freedom from unreasonable searches, seizures and unusual punishments, freedom to petition for the redress of grievances, freedom from unreasonable searches, seizures and punishments, and the right to bear arms. The Ninth Amendment declared "The

enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"; while the Tenth established that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." These ten amendments were incorporated as a Bill of Rights and this was placed at the head of the written constitution and, when the amendments were ratified on December 15, 1791, they were recognized as fundamental laws of the constitution (Wood, 1969: 519-564). The new Federal Constitution was approved when nine states had ratified it. It was already in operation before North Carolina and Rhode Island had ratified it (McDonald, 2000: 22).

To give legitimacy to this new definition and division of sovereignty every effort was made to claim that the Federal Constitution was devised, negotiated and accepted in the name of the American people. It was maintained that sovereign powers could be divided in practice without dividing the concept of sovereignty because all the powers at both state and national level were derived from the sovereignty of the people and these powers were retained only as long as the American people gave their consent to them. During the ratification process in Pennsylvania, James Wilson, for example, denied that sovereignty resided in any particular form of government. Instead, he insisted that it rested on the terms specified in written constitutions, which, in turn, gained their legitimacy from the sovereign authority of the people at large. He defined the nature of sovereignty as Blackstone had done, but he located it in popular not legislative sovereignty. He proclaimed: "The truth is, that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superiour [sic] to our legislatures; so the people are superiour to our constitution" (Dennison, 1977; Jezierski, 1971; McCloskey, 1967: II, 770). James Madison made a very similar claim two months later (Hamilton et al., 1787-1788: no. 46). To entrench this belief in the doctrine of the sovereignty of the people, it was explicitly suggested that the

Federal Constitution was the work of the American people as a whole. Its Preamble did not begin with a list of the states proposing the constitution, but with the words: "We the People."

In his 1803 edition of Blackstone's *Commentaries on the Laws of England*, St George Tucker expressed his belief that the United States had definitively rejected the arguments that Blackstone had advanced in favor of the sovereignty of the legislature. Tucker insisted that the supreme powers in America were established by a constitution that was the act of the people and these powers were defined and limited by them. The Federal Constitution had created a distinction "between the indefinite and unlimited powers of the people, in whom the sovereignty of these states, ultimately, substantially, and unquestionably resides, and the definite powers of the congress and state legislatures which are severally limited to certain and determinate objects, being no more than emanations from the former, where only, the legislative essence which constitutes sovereignty can be found" (St. G. Tucker, 1803: I, appendices 5-6).

VII. The Problems of Sovereignty Unresolved?

It is relatively easy to define the abstract term "sovereignty" as the ultimate authority in a state that has the constitutional authority to approve laws and taxes, and the power to coerce, punish or resist those who would challenge its legitimate right to exercise these powers by appealing to another power which they thought had a greater right to approve laws and taxes. What has proved difficult for any political society, is to decide whether there should be or can be any limits on what the sovereign power can do and where it should be located.

The loss of the American colonies was a severe blow to Britain's economy, finances, political stability, prestige and confidence. It initiated what was to be a long campaign to make the House of Commons more representative of the people at large, but it did not

prevent the majority of men from upholding the conviction that the Westminster legislature was the sovereign authority in the state. It could exercise absolute and arbitrary power, restrained only by what it regarded as humanly impossible or by what legal or customary limits it itself chose to accept. This constitutional attitude was to remain dominant among both constitutional experts and influential politicians throughout the nineteenth century and until at least the mid-twentieth century. What did slowly change was the composition of that sovereign legislature. By the mid-nineteenth century, the crown's patronage had sufficiently declined, and the strength of organized parties had gained such a hold over the members in both houses of parliament, that the monarch had to accept as Prime Minister the leader of the political party that could command majority support in both houses of parliament (Bogdanor, 1995; Olechnowicz, 2007). That Prime Minister could then appoint other government ministers to his cabinet. In the late eighteenth century the House of Lords was a vitally important debating chamber. By the mid-twentieth century, two important constitutional reforms had allowed the House of Commons to override a veto by the upper chamber if it passed a bill for three and then for just two successive sessions of Parliament (E. A. Smith, 1992).

The principal factor in reducing crown patronage and limiting the role of the House of Lords was the expanding power of the House of Commons as growing popular demands succeeded in widening the electorate responsible for choosing the members of that chamber. In the 1760s, no more than twenty per cent of the adult males in England (and lower percentages in Wales and Scotland) cast votes to choose the members of the House of Commons in a general election. After repeated and prolonged campaigns for parliamentary reform, the electorate had expanded to include all adult males and females by the earlier twentieth century (Cannon, 1973; Evans, 2000).

These developments have meant that sovereignty between elections is exercised by the leadership of the majority party in the

House of Commons. The policies favored by the party in government, of whatever political complexion, have produced new constitutional problems about the location and exercise of sovereignty. In the twentieth century, Britain had to surrender control over almost all its former empire. It has allowed three of the four Irish provinces to secede from the United Kingdom and then to create the Irish republic in 1922. In the 1990s, the Westminster parliament passed legislation to establish devolved elected assemblies in Scotland, Wales and Northern Ireland that were permitted to exercise control over the internal affairs of these constituent parts of the United Kingdom. These concessions to the notion of a more divided legislative sovereignty in the United Kingdom have not prevented growing demands, especially in Scotland, for complete independence. The fierce commitment to the sovereignty of the Westminster parliament, particularly in England, has also undermined the United Kingdom's relationship with the European Union and rendered it fraught with difficulties. Membership of the European Union was seen as a threat to the legislative sovereignty of the Westminster parliament, because that sovereignty had to be shared. The United Kingdom formally left the European Union at the end of 2020 (Dickinson, 2008).

The ratification and implementation of the United States Federal Constitution also failed to end all disputes in America about the nature and location of sovereignty. The issue that has most concerned the American politicians in the years after their declaration of independence—how to achieve a measure of union, while preserving the distinct and separate rights of the states—was not permanently solved by the division of sovereignty set down in the Federal Constitution. Despite the many virtues of the Federal Constitution even such firm supporters of it as James Madison and Alexander Hamilton still feared that the new Federal Constitution had not sufficiently defined the nature and location of sovereignty so as to prevent future disputes between the claims of the national government and those of the individual states (Rakove, 1996: 189).

The powers granted to the Federal government were explained in general terms and as early as the 1790s there were major disputes over whether it was exceeding its powers in seeking to establish a national bank and in passing the Alien and Sedition Acts. James Madison and Thomas Jefferson protested at what they regarded as excessive interpretations of the powers granted the Federal government and endeavored to defend the right of the states to reject such proposals. On the other hand, Alexander Hamilton and John Marshall claimed that the Constitution granted the Federal government that right to pass such measures because they came within its right to pass measures for the general good of the Union. Thus, from the outset, American opinion was sharply divided between those who supported a stronger Federal government and those determined to protect states' rights.

When, in the mid-nineteenth century the free states in the Union endeavored to prevent slavery being established in new states joining the Union, this was seen as a breach of faith and eleven states decided to secede from the Union in order to safeguard states' rights in the new Confederation. The northern states fought these seceding states in one of the most expensive and bloody civil wars in history between 1861 and 1865 in order to restore the Union by force of arms. Even this victory did not ensure complete support for the Federal Constitution. Resentment still exists within parts of the white citizenry in the former Confederate states. Even where the civil war has not left deep scars there are still criticisms of the fact that California, for example, still has the same representation in the Senate as Wyoming, despite their vast differences in population size and economic strength.

The Federal Constitution set down in express terms the powers of the different branches of the national Federal government, but as the United States experienced huge changes, social, economic, and cultural, and became the richest and most powerful country on earth, the Constitution itself, the powers of the national executive and the national legislature, and the electoral system, have all been

greatly altered from what they were in the late eighteenth century. There have been a further seventeen formal amendments to the Federal Constitution from to 1794 to 1992, in addition to the first ten amendments in the Bill of Rights. This, however, is a tiny proportion of the thousands of amendments that have been proposed in Congress, but proceeded no further; as well as six that were accepted by Congress but not subsequently ratified by the states. Other acts of Congress, of a kind never anticipated when the Federal Constitution was drafted, have made the Federal government the largest and most expensive in the world. For example, eleven new major executive departments have been created since 1913, including the Departments of Defense, Agriculture, Commerce, Labor, Energy and Transportation. Together, these cost many billions of dollars to run and employ millions of American citizens. Presidential initiatives have led to the creation of 83 National Parks since 1872, that attract millions of visitors. As head of the executive and commander-in-chief of the most powerful forces on earth, a modern US President has an immense amount of patronage at his disposal that hugely exceeds any that George III could command. Recent Presidents now issue many executive orders that are routinely obeyed, without being formally passed as laws by Congress. They also enjoy much greater informal powers than before because of the prestige of their office and their access and ability to manipulate the media of all kinds (Neustadt, 1991; Schlesinger, 1973).

The most persistent unresolved dispute about the location of sovereignty in the United States has been waged over whether it ultimately lies in the constitution or the people. Federalists, such as Alexander Hamilton and James Madison, elevated the constitution to ultimate sovereignty, believing that appeals could be made if legislative acts by the Federal or state legislatures or executive actions by the President were deemed to be contrary to the terms and principles set down in the written Federal Constitution. From the outset, they tried to claim that this new constitution had clearly

established a system of judicial review (Hamilton et al., 1787-1788: no. 78), but modern scholars are still not entirely in agreement as to whether a system of judicial review was originally intended or understood to have been established by the Federal Constitution (Prakash & Yoo, 2003: 887-982; Rakove, 1996: 130, 173-176, 186-189; Rakove, 1997: 1031-1064; Whittington, 1999). It certainly seems likely that others besides Hamilton and Madison believed that the Supreme Court had the power to resolve any conflict between state and federal laws (Rakove, 1996: 175-176). It was not, however, until the decision taken in the case of Marbury v. Madison, in 1803, that the Supreme Court first struck down an act of Congress as unconstitutional (Pfander, 2001). Chief Justice John Marshall, who wrote the court's report on this case, subsequently led the Supreme Court to take many other decisions to uphold the constitutional position that the Federal government could use the powers given to it to overturn decisions taken at state level. This set a precedent that the Federal Constitution was the ultimate sovereign power, not the American people. To challenge this position, the people needed to combine at state level to amend the terms of the Federal Constitution (Dippel, 1996: 41-45).

This power of the Supreme Court was sometimes challenged, but more often the legal dispute was over whether to interpret the Federal Constitution in the strictest terms, by seeking evidence to prove the intentions of those who drafted it, or by trying to understand what the mindset of the drafters might have led them to support if they had been faced with the different problems later justices were to face. This dispute about how to interpret the Constitution in later times has therefore created strict and broad constructionists, whose disputes about how to interpret the work of the Founding Fathers have never been entirely resolved (Banning, 2004: 35-70; Beeman, 2009: 407-423). This persistent dispute is not just between lawyers and constitutional experts, but sometimes draws in politicians and the wider public, because there are only nine Supreme Court Justices and five can make up the majority that can

decide a major constitutional issue. This not only gives these Justices enormous power, but, since the President appoints the Justices and the Senate has to approve their appointments, their selection can create very serious political disputes. Presidents therefore take a very great interest in appointing Justices, who they hope will take a particular stance on how to interpret the constitution.

The Federal Constitution was drafted by a narrow elite of educated and quite prosperous white men and it was ratified by fewer than two thousand white men, who were qualified voters in their respective states (Dahl, 2003: 2). It made no effort to widen the franchise; instead, leaving voting qualifications to be decided by the individual states. It also established that the President would be chosen by a two-stage electoral process (Dahl, 2003: 3) and, initially, that Senators would be chosen by the state legislatures, a process that favored the return of the elite candidates. The Federal Constitution did establish a clear process by which its terms could be amended, but Congress or the state legislatures played a greater role in proposing and ratifying such changes, rather than a direct referendum of the voters at state or national level. At the Pennsylvania ratification convention James Wilson proclaimed: "that in our governments, the supreme, absolute, and uncontrolled power, remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions" (Morgan, 1988: 281). He was almost certainly expressing a view that did not have complete support, as was the case when he later asserted that: "the supreme or sovereign power of the society resides in the Citizens at large; and that therefore, they always retain the power of abolishing or amending the CONSTITUTION at whatever time and in whatever manner they shall deem expedient" (Wilson, 1791: 32). James Madison was nearer the mark in claiming that the Federal Constitution was the work of the people, but "not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong" (Dahl, 2003: 16; Hamilton et al., 1787-1788: no. 39; McDonald,

2000: 19).

Despite its many virtues, and its claim to be the work of the people, the Federal Constitution did not establish the sovereignty of the people as clearly as some of its supporters hoped. The decisions of the drafters left the executive and legislative branches at both national and state levels largely dominated by men of wealth, education and status, who were elected by a minority of the American people. The franchise at state and national level was left for the states to decide. All the states except Vermont restricted the franchise to adult white men, who qualified for it by owning a certain amount or type of property, paying a certain amount of taxes or by being affiliated to a Christian church. Although it is clear that a much higher proportion of the American population possessed the franchise than was the case in Britain or indeed any state on earth at that time, every US state denied the suffrage to all adult females, all black slaves, and all Native Americans, while most also excluded poor white men from the franchise (Hamilton et al., 1787-1788: no. 39; Rakove & Sheehan, 2020). As in Britain, democracy grew slowly and gradually. Slavery was not abolished until the 13th Amendment in 1865 and after the 15th Amendment Black Americans were granted the franchise if they possessed the necessary qualifications that applied in their state. Women gained the vote at the national level by the 19th Amendment of 1920. Although Congress granted Native Americans the rights of citizenship by the Indian Citizenship Act of 1924, it permitted the individual states to decide whether to allow them to vote. Even after Black and Native Americans were legally enfranchised, some states, especially former slave states imposed or permitted infringement of these laws, leading to civil rights protest movements since the 1960s. The Supreme Court was sometimes slow to condemn such activities and they have not been entirely eradicated to the present day (Engstrom, 2013; Gates, 2019; Klarman, 2004; Kramer, 2004; McGann et al., 2016; Woodward, 1974).

The Federal Constitution attempted to define and locate sovereignty in ways that would satisfy different interests and

conflicting opinions on how to balance liberty and authority in a stable political order. It has achieved much, but it has not permanently or entirely resolved this vexed problem. It did not prevent secession and civil war in the 1860s. It abolished black slavery, but still today it has not always made it easy for ethnic minorities to fully exercise their democratic rights (C. Vann Woodward; Larry Kramer; Michael J. Klarman; Henry Louis Gates, Jr; Anthony McGann). Even today, disputes about the nature and location of sovereignty in the United States have not been fully resolved to the complete satisfaction of all lawyers, politicians, constitutional experts, or ordinary citizens.

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美國革命時期主權之爭

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摘　要

1760年代初期，大英帝國的商業與稅務政策引起其北美殖民地居民的反彈，但更深層的爭議點在於對主權本質與受管轄地區範疇的立場不同。英國議會認為大英帝國對北美殖民地有絕對的主權，但北美殖民地的人民則主張處理殖民地內部相關事務是當地立法機構的權限。雙方都提出建議，試圖解決爭議，但基於其切身利益的考量，終究無法達成共識。

當北美殖民地脫離大英帝國，取得獨立之後，他們必須自己處理有關主權的本質與受管轄地區的爭議。1776年《邦聯條例》顯然不能解決問題，於是產生《聯邦憲法》，取而代之。在《聯邦憲法》中，清楚區分聯邦政府與各州政府的主權，但終究未能阻止1860年代南北內戰發生，而主權最終屬於人民、憲法或最高法院，仍是一個具爭議性的問題。

關鍵詞：主權、英國議會、殖民地立法機構、州權、《聯邦憲法》