

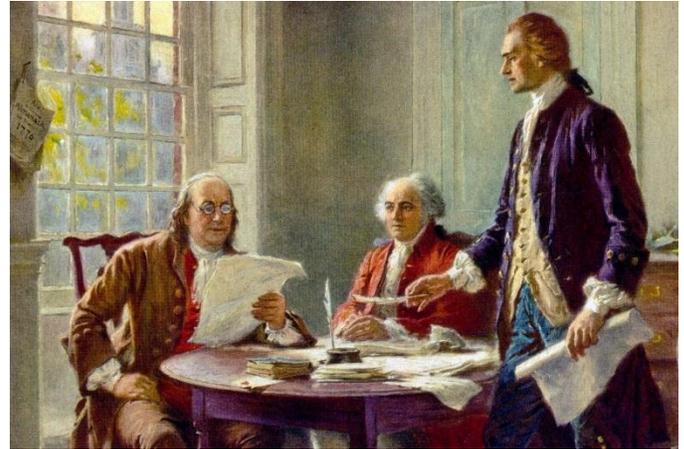
A Matter of Common Sense

How distinctly American constitutional ideas led to American independence

Scott Plencner *Georgetown University, Washington, DC (3 July 2015)* for the James Madison Memorial Fellowship Summer Institute

By the time Thomas Jefferson sat down to compose the first draft of the Declaration of Independence for the Continental Congress, the English colonies functioned as independent states, and had been doing so, arguably, for 150 years. While the long-lasting federal Constitution which followed the Declaration as a “charter of freedom” was, in fact, quite a novelty; to most Americans, Jefferson’s words in 1776 were not so revolutionary as they were a reflection of common sense. Richard Henry Lee’s passionate motion in Congress on June 7th that “these United colonies are, and of right ought to be, free and independent states,” nodded to the fact that the colonies were already functioning as independent states under already legitimate constitutions.¹ The Declaration, which severed the last remaining ties to the British monarch, and which admitted that the colonies were forced to “alter their former Systems of Government,” in the next breath identified the monarch as a tyrant and usurper.² What the monarch (along with his Parliament) was usurping was what patriots considered a legitimate and century-old constitution, responsive to a uniquely American experience.

The Declaration does, in fact, acknowledge an imminent change in fundamental structures and organization of governments in America. The People (represented by Congress), Jefferson wrote, were only doing so after tolerating rule by the metropole “while Evils are sufferable.”³ But the king crossed a point that made toleration impossible. It was the king who was presented as the entity instigating change by his attempt to establish “an absolute Tyranny over these States.” Jefferson argued that changes in “long-established” governments should not be knee-jerk reactions to “light and transient Causes.”⁴ Since the



Americans were already independent, the Declaration was probably partly written to legitimize the power being centralized in the Continental Congress itself.

American polities were long established by the late 18th century and, over the years, developed their own constitutions and traditions. Except for a brief interruption when Charles II tried to crack down on free-wheeling New England through his regent governor Edmund Andros, the colonies were left in a state of neglect as Britain struggled with its own constitutional dilemmas during the English Civil War. Edmund Burke, one of Parliament’s leading orators, certainly recognized this as things fell apart in 1775 when he said, “The colonies in general owe little or nothing to any care of ours” and have taken “her own way to perfection.”⁵ The situation of American quasi-independence, according to Parliament’s Whigs like Burke, proved profitable to the British Empire and he, representing a rising merchant class, feared what Americans feared: a change in the constitutional *status quo*.

History seems to bear out Burke’s and Jefferson’s assertions about a pre-existing American independence and constitution. Even before leaving the *Mayflower* in 1620, the earliest colonists in

¹ Richard Henry Lee. “Resolves for Independence (June 7, 1776),” from Jack Greene, ed. *Colonies to Nation, 1763-1789: A Documentary History of the American Revolution* (New York: Norton, 1975), p. 284.

² “The Unanimous Declaration of the Thirteen United States of America (July 4, 1776), from Greene, p. 299.

³ *Ibid.*

⁴ *Ibid.*

⁵ Edmund Burke, “Speech on Conciliation with America, 1775,” from *The Works of the Right Hon. Edmund Burke*, Vol. 1 (London: Holdsworth and Ball, 1834), p. 186.

Plymouth formally wrote in the Mayflower Compact of their commitment to the combination of individuals “into a civil body politic.”⁶ The monarch himself set the same goal for the colonies in the 1612 Virginia Charter. The charter listed as a goal the creation of a perpetual “body politique” for “the greater good and benefit” of the commonwealth.⁷ Facing the uncertainty of the frontier, thousands of miles from reinforcements, the colonies went to work doing just as they promised they would do in their original charters and pacts: they created local constitutions. The most complete of these early agreements was certainly the 1639 Fundamental Orders of Connecticut, which not only established vague goals for a government aiming for the commonweal, but also in writing set up the structures of a formal government to create a “decent and orderly government” to “maintain peace and union.”⁸

It is not surprising that the people of New England especially, motivated to establish a polity based on their fundamentalist Bible-believing faith would put their agreements into writing, so as not to allow for adulteration by future generations of common law judges that might put the entire polity in jeopardy of dissolution or, worse, the awful judgment of God. Considering the Scriptural commandment in Paul’s epistle to the Romans that “every soul be subject unto the higher powers” lest he is damned,⁹ Jefferson was careful to “[appeal] to the Supreme Judge of the World for the rectitude of our Intentions.”¹⁰

The constitutions of the colonies were a coming together of what popular British legal scholar William Blackstone referred to as *lex scripta* and *lex non scripta*.¹¹ While English common law served as a basis for the day to day implementation of these colonial governments, limited access to judges and the absence of a nobility made for an incomplete adoption of the *lex non scripta* that came from centuries of precedence in England. In America, there truly was no precedence “since time immemorial” for many problems of governance. Most of the colonies were

based originally on the royal prerogative and on constitutions formulated before the rise in the prominence of Parliament that was the result of the English Civil War and subsequent Glorious Revolution. While the colonies were part of a composite dominion of the monarch, a monarch limited by the English Constitution consisting of common law and such documents as the Magna Carta, it was not clear to most Americans if they were under the jurisdiction of Parliament.

It is clear that the colonies had, during the constitutional crisis of the English Civil War, grown politically independent of the metropole. The 1677 reports to Charles II of colonial administrator Edward Randolph complained that the New Englanders had usurped the authority of the king. Randolph complained that the New England colonies acting as independent states act: coining money, carrying out even capital sentences “in matters of religion,” administering oaths to their own local government and *not* to the crown, and violating Parliament’s Navigation Acts by continuing to self-police their trade.¹² This divergence from the authority of the English laws caused Charles II to revoke colonial charters upon which the constitutions of New England partially rested. A century later the Declaration of Independence likewise complained of a king that took “away our Charters, abolishing our most valuable laws, and altering fundamentally the Forms of our Government.”¹³

Charles II’s brother and successor James II would reorder the American polities in a patriarchal order based on the philosophies of theorists like Sir Robert Filmer who claimed the king was the *pater patriae*.¹⁴ The king’s commission to his regent Sir Edmund Andros outlined a new constitution based not on liberal English common law, but one modeled on a Franco-Spanish *ancien régime* model in which the king ruled as an autocrat through his governor. Councils sat at the pleasure of the king and the powers of taxation, conscription, the judiciary, and even religion rested with Andros himself, the council acting

⁶ “Mayflower Compact (Nov. 11, 1620), from Morrison, Jeffry, et. al. “Foundations of American Constitutionalism, LSHS-520 Course Packet.” (Washington, DC: James Madison Memorial Fellowship Foundation, 2015), p. 184.

⁷ “Third Virginia Charter (March 12, 1612), from Morrison, et. al., p. 174.

⁸ “Fundamental Orders of Connecticut (Jan. 14, 1639), from Morrison, et. al., p. 184.

⁹ “The Epistle of Paul to the Romans 13:1-2,” from Morrison, et. al., p. 223.

¹⁰ Greene, et. al., p. 299.

¹¹ William Blackstone. “Section III: Of the Laws of England,” *Commentaries on the Laws of England in Four Books, Vol. 1* (1753), from Morrison, et. al., p. 108.

¹² Edward Randolph, “Representation of ye affairs of N England by Mr. Randolph (May 6, 1677),” from Morrison, et. al., pp. 188-9.

¹³ Greene, ed., p. 300.

¹⁴ Robert Filmer, “Patriarcha, or the natural power of kings (1680), from Morrison, et. al., p. 162.

only in an advisory role.¹⁵ The reaction in New England to these changes to their constitutions was not surprisingly violent. Boston erupted in riots in 1689, foreshadowing the events of the revolutionary era 86 years later. In 1691, under William III, the Massachusetts charter was restored giving the Massachusetts assembly power to govern and tax the colony locally, so long as the laws passed were “not repugnant to the Lawes and Statutes of this, our Realme of England.”¹⁶

Local rule by an elected and responsive representative legislature, particularly when it came to the issue of taxation, was a cornerstone of the developing American constitution, as evidenced by the Boston revolts against Andros. The leashing of executive power in order to protect against arbitrary rule was as essential a constitutional principle in Britain as it was in America, dating back at least to the struggles between Charles I and Parliament over taxation. According to the 1628 Petition of Rights, it was considered “against reason” for an executive to expect moneys from non-willing subjects. “No tallage or aid shall be laid or levied by the king or his heirs in this realm,” the Petition asserted, “without the goodwill and assent of... [the] burgesses and other freemen of the commonalty of this realm.”¹⁷ This principle of taxes as a gift was asserted by a rising class of commoners in the metropole who found a voice in Whig leaders like William Pitt who called taxes “a voluntary gift from the commons.”¹⁸ This ideal was applied in the colonies, mostly devoid of nobility and hierarchy, with even more conviction. The consent of the people to taxation became a principal aim of American Revolutionary rhetoric, anchored by the mantra “No taxation without representation!” In the Declaration of Independence, Congress complained that the king was “imposing taxes on us without our consent.”¹⁹

Without this consent, there was no evidence of a legitimizing social contract between the People of America and Parliament. Liberals believed, as David

Hume and Montesquieu philosophized, that the legitimacy of a polity rested on the consent of the parties involved.²⁰ America’s peculiar religious foundations also encouraged consent. In the American constitutions, created in the absence of feudal tradition, the will of the people was the authoritative and ultimate source of legitimate rule. The House of Burgesses and Massachusetts Assembly were republican bodies that was guided by popular sovereignty.

As historian David Armitage has argued, the wider British Empire of the modern era is in no way congruent to the pre-modern building of the British nation-state.²¹ The British Empire, although efficient and effective, was never so legally unified. Blackstone even argued that much of the Britain built in pre-modern times retained valid, legitimate laws peculiar to specific places or classes of people.²² The Founding Fathers argued that the laws and constitutions in America were prime examples of Blackstone’s argument for “particular customs.” The colonial governments and their laws met Blackstone’s qualifications for the legitimacy of such a set of laws: they existed, they were continued, and they were peaceable, compulsory, and certain.²³ In this interpretation of English law, the statutes passed by colonial legislatures and legal traditions of the American colonies carried the same legitimacy as manor law or mercantile law within the far-flung Empire. Example of particular laws at work in the colonies included those that governed slavery in the colonies.²⁴ It is true that this concept of particular customs continued to have force in American constitutional politics even in the post-revolutionary era.²⁵

The trigger to conflict was eventually pulled by Parliament when it stationed troops in the colonies challenging the American constitutions’ concepts of sovereignty. American colonists encountered a situation, at least in the modern era, foreign to their British brethren: the wide, seemingly limitless

¹⁵ “Commission of Sir Edmund Andros for the Dominion of New England (April 7, 1688),” from Morrison, et. al., p. 191, 193.

¹⁶ “The Charter of Massachusetts Bay (1691),” from Morrison, et. al., p. 198.

¹⁷ “The Petition of Right (1628),” from Morrison, et. al., p. 140.

¹⁸ William Pitt, “Debate in the House of Commons: William Pitt vs. George Grenville (Jan. 14, 1766),” from Greene, ed., p. 68.

¹⁹ Greene, ed., p. 300.

²⁰ David Hume, “Essay XII: Of the Original Contract,” from Morrison, et. al., p. 100 & Montesquieu, “Of the republican government, and the laws relative to Democracy,” from Morrison, et. al., p. 99.

²¹ David Armitage, “Greater Britain: A Useful Category of Historical Analysis?” *The American Historical Review* 104, no. 2 (April, 1999), p. 428-9.

²² Blackstone, from Morrison, et. al., p. 113.

²³ *Ibid.*, 115.

²⁴ “An Act Concerning Servants and Slaves (Oct., 1705),” from Morrison, et. al., p. 208.

²⁵ An example might be Stephen Douglas’s 1858 “Freeport Doctrine.”

expanse of land to the West. Since the days of John Smith's negotiations with the Powhatan, conquest and domination of this frontier, at the expense and exclusion of American Indians, was carried out by colonists independently and at their own expense, but in the name of the king.²⁶ A 1646 treaty enacted by the Virginia Assembly excluded Amerinds from lands conquered by jealous planters under penalty of death and placed the Amerinds under subjugation.²⁷ In the North, most violently in Connecticut, the colonists waged annual wars against the Wampanoags and Pequots, managing to raise funds to build little fortifications where local assemblies deemed necessary. Bacon's Rebellion in 1676 proved that protection of emigrants via colonial militias was considered the duty of local governments, acting *with* the king in the way Parliament did. This indicates that American constitutions placed military power, and not just legislative power with local governments. The complaints of groups like the Paxton Boys that the colonial governments failed to protect them proves that there existed an expectation of protection from local governments.²⁸

After Daniel Boone set a path through the Appalachians, many Founding Fathers, like Washington and Mason, organized vast real estate claims in the West. Securing these lands was a matter of great importance to all colonists North and South. The Virginia militia's forays into the disputed Ohio Country was the original conflict that sparked the French & Indian War in 1754 which carried an onerous £18 million annual cost. While later colonists later asked for protection on the frontier from British regulars, colonial leaders like Benjamin Franklin saw danger in the perpetual stationing of professional troops in the colonies and suggested that colonists unite and form a confederated constitution to handle the problem of French and Indian presence in the West. The Albany Plan, as it was known, placed authority in dealing with Amerinds in trade, land deals, and war with a united assembly headed by an executive. The new confederation would have power to "raise and pay soldiers and build forts for the defence of any of the Colonies," and much unlike

Britain would "not impress men in any Colony" without consent.²⁹ Even though Parliament squashed the proposal, Franklin testified in 1766 that the colonial governments still managed to raise, clothe, and pay for their own armies by "spending many millions."³⁰ The role of Americans in the war indicated a persistent colonial acknowledgement that they locally held (or at least shared with the king) one of the essential duties of a sovereign: the power to conduct diplomacy and manipulate armed force.

The Proclamation of 1763, which barred colonists from continuing their conquest in "Indian Territory", was a shocking blow to American constitutionalism and struck the Founding generation of arbitrariness. Not only did Jefferson, whose opulent mansion was erected near the Western frontier, chide the king in the Declaration of Independence for "refusing to pass [laws] to encourage their migrations hither," but also complained of the stationing of "standing armies."³¹ It seems an important part of the peculiar American constitutions involved the legitimate use of armed force. Even though Americans did not complain about standing armies until the armies stood at the doorsteps of the elite on the Eastern seaboard, a long-standing tradition of militia had developed.

As the situation broke down in the 1770s, it became apparent that the polity that Americans were participants in was not one of Greater Britain, as Armitage puts it, but one of America itself. The colonies, by 1776, had developed long-standing traditions and expectations, which along with their charters and agreements and treaties amounted to a constitution separate from that of the British constitution. When an awareness of these divergent constitutional ideas was laid bare in the light of the violent showdowns at Lexington and Bunker Hill, a people once "led by a thread," as Franklin put it, now required garrisons to keep order.³² British laws and constitutional ideas were now foreign laws and constitutions. Independence was the logical sense and was, as Thomas Paine put it, a matter of "common sense."

²⁶ Richard Bland, "An Enquiry into the Rights of the British Colonies (1766), from Greene, ed., p. 90.

²⁷ "Treaty Ending the 3rd Ando-Powhatan War (1646), from Morrison, et. al., p. 200.

²⁸ "The Declaration of the Injured Frontier Inhabitants (Feb., 1764), from Greene, ed., 96.

²⁹ "Albany Plan of Union (1754)," from The Avalon Project of Yale Law School's Lillian Goldman Law Library, http://avalon.law.yale.edu/18th_century/albany.asp, (accessed June 29, 2015).

³⁰ Benjamin Franklin, "Examination of Benjamin Franklin in the House of Commons (Feb. 13, 1766), from Greene, ed., p. 73.

³¹ "The Unanimous Declaration of the Thirteen United States of America (July 4, 1776), from Greene, p. 299.

³² Franklin, p. 73.