

CHAPTER 1

The Colonial Origins of American Constitutionalism

The Thirteen British Colonies – The First Permanent Settlement – The Pilgrims – The First Republican Settlers

The Thirteen British Colonies



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Virginia – 1585

In 1607, British colonists settled permanently in the American continent, on the shores of the present Commonwealth of Virginia. Several failed attempts had been made previously, such as the legendary Lost Colony, in Roanoke, North Carolina, an expedition that had been organized and financed by Sir Walter Raleigh in 1587.

After the Virginia settlement became established, other British colonists moved to America and, in 1620, permanent settlements on the shores of what today is the Commonwealth of Massachusetts were begun. From that time on, several other colonies were formed, some as the result of the proliferation of other already

established colonies such as Connecticut, Rhode Island or New Hampshire, which were originally part of the Massachusetts Bay Colony. Maryland, the two Carolinas,

Sir Walter Raleigh (ca. 1554-1618), known as Guantarral in the Spanish literature of the time, was an English aristocrat, model of a Renaissance man: soldier, courtier, poet, explorer, and, finally, buccaneer. In 1580, he took part in the suppression of the Irish rebellion, seizing a large part of the lands of the rebels. Queen Elizabeth I knighted him, and Raleigh became one of the Queen's favorites. In 1584, Raleigh got a Royal Patent to establish a settlement in the North American continent, but by 1590 that settlement had failed and the settlers had disappeared without trace. In 1596, Raleigh took part in the sacking of the City of Cadiz, in Spain. He was repeatedly imprisoned in the Tower of London, first for disobeying the Queen, and later for conspiring against King James I. At the request of the Spanish Ambassador, in 1618 Raleigh was imprisoned and later beheaded, on charges of having sacked the City of Santo Tomás de la Guayana, in present Venezuela.

Pennsylvania, Georgia, and the original Virginia all spawned new settlements and to this were added the spoils of war or captured lands already settled by other nations, such as New York and New Jersey taken from the Dutch or Delaware from the Swedish. In 1776, these thirteen colonies rose in rebellion and declared their independence from the British Crown.

All these British colonists spoke the same language, had very similar customs, declared fealty to the same monarch, received laws from the same Parliament, and had the same common law; but they had forms of government sufficiently diverse to be manifest and mark a difference among them. Some of those differences came from the way each colony was started. Basically, a colony had one of three possible origins. A first group, such as Virginia or Massachusetts Bay, for example, started from a Royal Charter granted by the king to a group of citizens or a corporation and establishing the terms of the grant of land and the form of government the colonists would have; in a second group, like Maryland or Pennsylvania, the king made them the proprietary possession of one or more noblemen; and in a final group were colonies originated just as the provincial dominions of the king himself. (Curtis, vol. I, pp. 4 ff; Putney, vol. I, pp. 194 ff.)

The colonies (with the exception, at most, of the colony of New York, which was a grant of the king to his "dearest" brother James, Duke of York) received at the time of its establishment some kind of Royal Charter. By 1776, only three of the colonies – Massachusetts, Connecticut, and Rhode Island– were ruled according to their original Charters (in the case of Massachusetts, its second one), and enjoyed a remarkable degree of independence, away from the direct control of the monarch. In the particular case of Connecticut and Rhode Island, these two colonies elected all their officers, and their relation to the crown was limited basically to their oaths of loyalty and fealty to the British king. Such was the level of self-government of these two colonies that, after their independence, they held their original Charters as their respective State Constitutions –Connecticut did it until 1818, and Rhode Island until 1842– by just removing in those the references to the British Parliament and monarchy.

While the Portuguese and Castilian kings, for example, had personally financed their respective settlement efforts in the New Continent, England's solution, on the other hand, was initially to establish mercantile corporations or companies for the

specific purpose of financing the expeditions and with the intention of benefiting investors from future financial returns. In 1555, the Muscovy Company was chartered for the purpose of opening a new route to China through Northern Russia. In 1600,

James I of England and VI of Scotland (1566-1625) became King of Scotland in 1566, when he was few months old, and of England and Ireland in 1603, at the death of Elizabeth I. In spite of attempts made by James I to unite as one the kingdoms of England and Scotland, these remained legally separated, with separate parliaments and statutes. In 1606, the King “vouchsafed unto the London and Plymouth Companies his License to deduce colonies in America,” what later became the First Charter of Virginia, and in 1609 and 16011-12, the Second and Third Charters of Virginia, respectively. In the midst of the religious conflicts of the time, James I was the target in 1605 of a failed plot, planned by a group of Catholics, to assassinate him –the Gunpowder Plot– by blowing up the Houses for Parliament while the king was present. As a result of the plot, persecution of Catholics and Puritans increased. One of the results of those religious persecutions was, in 1620, the migration to the shores of what is now Massachusetts of a group of Puritans that later became known as The Pilgrims.

Queen Elizabeth I granted a Royal Charter to the East India Company. The London Company and the Plymouth Company were created in 1606 for the initial colonization of North America; each of these two corporations received from King James I a Charter or Letter Patent that described precisely the tracts of land where each Company could settle, its privileges, and the form of government it could take. (See *infra* the details in *The First Charter of Virginia*.) The Virginia Colony was the result of the investments by the London Company –later on named The Virginia Company– and the first settlements in the New England region by the Plymouth Company. Due to the many difficulties encountered during the initial colonization, both of these companies became insolvent, the Virginia Company in 1624 and the Plymouth Company in 1635. As a

Charles I (1600-1649), second son of James I, became King of England, Scotland and Ireland in 1625, at the death of his father. (His older brother Henry, Prince of Wales, had died without progeny leaving the succession to Charles.) Of an absolutist character, Charles I clashed with the English Parliament when the latter attempted to limit his Royal prerogatives. The end result of that dispute was the English Civil Wars of 1642-1646 and 1648-1649. The Royalists lost both wars and, in 1649, Charles I was executed. The Parliament approved then the abolition of the monarchy, establishing the Commonwealth. After the restoration of the monarchy in 1660, Charles II, son of Charles I, ascended the throne, and had him canonized by the Church of England as King Charles the Martyr for allegedly having given his life in defense of his faith.

result, both lost their Charters, and Virginia became a provincial colony. New England was divided into several colonies, one of them New Hampshire that, later on, became another of the provincial colonies. In 1629, Charles I signed a Charter for a group of Puritans to establish the colony of Massachusetts Bay. Charles II annulled this Charter in 1684, and subsequently the Massachusetts colony was ruled by a king’s governor. In 1691, William and Mary approved a new Charter for the citizens of Massachusetts, although it was not on the same terms as the original of 1629, as the people of Massachusetts had requested.

By the end of the colonial period, several of the British colonies had become provincial colonies, in which it was the king who, through governors directly appointed by him, made practically all political and administrative decisions in the colonies,

Charles II (1630-1685) became King of Scotland in 1649, at the death of his father, Charles I, but he had to wait for the restoration, in 1658, of the English monarchy to become King of England. In 1660, Charles II returned to England from The Netherlands, where he had been exiled since 1651, during the English Interregnum. His reign was beset by conflicts with the Parliament and religious intrigues. In 1682, Charles II dissolved the Parliament, governing from that date as an absolute monarch. On his deathbed he converted to Roman Catholicism, the religion professed by his brother James, Duke of York, who succeeded him in the throne because Charles II had fathered no legitimate heir.

thereby becoming also known by the name of royal colonies. As a matter of fact, during the colonial period every colony became, at some time in its history, a provincial or royal colony because, for one or other reason, the king would temporarily revoke the original Charters of the colonies and take them under his direct control. Thus, in 1686, King James II joined as the “dominion of New England in America known by the names of our Colony of the Massachusetts Bay, our Colony of New Plymouth, our Provinces of New Hampshire and Maine and the Narraganset Country or King’s Province.” James then appointed Sir Edmund Andros as his common governor in 1688 (Grau vol. II, pp. 483 ff). When the American Revolution started in 1775, New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia were provincial colonies.

In the proprietary colonies, the king granted certain tracts of land to a single or small number of proprietors –always noblemen– who, in return for a symbolic rent,

James II of England and Ireland and VII of Scotland (1633-1701) succeeded his brother, Charles II, in 1685. The last Roman Catholic king to reign in those kingdoms, James II ruled as an absolutist monarch, what spurred the opposition of both Anglicans and Protestants. When in 1688, the Queen consort gave birth to a Catholic heir, a group of noblemen started what would become known as the Glorious Revolution, and offered the throne to William III of Orange through the royal line of his Protestant wife Mary II (daughter of the same James II). Facing the opposition of a large number of Peers, James II fled to France. In 1689, he tried to recover the throne, but he was defeated in battle and had to return to the court of his cousin Louis XVI of France, where he remained until his death.

ruled those territories as feudal lords. The first of these colonies was Maryland, for which, in 1632, King Charles I granted proprietorship to Lord Baltimore, who had the purpose of setting in America a safe haven for Catholics, then persecuted in Great Britain and Ireland for their faith. Years later, in 1663, Charles II granted the Carolinas to several of his courtiers in appreciation for their efforts to facilitate his restoration. In 1664, when the colony of Nieuw-Nederland was still in the hands of the Dutch, Charles II granted it to his brother, the Duke of York and future King James II, renaming it the colony of New York. In 1682, to clear a debt incurred with Admiral Penn, Charles II granted William Penn, son of the Admiral, the colony of Pennsylvania. Lastly, in 1732,

George II granted a charter for James Oglethorpe and some other Peers “to erect and settle a corporation” for the purpose of establishing the Colony of Georgia, to be used as a refuge where the poor and the insolvent debtors imprisoned in British jails could make a new start.

In 1664, the Duke of York sold a large tract of the land he had received from the King, his brother, a tract that then became part of the Colony of New Jersey. When in 1685 the Duke ascended to the throne as James II, the rest of the land became the Royal

Sir Edmund Andros (1637-1714) was appointed by James II as Royal Governor for the dominion of New England, which extended from the limits of Canada all the way to Pennsylvania. Hated by most of the American colonists who thought of him as a tyrant, today Andros is considered a good and efficient administrator who faithfully followed the orders of the King. In 1689, when news of the Glorious Revolution reached the British colonies, Andros was arrested and sent back to England in irons.

Colony of New York. In 1729 the proprietary colony of Carolina split into the separate colonies of North and South Carolina, and became too royal colonies. Contrary to the perpetuity of the grants of other proprietary colonies, the grant for the Colony of Georgia was for only 21 years. Due to disagreements between its trustees, these returned the colony to the monarch in 1752, and Georgia thus became the last provincial colony. Consequently, in 1776 the only proprietary colonies were Maryland, Pennsylvania and Delaware, although William Penn had conveyed to the settlers of these last two colonies a very large degree of self-government. (The Charters of these colonies can be found in Grau 2009, vol. I, pp. 339-381, for Maryland; vol. I, pp. 625-653, for Carolina; and vol. II, pp. 297-321, for Pennsylvania.)

In spite of the differences in the way the colonies were originally created, all of them (perhaps with the partial exception of Pennsylvania) ended up having quite

Cecilius (or Cecil) Calvert, 2nd Baron Baltimore (1605-1675) was the first Proprietary and Governor of the Colony of Maryland. His father, George Calvert, 1st Baron Baltimore, like him a Roman Catholic, asked from Charles I the grant of a colony in America to serve as refuge for Catholics and other religious minorities, such as the one the monarch had previously granted to the Puritans in Massachusetts. But George Calvert died before the King issued the Charter, thus it was granted to his son. Cecil Calvert established the colony on the principles of religious tolerance and –a certain degree of– separation between Church and State. In 1649, the General Assembly –the legislative branch– of Maryland passed An Act concerning Religion (Grau, vol. I, pp. 589-597), the first statute on religious tolerance. The heirs of Cecil Calvert still ruled the colony at the time of the Revolution of Independence, in 1776.

similar government structures. These structures closely resembled an ideal British model. All the colonies had, at the top, a governor as their principal executive figure. Whereas in the charter colonies he was elected accordingly to the procedure indicated in the Charter itself, in the case of Connecticut and Rhode Island, the election of the governor was conducted by the colonists’ own representatives, without requiring any royal participation or approval of him. In the provincial or royal colonies, the governor was appointed and named by the King himself or the officer to whom he had delegated

this power. In the proprietary colonies, the proprietor or proprietors of the colony (who frequently resided in the metropolis) appointed an officer to act as their local

James Edward Oglethorpe (1696-1785) was a British general, politician, philanthropist, and social reformer who was looking for a solution to the terrible situation of the many poor that inhabited the United Kingdom at the time, as well as of the people incarcerated for insolvency. Oglethorpe and a group of noblemen proposed to George II the establishment of the Colony of Georgia, in America, where all those deprived people could have a new start in life. Oglethorpe's plan was that the colonists would own the land they worked, but could not sell it nor bequeath it. Very few debtors, however, migrated to the new Colony. Oglethorpe and his partners then opened the Colony to refugees of all faiths and beliefs, except Roman Catholics. Oglethorpe, as a trustee and de facto governor of the colony, imposed many restrictive policies, like banning slavery or the sale of rum. Due to these policies and his strict character, many of the early colonists branded him a dictator.

representative and executive head. All the colonies had a Council to assist the governor in his decisions. These Councils performed, effectively, the functions of an Upper House. All colonies had a Lower House (similar to the House of Commons in the British Parliament) where most of the estates or ranks of the colony were represented. The very first official gathering of representatives of "freemen" settlers took place in Virginia, in 1619, at an assembly that was named the House of Burgesses. This body acted as the lower house of the General Assembly of Virginia, which, together with the Council, was presided over by the governor (Putney, p. 196). The General Assembly had the power to enact any statute that was considered essential or necessary to the good order of the colony. In addition to its strictly legislative functions, the House of

William Penn (1644-1718) was the son of an Admiral who participated in the restoration of Charles II. At the age of 22, Penn converted to the Religious Society of Friends, becoming a Quaker. His religious opposition to the established Anglican religion inflamed the wrath of his father, who expelled him from home, and of the Royal Justice, who repeatedly arrested and incarcerated him. At the time, Quakers were persecuted in England by the Anglican Church and in America by the Puritans. At the death of his father, William Penn inherited the rights on a large debt that the King Charles II owed to the Admiral. Penn then exchanged the debt for the rights to a large tract of land in America to establish a colony there –named by the King Pennsylvania or "the forest of Penn"– where the Quakers could practice their religion free of prosecutions, and Penn could establish a government in which to materialize his democratic and egalitarian ideals. In 1682 William Penn wrote "The frame of the government of the province of Pensilvania, in America" (Grau 2009, vol. II, pp. 377-407), and then sailed for his colony with a large group of his followers. He signed a peace treaty with the Indians of that area and founded the city of Philadelphia. Besides his good intentions and beliefs, William Penn was not a good administrator of his personal fortune, nor a good manager, eventually losing control of his colony and of his fortune, dying a bankrupt.

Burgesses had power over other tasks through three Committees: the Committee on Private Claims, the Committee on Election Returns, and the Committee on Propositions and Grievances" (Bruce, p. 478 ff).

Assemblies were an institution intrinsic to the Puritan and Presbyterian

congregations, since that was the way those groups ruled themselves ecclesiastically. Thus, in the Charter for the Massachusetts Bay colony, King James I decreed, at the

George II (1683-1760) was King of Great Britain and Ireland, ascending to the throne in 1727. He had been born in Hannover, Germany. His father, George I, had inherited the British throne at the death of Queen Anne. George II was the last British king to personally command his troops in battle, which he did at Dettingen, Bavaria, in 1743. As Prince of Wales he quarreled frequently with his father, as he did later on with his own son, heir apparent Frederick Louis. More interested in the European intrigues than in managing the British government, George II allowed the British Parliament and his prime ministers to increase their power and influence. In 1756, France and Great Britain became entangled in the Seven Years' War, which eventually became one of the causes leading to the American Revolution and subsequent independence of the thirteen British colonies, already in the reign of his successor.

request of the settlers, that “in any of their general Courts aforesaid, or in any other Courts to be specially summoned and assembled for that Purpose [...] to make, ordain, and establish all Manner of wholesome and reasonable Orders, Laws, Statutes, and Ordinances, Directions, and Instructions, not contraire to the Laws of this our Realm of England, as well for settling of the Forms and Ceremonies of Government and Magistracy fit and necessary for the said Plantation, and the Inhabitants there, and for naming and setting of all sorts of Officers, both superior and inferior, which they shall find needful for that Government and Plantation” (Grau 2009, vol. I, p. 268).

The New Hampshire Colony resulted from a break away from the Massachusetts Bay Colony. In The Commission constituting a President & Councill for ye Province of New-Hampshire in New-England (also known as the John Cutt's Commission), the King ordered that the General Assembly of that Colony was to be implemented immediately in a manner he prescribed as follows: “by these presents authorize, require, & command the said President and Council that they within 3 months after they have been sworn (as aforesaid) do and shall issue forth Summons under the seal by Us appointed to be used in the nature of writs for the calling of a General Assembly of the said Province” (Ibid., vol. II, p. 290).

A strict construction of the statement “of and with the advise assent and approbation of the Freemen of the said Province, or the greater part of them, or of their delegates or deputies, whom for the enacting of the said Laws, when, and as often as need shall require, We will that the said now Lord Baltimore, and his heirs, shall assemble in such fort and form, as to him or them shall seem best,” in the Maryland Charter (Ibid., p. 354), forced the proprietor to admit and allow an assembly of the representatives of the settlers, and their participation in the legislative functions of the Colony of Maryland.

Before the first group of Pennsylvania settlers departed for America, the Quaker William Penn, proprietor of the colonies of Pennsylvania and Delaware, agreed with them that they would participate directly in the government through assemblies of their representatives. The Colony of New Jersey, also settled mainly by Quakers, had a similar form of representation. Many of the settlers that originally migrated to Carolina came from Virginia, where they used to be represented in the House of Burgesses. Thus, they forced the proprietors of their new Colony of Carolina to establish a House of popular representation. The Assemblies of the colonies of New York and Georgia

were established by Royal grants, for the first in 1683, and for the second in 1775, once Georgia had become a provincial colony.

We can see, then, that some of the colonies were originally established as commercial investments; others were religious refuges; and others simply the feudal land of certain noblemen. Their economic models were also different. Certain colonies depended solely on agriculture for their economic growth; in others, manufacturing industries were the main economic contributors; while others still were primarily dependent on the direct exploitation of their natural resources, mainly timber at that time. In some colonies, the Anglican Church was the official one, while diverse sects of puritans populated others. To all these variances, one should also consider that the distances separating the several colonies were so huge, and the communications between them so difficult, that, in many ways, they could be considered as several isolated foreign nations. However, it can be observed that, in spite of the differences in their original formation or way of establishment, by 1776 every one of the thirteen colonies had a legislative assembly with a House of popular representation, in which delegates were elected by a sector of society, and each had also a governor as its main magistrate, assisted by a Council that –except in Pennsylvania and Delaware–acted at the same time as the Upper House of the legislative Assembly. Those differences and similarities marked their separate and sovereign character at the time of their independence, and they were reflected in the peculiarities of their individual constitutions.

The First Permanent Settlement

On 26th of April of 1607, around a hundred British subjects landed on the shores of the Chesapeake Bay, at a point near the present town of Williamsburg, in Virginia. After a great deal of difficulties and enormous suffering, those colonists managed to establish



Hatzigeorgiou, Karen J. *U.S. History Images*, 2011. <<http://ushistoryimages.com>>
Scott, David B. *A School History of the United States*. New York: Harper & Brothers, 1883

Arrival at Jamestown – 1607

the first permanent British settlement on the American Continent. The settlers had sailed from Blackwall, London, in December 1606, and, when they landed, claimed a right to settle in the American territory. This claim was made on the basis of a Royal Charter that one year earlier, on the 10th of April of 1606, the British monarch James I had issued with his signature and the private Seal of England. (This document was termed a “patent letter” because it was open to everybody’s inspection and had to be recognized and obeyed by everybody.) The

Charter, and other orders and instructions issued by the King at the same time, established a corporation named initially The Virginia Company, and later The London Company, to finance and manage the expedition and the consequent “first Plantation and Habitation” (Ibid., vol. I, p. 54).

In the Charter, the monarch granted the partners of the Virginia Company the possession of “all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever,” within a circle of “fifty Miles of English Statute Measure” radius from the “first Seat of their Plantation” (Ibid., p. 54). (The actual ownership or domain of those goods belonged to the King exclusively.) In exchange, the Company had just to yield and give to the monarch and his “heirs and Successors, the fifth Part only of all the same Gold and Silver, and the fifteenth Part of all the same Copper, so to be gotten or had, as is aforesaid, without any other Manner of Profit or Account” (Ibid., p. 58).

The Charter also granted “that each of the said Colonies shall have a Council, which shall govern and order all Matters and Causes, which shall arise, grow, or happen, to or within the same several Colonies, according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed with Our Hand or Sign Manual, and pass under the Privy Seal of our Realm of England” (Ibid., p. 56). Without an explicit mention of the English Parliament, the monarch had released, at least in part, the government of the colony to its Council, although it had to rule in accordance with the laws “given and signed” by the King himself.

However, the clause of this first Charter of Virginia that later became the most significant and exercised by the rebellious colonists was in its section XV, where the monarch manifested “that all and every of the Persons, being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their Children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions” (Ibid., pp. 62-64). Then, one hundred and seventy years later, when the colonists needed to justify their decision to break off their political ties with Great Britain, the words included in the first Charter of James I were employed to their advantage. Thus, in the 2nd section of the Resolves of the Convention of the English Colonies at New York, October 19, 1765, the colonists reminded King George III that “His Majesty’s liege subjects, in these colonies, are entitled to all the inherent rights and liberties of his natural born subjects within the kingdom of Great Britain” (Ibid., vol. III, p. 14). And nine years later, the 14th of October, 1774, the Continental Congress made a political declaration of rights in which they “Resolved, N.C.D. [Nemine Contradicente Dissentiente] 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England” (Ibid., p. 22). By this means, then the principle was established that the first Charter of the colonies gave their inhabitants inherent rights that belonged to them by the simple fact of having been born in the colonies as freemen.

The Virginia Colony suffered all kind of disasters –such as plagues, famines, and

Indian attacks— and it was close to vanishing, just as the Lost Colony had on the shores of present time North Carolina. In an attempt to save it, James I granted several additional charters (of which two are known) to increase and modify the grants previously made to the London Company. In addition, as we saw above, the King granted the colony the right to establish its own “legislative-judicial” institution: the House of Burgesses. This lower House was formed by representatives elected directly by the freemen in Colony, and it was presided by its governor, meeting for the first time the 30th of July, 1619, in the city of Jamestown and presided by Sir George Yeardley, then Governor of Virginia. Thus, just twelve years after its foundation, the English Colony of Virginia had a popular presence in its main instrument of government.

The Pilgrims

The religious conflicts in England that had built up at the end of the 16th century finally persuaded a congregation of Puritan English Dissidents, followers of the doctrines of John Calvin, to flee to The Netherlands in 1608.

In spite of having a flourishing congregation in the Dutch city of Leiden, the group concluded that they could better follow their own religious faith and practices in an environment where they could be free of any pressure imposed by local authorities with different beliefs. So, in 1618, they decided to migrate to America, and to that end sent agents to England to negotiate a Charter or letter patent from the officers of the London Company that would allow them to settle in the territory of the Colony of Virginia.

However, due to some problems arising during the negotiations with the London Company, a merchant, by the name of Thomas Weston, told the migrant puritans that he could get the necessary Charter of settlement from the Plymouth Company, and he persuaded them to settle further north from the Colony of Virginia, within the territory granted to the Plymouth Company.

The Leiden congregation returned to England and, even before getting the necessary Charter and permits, approximately a hundred of its members boarded a ship by the name of Mayflower, departing Plymouth on September 6, 1620, and arriving two months later in America, at the shores of Cape Cod, in the bay of Massachusetts. These settlers are commonly known as The Pilgrims.



Hatzigeorgiou, Karen (Ibid.) <<http://ushistoryimages.com>>
Stephens (1), Alex H. *A Comprehensive and Popular History of the United States*. Chattanooga: Hickman and Fowler, 1882

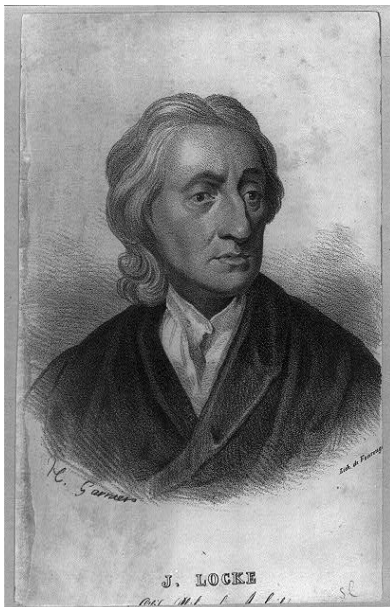
The landing of the *Pilgrims*

Since the settlers arrived to the New Continent without any legal document to establish their settlement and that would allow them to legally inhabit the territory or to organize themselves on the basis of some form of recognized authority, they drafted a common agreement or contract regulating in very general terms their rules of

The Pilgrims are frequently used in American historiography as the best example to justify the British colonization in the American continent. Their conduct, from today's viewpoint, was positive from all sides. Their main reason for migrating was to escape from religious prosecution and to assert their right to freedom of religion; their relationship with the native inhabitants seems to have been always respectful and fair; and they established an ethical society from the very moment they landed in their new land, as the Mayflower Compact shows. Although there are references to the Pilgrims in several of the earlier narratives of the British colonization of America, the use of the term to refer to the settlers that in 1620 landed on the shores of Massachusetts did not become commonplace until 1825.

behavior and organization before landing. This contract is known as the Mayflower Compact. It is a clear example of a social contract, but written as early as 1620 –that is, much earlier than Hobbes, Pufendorf, or Locke– and, though concise, it exhibits all the requirements identified by Prof. Fioravanti in a contract of the kind. That is, that before the *pactum subiectionis* [contract of subjection] was agreed to, the Pilgrims understood that they had to “combeene our selves together into a civill body politick” (Ibid., vol. I, p. 194). That means that the settlers acknowledged “the *pactum societatis* from which the civil society of individuals sprouts” (Fioravanti 2007, p. 42).

Despite its brevity, the constitutional significance of the Mayflower Compact is definitive, and American historiography considers it the democratic seed of the present constitutional system of the United States of America. This simple agreement has the fundamental elements qualifying it as a constitutional text, since it starts from a covenant or pact among the constituents; it sets up a rudimentary form of government (as the settlers defined it “a civill body politick”); it establishes the supremacy of the law –“unto which we promise all due submission and obedience”– by “just & equall lawes, ordinances, acts, [and] constitutions” (Grau 2009, vol. I, p. 194), thereby enshrining those implicit fundamental rights of justice and equality that could not be violated.



Library of Congress <http://www.loc.gov/pictures/item/2004672071/>

John Locke

measures, they would end up in a state of nature, including all the “inconveniences” associated with it. To avoid all those “inconveniences of the state of nature,” the only

“proper remedy,” according to John Locke, was to establish a civil government. The way to reach that civil government was through a compact, but Locke specified that: “it is not every compact that puts an end to the state of nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic” (Locke, p. 13).

And that is what the Pilgrims did when all forty one, “whose names are underwritten [...] solemnly & mutually, in ye presence of God, and one of another, covenant & combeene our selves together into a civill body politick, for our better

John Locke (1632-1704) was an English philosopher and physician whom many consider to be the father of modern liberalism. His ideas had a great influence on many other philosophers of the Age of Enlightenment –such as Voltaire, Rousseau, Hume, or Kant– as well as on the American revolutionaries. His influence can be seen in The unanimous Declaration [of Independence] of the thirteen united States of America itself. Son of Puritan parents, Locke studied medicine and philosophy in Oxford. In 1666, John Locke met the 1st Earl of Shaftesbury, becoming a member of his entourage as his personal physician. When, in 1675, Shaftesbury fell into disgrace with King Charles II, Locke moved to France, where he stayed until 1679, before returning to England. Shortly after, Shaftesbury was part of a plot to prevent the accession of the Duke of York –the brother of Charles II– to the throne. When the conspiracy failed, Shaftesbury had to flee to Holland, where Locke followed him. After the Glorious Revolution of 1688, Locke returned to England with the entourage of Queen Mary II, wife of William III of Orange. John Locke wrote his most influential works while in Holland, publishing them in England after his return. His principal works are the *Essay Concerning Toleration* (1667); the three *Letters Concerning Toleration* (1689, 1690 and 1692); the two *Treatises of Government* (1689); and *An Essay Concerning Human Understanding* (1690). The *Fundamental Constitutions of Carolina*, completed in 1669, is also attributed to Locke.

ordering & preservation.” For Locke, “[t]hose who are united into one body, and have a common established law and judicature [...] are in civil society one with another” (Ibid., p. 47). In a surprising parallel, to establish their own civil society, the Pilgrims manifest sets out “to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie.” And Locke, also in the very same terms, states that “when any one joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or which is all one, the legislative thereof, to make laws for him, as the public good of the society shall require” (Ibid., p. 48). Laws “unto which [the Pilgrims] promise all due submission and obedience” because, as Locke also required, “[n]o man in civil society can be exempted from the laws of it” (Ibid., p. 51).

In this way, the Pilgrims, while still on board of the ship that had brought them from Europe, and before physically landing on the American shore and dispersing themselves into a situation perhaps the closest to the “state of nature” mentioned by Hobbes and Locke many years later, drafted a very brief constitution in which they pledged and joined in a very simple form of government under which, consensually, they would enact just and equal laws, the most convenient for the general good of the Colony, and they would choose the officials that such a government required.

The rights and liberties of the Pilgrims were equally protected since, just by

affirming their loyalty to their “dread sovereign Lord, King James,” they could practice their religion “for ye glorie of God, and advancement of ye Christian faith,” without fear of being persecuted, as they had been back in England.

The First Republican Settlers

The Fundamental Orders of Connecticut were approved January 14, 1638, by representatives of the freemen of the towns of Windsor, Hartford and Wethersfield, convened in General Assembly in the town of Hartford. All these towns had been established after 1633, as a result of migrations from the colonies of Plymouth (where the Pilgrims had originally settled) and Massachusetts. Those migrations were the consequence of disagreements between the Puritan leaders of the colonies and certain dissident groups.

It seems that during the first year after the new settlements, there was no formal civil, military or religious authority in the region (Trumbull, p. 100). Since the dissidents settled outside the tract of land granted to Massachusetts in its Charter, and since the new settlements had no Charter of their own that would bring them within the Royal jurisdiction, the settlers found themselves in a situation without laws to apply and without formal authorities that would apply them.

On the other hand, such a situation was ideal in a highly Puritan society, whose goal was to establish a new social and religious order, democratic to a certain degree since the “choice” of magistrates “shall be made by all that are admitted freemen [...], and doe cohabite within this Jurisdiction, [...] or the mayor part of such as shall be then present” (Grau 2009, vol. I, p. 420). But, at the same time, the jurisdiction would be highly theocratic since, in the absence of the necessary civil laws, the settlements would be ruled “according to the rule of the word of God.”

Less than twenty years after the Mayflower’s arrival in America, and still before Locke had publish his Treatises, the Connecticut settlers were much more explicit than the Pilgrims when declaring their “*pactum societatis*.” They continued to recognize the need for the Compact and its consequences, since “to maintain the peace and union of such a people there should be an orderly and decent Government” to which, once established, the settlers, their successors and everyone that would join them in the future, will “associate and conjoin ourselves to be as one Public State or Commonwealth [... to be]



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Emigrants on their way to Connecticut

governed according to such Laws, Rules, Orders and decrees as shall be made, ordered and decreed” (Ibid., p. 420). Additionally, the Fundamental Orders clearly identify “those politically active individuals –the People [...]– as such autonomously capable of executing the constituting power and the willingness to establish a certain kind [...] of a political association” (Fioravanti 2007, p.42). Those are the “freemen and have taken the Oath of Fidelity, and doe cohabite within this Jurisdiction, (having been admitted Inhabitants by the major part of the Town wherein they live)” (Grau 2009, vol. I, p. 420).

But the “contractual dimension of reciprocity” (Fioravanti 2007, p. 27), proper of the feudalism of the Middle Ages, fails in America, even at this very early stage of the constitutional process. Therefore, contrary to wording in the Mayflower Compact, in the Fundamental Orders of Connecticut the settlers do not swear loyalty to the king, but they do it to themselves and to the laws approved by themselves; and, at the same time, do not expect any protection from the monarch since, given their distant and isolated situation, the most basic pragmatism made it obvious that royal protection would never be sent, and that if sent, it would never arrive in time. Consequently, the settlers expected protection from –and thus pledged loyalty to– themselves through the keeping of their laws.



American Military History, United States Army Center of Military History, *American Military History*, vol. 1, Richard W. Stewart, Editor <http://www.history.army.mil/books/AMH-V1/Map01.jpg>

The Thirteen Colonies – 1776

Although by means of what nowadays could be considered primitive institutions, the Fundamental Orders include certain features required by present western constitutions. The Orders set up a form of government with assemblies, courts

and public officials, including a governor. All those institutions had a clearly republican character, since all their offices were filled by suffrage and were temporary; and it was not possible to acquire permanent privileges, as was the case with all European monarchies of the time. On the contrary, in Connecticut the provisions were that “no person be chosen Governor above once in two years” and in addition “no other Magistrate to be chosen for more then one year.” It should be noted, however, that its theocratic character is also widely present across the document, and thus “the Governor be always a member of some approved congregation,” and he, as well as all the other magistrates, should always “further the execution of Justice according to the rule of God’s word.” (Grau 2009, vol. I, p. 420, 422 and 428.)