PROLOGUE: INHERITANCE

The revolution that occurred in North America during the last quarter of the eighteenth century was the unintended consequence of a dispute about law. During the dozen years between 1764 and 1776, Britons on both sides of the Atlantic engaged in an elaborate debate over the source and character of law within the larger British Empire. Whether the king-in-Parliament, the ultimate source of statute law in Great Britain, could legislate for British colonies overseas was the ostensible question in dispute, but many other related and even deeper legal issues involving the nature of the constitution of the empire and the location of sovereignty within the empire emerged from and were thoroughly canvassed during the debate. On neither side of the Atlantic was opinion monolithic, but two sides, one representing the dominant opinion in metropolitan Britain and the other the principal view in the colonies, rapidly took shape. The failure to reconcile these positions led in 1775 to open warfare and in 1776 to the decision of thirteen of Britain's more than thirty American colonies to declare their independence and form an American union. The nature and shifting character of this dispute can only be understood by placing it in the larger temporal process of imperial legal and constitutional thought and practice over the previous century and a half.

As recent literature on European state formation reveals, the problem of how to organize and theorize an extended polity was intrinsic to late medieval and early modern state building. As the national states emerging in western Europe sought through conquest, dynastic unions, or annexations to expand their authority over areas already well peopled and possessed of their own peculiar socioeconomic, legal, and political traditions, they could sometimes absorb those areas into the central polity, as England did with Wales in the fifteenth century, but often lacked the resources for such consolidation and had to settle for some form of indirect governance and limited sovereignty, the form of which had to be negotiated with local power holders in those areas. In the resulting constitutional arrangements, authority did not flow outward from a powerful central core but was constructed through a process of reciprocal bargaining between the core and newly acquired territories that usually left considerable authority in the hands of provincial leaders.[1]

Increasingly, imperial historians have come to realize that the process of governance and constitution making in early modern overseas empires represented an extension of this model. In those empires, fiscal resources were never sufficient to support the bureaucratic, military, and naval machinery necessary to impose central authority on the dominant, self-empowered possessing classes in the new peripheries without their consent or acquiescence. To obtain the cooperation of those classes, metropolitan officials had little choice but to negotiate systems of authority with them in a bargaining process that produced varieties of indirect rule that at once set clear boundaries on central power, recognized the rights of localities and provinces to varying degrees of self-government, and ensured that under normal circumstances metropolitan decisions affecting the peripheries should consult or respect local and provincial interests. For historians of

[1] The foundational works are Charles Tilly, *Coercion, Capital, and European States, AD 990–1990* (Cambridge, Mass.: Basil Blackwell, 1990) and Mark Greengrass, ed., *Conquest and Coalescence: The Shaping of the State in Early Modern Europe* (London: Arnold, 1991).

empire, this new perspective has led to a new appreciation of the extraordinary agency of the dominant settler populations in overseas territories in creating and managing the polities by which they were governed and of the critical role of those polities in forming the constitutional arrangements that characterized those empires.

Settler agency was directly related to the limited resources of colonizing nations. At the beginning of the era of early modern colonization, none of the emerging nation-states of Europe had either the coercive resources necessary to establish its hegemony over portions of the New World or the financial wherewithal to mobilize such resources. As a result, during the early stages of colonization, any nation-state contemplating overseas ventures farmed out that task, either to private groups organized into chartered trading companies or to influential individuals. In return for authorization from the Crown and in the expectation of realizing extensive economic and social advantages, these *adventurers* agreed to assume the heavy financial burdens of founding, defending, and succoring beachheads of European occupation in America. In effect, European rulers gave these private agents licenses with wide discretion to operate in domains to which their claims were highly tenuous and over whose indigenous inhabitants they exercised no effective control. If the gamble was successful, European rulers secured at least minimal jurisdiction over American territories and peoples at minimal cost to royal treasuries.

Some of these early private agents of European imperialism, especially the trading companies operating under the aegis of the Portuguese and the Dutch, enjoyed considerable success in establishing commercial footholds to exploit some of the economic potential of the New World. However, unless they encountered wealthy native empires, rich mineral deposits, or vast pools of native labor – things that in America happened on a large scale only in Mexico and Peru – few private adventurers had the resources to sustain the high costs of settling, administering, and developing a colony. Most of them were quickly forced to seek cooperation and contributions

from settlers, traders, and other individual participants in the colonizing process.

These efforts to enlist such cooperation acknowledged the fact that the actual process of establishing effective centers of European power in America was often less the result of the activities of colonial organizers or licensees than of the many groups and individuals who took actual possession of land, built estates and businesses, turned what had previously been wholly aboriginal landscapes into ones that were at least partly European, constructed and presided over a viable system of economic organization, created towns or other political units, and subjugated, reduced to profitable labor, killed off, or expelled the original inhabitants. Making up for their scarcity of economic resources, thousands of Europeans, by dint of their industry and initiative, created social spaces for themselves and their families in America and thereby created for themselves status, capital, and power.

Throughout the new European Americas during the early modern era, independent individual participants in the colonizing process were thus engaged in a deep and widespread process of individual and corporate self-empowerment. In contemporary Europe, only a small fraction of the male population ever managed to rise out of a state of socioeconomic dependency to achieve the civic competence, the full right to have a voice in political decisions that was the preserve of independent property holders. By contrast, as a consequence of the easy availability of land or other resources, a large proportion of adult male white colonists acquired land or other resources, built estates, and achieved individual independence.

This development produced strong demands on the part of the large, empowered settler populations for the extension to the colonies of the same rights to security of property and civic participation that appertained to the empowered, high-status, and independent property holders in the polities from which they came. In their view, colonial governance, no less than metropolitan governance, should guarantee that men of their standing would not be governed without being consulted

or in ways that were patently against their interests. Along with the vast distance of the colonies from Europe, these circumstances powerfully drove those who were nominally in charge of the colonies toward the establishment and toleration of political structures that involved active consultation with, if not the formal consent of, local settlers. Consultation meant that local populations would more willingly both acknowledge the legitimacy of the authority of private agencies of colonization and contribute to local costs. The earliest stages of colonization thus resulted in the emergence in new colonial peripheries of many new and relatively autonomous centers of European power that were effectively under local control.

These centers invariably were reflections of the European worlds from which the settlers came. Intending to create offshoots of the Old World in the New, the large numbers of emigrants to the colonies took their laws and institutions with them and made them the primary foundations for the new societies they sought to establish. For these societies, these laws and institutions functioned as "a concomitant of emigration." They were not, as one scholar has noted, "imposed upon settlers but claimed by them."[2] They served as a vivid and symbolically powerful badge of the emigrants' deepest aspirations to retain in their new places of abode their identities as members of the European societies to which they were attached, identities that, in their eyes, both established their superiority over and sharply distinguished them from the seemingly rude and uncivilized people they were seeking to dispossess.

The English settlements established in North America, the West Indies, and the Atlantic islands of Bermuda and the Bahamas provide a case study of the way this process worked. Among the main components of the emerging identity of

[2] Jorg Frisch, "Law as a Means and as an End: Remarks on the Function of European and Non-European Law in the Process of European Expansion," in W. J. Mommsen and J. A. De Moor, eds., *European Expansion and Law: The Encounter of European and Indigenous Law in 19th- and 20th-Century Asia and Africa* (Oxford: Oxford University Press, 1992), 21.

English people in early modern England, the Protestantism and, increasingly during the eighteenth century, the slowly expanding commercial and strategic might of the English nation were both important. Far more significant, however, were the systems of law and liberty that, contemporary English and many foreign observers seemed to agree, distinguished English people from all other peoples on the face of the globe.[3] The proud boast of the English was that, through a variety of conquests and upheavals, they had been able, in marked contrast to most other political societies in Europe, to retain their identity as a free people who had secured their liberty through their dedication to what later analysts would call the rule of law.

A long-developing tradition of jurisprudential political discourse supported this dedication. Emphasizing the role of law as a restraint on the power of the Crown, this tradition was rooted in such older writings as Sir John Fortescue, *De Laudibus Legum Angliae*, written during the fifteenth century but not published until 1616, and elaborated in a series of important works by several of the most prominent judges and legal thinkers of the early seventeenth century, including Sir Edward Coke, Sir John Davies, and Nathaniel Bacon. Writing in an age when, except for the Netherlands, every other major European state was slipping into absolutism and England's own first two Stuart kings seemed to be trying to extend the prerogatives of the Crown and perhaps even to do away with Parliaments in England, these early seventeenth-century legal writers were anxious to erect legal and constitutional restraints that would ensure security of life, liberty, and property against such extensions of royal power.[4]

[3] See Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (Chicago: University of Chicago Press, 1992); Linda Colley, *The Britons: Forging the Nations, 1707–1787* (New Haven: Yale University Press, 1992); and Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

[4] The best analysis of this tradition is still to be found in J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957).

This emerging jurisprudential tradition rested on a distinction, already fully elaborated by Fortescue, between two fundamentally different kinds of monarchy, *regal* and *political*. Whereas in a regal monarchy such as that in France, "*What pleased the prince*," as Fortescue wrote, had "*the force of law*," in a political monarchy such as that in England, "the regal power" was "restrained by political law." Bound by their coronation oaths to the observance of English laws, English kings could neither "change laws at their pleasure" nor "make new ones" "without the assent of the subjects." The happy result of this system, according to Fortescue, was that English people, in contrast to their neighbors, were governed by laws to which they had consented, and, as Coke and other writers pointed out, this was as true for the common law, to which the people assented through long usage and custom, as it was for the statute law passed by the Parliaments to which they sent representatives.[5]

With a wide variety of other contemporary political writers, the exponents of the English jurisprudential tradition agreed that the happy capacity of English people to preserve their liberty rested largely on two institutions for determining and making law: Juries and Parliaments. By guaranteeing that no legal case would be determined "but by the Verdict of his Peers, (or Equals) his Neighbours, and of his own Condition," wrote the Whig political publicist Henry Care, the first, juries, gave every person "a Share in the executive Part of the Law." By giving each independent person through "his chosen Representatives" a share "in the Legislative (or Lawmaking) Power," the second, Parliament, insured that no law should be passed without the consent of the nation's property holders. These "two grand Pillars of *English* Liberty," declared Care in paraphrasing Coke, provided English people with "a greater inheritance" than they had ever received from their immediate "Progenitors." For Englishmen, liberty was, thus, not just a condition enforced by law but the very essence of their emerging national identity.[6]

[5] Sir John Fortescue, *De Laudibus Legum Angliae* (Cambridge, 1942), 25, 27, 31, 33, 79, 81.
[6] Henry Care, *English Liberties*, 5th ed. (Boston, 1721), 3–4, 27.

For English people migrating overseas to establish new communities of settlement, the capacity to enjoy – to possess – the English system of law and liberty was thus crucial to their ability to maintain their identity as English people and to continue to think of themselves and be thought of as English. For that reason, as well as because they regarded English legal and constitutional arrangements as the very best way to preserve the properties they hoped to acquire in their new homes, it is scarcely surprising that, in establishing local enclaves of power during the first few years of colonization, English settlers all over America made every effort to construct them on English legal foundations. As the legal historian George Dargo has observed, "the attempt to establish English law and the 'rights and liberties of Englishmen' was constant from the first settlement to the [American] Revolution" and beyond.[7]

Nevertheless, as Yunlong Man has shown in his careful study of the first half century of development of provincial political institutions in England's five most successful colonies, English authorities did not anticipate the development of such demands when trying to work out a mode of governance for the colonies. "During the first half of the seventeenth century, the formative years of the colonial polities," Man finds, "English authorities never devised, or even conceived of," an arrangement by which colonial governance would be modeled on "the national government of England." Instead, they remained committed to a conciliar form of colonial governance of the kind they devised for Virginia during its early years. This form consisted of an appointed governor and councilors and included no formal devices for consulting the broader population, and they continued for several decades to think of this conciliar form as the norm for English colonial governance.[8]

[7] George Dargo, *Roots of the Republic: A New Perspective on Early American Constitutionalism* (New York: Praeger, 1974), 58.

[8] Yunlong Man, "English Colonization and the Formation of Anglo-American Polities, 1606–1664" (unpublished Ph.D. dissertation, Johns Hopkins University, 1994), 17–61, 455.

But several developments during the early stages of the colonizing process encouraged the development of a representative component in the emerging colonial constitutions. To entice settlers, colonial organizers found early that they not only had to offer them property in land but also guarantee them the property in rights by which English people had traditionally secured their real and material possessions. Thus in 1619, the Virginia Company of London found it necessary to establish a polity that included a representative assembly through which the settlers could, in the time-honored fashion of the English, make – and formally consent to – the laws under which they would live. Directed by company leaders "to imitate and follow the policy of the form of government, laws, customs, and manner of trial; and other administration of justice, used in the realm of England," the new assembly, the first such body in England's still small American world, immediately claimed the right to consent to all taxes levied on the inhabitants of Virginia.[9]

The legal instruments of English colonization – letters patent, charters, proclamations – encouraged this attempt in three ways. First, they often specified that the settlers and their progeny should be treated as "natural born subjects of England" and thereby strongly suggested that there would be no legal distinctions between English people who lived in the home island and those who resided in the colonies. Second, they required that colonies operate under no laws that were repugnant to "Laws, Statutes, Customs, and Rights of our Kingdom of England" and thereby powerfully implied that the laws of England were to provide the model, and the standard, for all colonial laws. Third, beginning with the charter to Maryland in 1632, they also stipulated that colonies should use and enjoy "all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peacefully to have and possess … in the same manner as our Liege-Men

[9] Ordinance, July 24, 1621, Virginia Laws, March 1624, in Jack P. Greene, ed., *Great Britain and the American Colonies, 1606–1783* (New York: Harper and Row, 1970), 28, 30.

born, or to be born within our said Kingdom of England, without Impediment, Molestation, Vexation, Impeachment, or Grievance," and thereby guaranteed that no laws would be passed without the consent of the freemen of the colony.[10]

In no case more than twenty years after the founding of a colony, and often much earlier, these conditions and developments encouraged the establishment of representative institutions. Between roughly 1620 and 1660, every American colony with a substantial body of settlers adopted some form of elected assembly to pass laws for the polities they were creating: Virginia and Bermuda in the 1620s, Massachusetts Bay, Maryland, Connecticut, Plymouth, New Haven, and Barbados in the 1630s, St. Kitts, Antigua, and Rhode Island in the 1640s, and Montserrat and Nevis in the 1650s. By 1660, all thirteen settled colonies in the Americas had functioning representative assemblies. From New England to Barbados, colonial English America proved to be an extraordinarily fertile ground for Parliamentary governance.[11]

Even in situations in which company officials or proprietors took the initiative in establishing these early lawmaking bodies, as was the case with Virginia, Bermuda, and Maryland, the representative bodies never acted as the "passive servants and petitioners of the prerogative" as had been the case with the medieval House of Commons. On the contrary, modern historians have been impressed by their "effectiveness and spirit of assertiveness." "Usually from their very first meetings," Michael Kammen has noted, they acted as the aggressive spokesmen for the proliferating settlements within the colonies. Claiming their constituents' rights to the traditional English principles of consensual governance, they early insisted that no laws or taxes might go into effect without their assent, demanded the initiative in legislation,

[10] David S. Lovejoy, *The Glorious Revolution in America* (New York: Harper & Row, 1972), 39; Maryland Charter, June 30, 1632, in Greene, *Great Britain and the American Colonies*, 24.

[11] See Michael Kammen, *Deputyes & Libertyes: The Origins of Representative Government in Colonial America* (New York: Knopf, 1969), 11–12.