COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION
A DOCUMENTARY HISTORY

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Preface

This volume is not just another collection of documents assembled in the hope of illuminating general historical trends or eras. Instead, the set of documents selected for

reproduction results from decision rules based on a theory of politics. The theory of politics is drawn from the work of Eric Voegelin, although it was the work of Willmoore Kendall and George Carey that first pointed to the possibility of, and need for, a collection of American colonial documents based on Voegelin's ideas.[1]

Eric Voegelin argues that political analysis should begin with a careful examination of a people's attempt at self-interpretation—a self-interpretation that is most likely to be found in their political documents and writing. The crucial point occurs when, either before or after creating a political society, a people reach a shared psychological state wherein they recognize themselves as engaged in a common enterprise and bound together by values, interests, and goals. It is this sharing, this basis for their being a people rather than an aggregate of individuals, that constitutes the beginning point for political analysis.

Essentially what they share are symbols and myths that provide meaning to their existence as a people and link them to some transcendent order. The shared meaning and shared link to some transcendent order allow them to act as a people, to answer such basic political questions as How do we decide what to do? By what standards do we judge our actions? Through what procedures do we reach collective decisions? What qualities or characteristics do we strive to encourage among ourselves? What qualities or characteristics do we seek or require of those who lead us? Far from being the repository of irrationality, shared myths and symbols constitute the basis upon which collective, rational action is possible.

These myths and symbols become at the same time both the basis for action as a people and the means of their self-illumination as a people. Frequently expressed in political documents, the core political symbols tend to structure the documents and determine their content. Voegelin also says that these shared symbols can be found in embryonic form in the earliest political expressions made by a people and in "differentiated" form in later writings. Put another way, by studying the political documents of a people we can watch the gradual unfolding, elaboration, and alteration of the embryonic symbols that define a given people. Voegelin calls this process "differentiation" but also refers to it as "self-illumination" and "self-interpretation."

Finally, in a synopsis too brief to do credit to such a profound theory, Voegelin argues that in Western civilization basic symbolizations tend to be variants of the original symbolization of the Judeo-Christian religious tradition. Without getting into a discussion of where this argument leaves the Greeks and Romans, suffice it to say that Voegelin's analysis led Kendall and Carey to reexamine early American political documents, and what they found was a variant on the symbolization of the Judeo-Christian tradition.

Using only a few of these early documents of foundation, Kendall and Carey identified a number of basic symbols present in all of them as well as in documents of the 1770s and 1780s: a constitution as higher law, popular sovereignty, legislative supremacy, the deliberative process, and a virtuous people. The important points made by Kendall and Carey are that there are basic symbols, in embryonic form, found in the earliest

documents of foundation written by colonial Americans and that these symbols are found in American political documents written 150 years later, after the colonial era, but now in a differentiated form. While provocative and convincing, the position taken by Kendall and Carey cannot be considered firmly established until the early American documents of foundation can be comprehensively analyzed and the symbols traced through succeeding documents.

Later research by others does indeed show the continuity in symbols running from the Mayflower Compact to the American state and national constitutions of the late eighteenth century and that the embryonic basis for this political tradition clearly evolves from basic symbols in the Judeo-Christian tradition.2 Later support for the Kendall and Carey application of Voegelin's theory thus leads to the need for a comprehensive collection of documents that illustrates the evolution of American constitutional symbols.

Because there are thousands of candidates for inclusion in a collection of American political documents based on Voegelin's approach, a brief discussion of the decision rules used to select among them is required. The first decision rule was to include only those documents written during the colonial era. Post-1776 documents are readily available in a number of good collections, but there has been no good collection of pre-1776 foundational documents. The one exception to this rule in the present collection is The Articles of Confederation, which has been included because it is the direct culmination of colonial constitutional evolution. The Articles and the Declaration of Independence not only embody the colonial covenantal/compactual symbols but also together are what moved the colonies into independent nationhood. The state constitutions should also be included but are easily available in any library and are too long for inclusion, whereas the Articles of Confederation is brief and makes the transition from colonial to postindependence documents of political foundation dramatically apparent. Juxtaposing the Articles of Confederation with its immediate predecessors is therefore useful for illustrating the connection between pre- and postindependence documents.

The second decision rule was to include only documents written and adopted by the colonists, which excludes those written in Britain. Some may see this rule as tending to minimize the impact of the Mother Country on the process of constitutional development in America. The purpose of the rule, however, is to produce a coherent book of manageable length and not to imply the absence of English common law influences. The extent to which there was appropriation of English common law and foundational ideas by the colonists will be apparent in the documents written on this side of the Atlantic.

The third decision rule was to include documents that were in fact foundational. Political systems are not founded by judicial decisions or executive actions, so colonial case law and executive directives were excluded. Too often constitutionalism is viewed merely legalistically, whereas legalism is the result of constitutionalism and not the other way around. Foundational documents by definition create institutions and decision processes that did not exist before; or else they establish fundamental laws that give direction to

what legislatures, executives, and courts later do, although these fundamental laws do not determine the actual form or content of later political decisions.

Finally, a document was included only if it had been publicly adopted by the entire relevant community through the consent-giving process in use by that community. This decision rule thus excluded political essays and tracts no matter how important or influential they might have been at the time. Often adoption resulted from legislative action whereby the legislature was conscious of acting in a foundational capacity. Usually these legislative actions amounted to amending the existing constitutional order at a time when a formal amendment process that directly involved the people had not yet been invented.

Even with these decision rules to narrow the eligible documents, some further exclusions were necessary. Some documents were too long and largely redundant in their content. So, for example, Connecticut had multiple codes of law adopted during the 1600s, but they largely reiterated the first law with minor variations, and including them served no real purpose other than to lengthen the book. The result is a collection of foundation documents from the colonial era that provides the basic information needed by any reader to understand the process of differentiation described by Voegelin.

Having established, therefore, at least in a preliminary way, the common threads running among them, these documents are presented here so that others may become familiar with, and advance our understanding of, their contents. There is much for us to learn. The Pilgrim Code of Law (1636), for example, is probably the first true written constitution in the English language; and if it is not, the Fundamental Orders of Connecticut (1639) most certainly is. Covenants, compacts, and citizenship oaths are prominent among our earliest documents. Those writing on political obligation have been quite taken with John Locke; however, in this collection we have people solving the problem of political obligation in a modern context even before Locke was born. The concepts of equality, popular sovereignty, majority rule, representation, and constitutionalism are a few of those whose meaning and origins can be illuminated by reference to these documents. Until now most of the documents have been lost to public view, and the few studied in depth have been studied in isolation. It is hoped that the publication of this volume will help achieve at least two ends: first, that the early documents in our political tradition will become well known to students of American politics; and second, that we will learn to read these documents together rather than separately.

The careful and attentive reader should begin with the understanding that the collection of documents presented here is not a book of readings. It is the foundation story of a people, told by themselves.

This volume is an altered and corrected version of a book originally published in 1986 under the title *Documents of Political Foundation by Colonial Americans.* The author wishes to thank Transaction Press for permission to reproduce whatever may overlap in that earlier book. The introductory essay for that volume has been significantly shortened and revised for this version, the headnotes to each document are completely new as well

as lengthier and more detailed with respect to constitutional precedence, and the ordering of the documents has been radically altered. Also, seven documents from that earlier book have been dropped, and twelve completely new documents have been added. Finally, the documents themselves are in the public domain and have been corrected for any errors that may have crept into the earlier volume. In each case, the documents in this book have been carefully compared with their respective earliest surviving versions.

Endnotes

[1.] Voegelin's basic theory can be found in the introductions to *Israel and Revelation* (Baton Rouge: Louisiana State University Press, 1956) and *The World of the Polis* (Baton Rouge: Louisiana State University Press, 1957), which are the first two volumes of his five-volume work, *Order and History*, published by Louisiana State University Press. The book by Willmoore Kendall and George Carey is *The Basic Symbols of the American Political Tradition* (Baton Rouge: Louisiana State University Press, 1970).

[2.] For an analysis that uses Voegelin's approach and explicates systematically many of the documents found in this collection, see Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

Introductory Essay

Part 1 from covenant to constitution

Local government in colonial America was the seedbed of American constitutionalism—a simple fact insufficiently appreciated by those writing in American political theory. Evidence for neglect can be found simply by examining any book dealing with American constitutional history and noting the absence of references to colonial documents written by Americans. Rather, at best there will be brief references to Magna Carta, perhaps the English Constitution, and probably the Declaration of Independence. If the authors of these books discuss the source of American constitutional theory beyond these few documents, they will almost inevitably mention European thinkers, John Locke being prominent among them. It is the purpose of this volume to end such neglect and reverse such attitudes.

Work by historians during the Bicentennial has pointed us in the direction of reexamining the colonial roots of our political system, but the implications of this work have not been absorbed by political scientists.1 Furthermore, historians are not inclined to put their questions in such a way as to lead to the comprehensive examination of colonial documents of political foundation. Intellectual historians almost immediately look to Europe and the broader Western tradition when seeking the roots of constitutionalism for the simple reason that a profound constitutional tradition is there to examine. There has also been a tendency to view the American Revolution as the fundamental watershed in American history, closely followed by the Civil War. This outlook introduces an unavoidable sense of discontinuity in American thinking and affairs. Rather than suggest that the perception of such discontinuities should be rejected, it is instead argued here that

we should look for continuities as well. One fundamental continuity to be found runs from the earliest colonial documents of foundation to the written constitutions of the 1770s and 1780s. We should look to our own shores as well when seeking a constitutional tradition for America.

One important caveat must be mentioned. This author has argued elsewhere that there are two constitutional traditions running through colonial documents.2 The first tradition can be found in the charters, letters-patent, and instructions for the colonists written in England. In certain respects, the United States Constitution favors this tradition. The second tradition is found in the covenants, compacts, agreements, ordinances, codes, and oaths written by the colonists themselves. While the U.S. Constitution embodies aspects of this tradition as well, it is in the early state constitutions that we find the full flowering of this second tradition.

These traditions, while in certain respects distinct, also interpenetrate each other. Most of the early colonial charters allow the colonists to design their own political institutions and practice self-government, and most of those charters that did not so provide explicitly at least permitted the colonists to fill in the blanks themselves. Charter revisions and colonial document writing took each other into account, and often one was the result of the other. Nevertheless, it needs to be emphasized that the former set of documents was handed down to, or imposed on, the colonists, while the second set was written by the colonists themselves.

The two traditions were blended to produce a constitutional perspective uniquely American. The fact that American colonists were invariably here as the result of a written charter that could be amended led to their becoming used to having a written document defining the context of their politics and having a document that could be altered through some political process. The English had a written constitution, but it was composed of the vast corpus of common law and legislative ordinance. English colonists in America became familiar with the idea of a single document being the focus of their link with that vast corpus.

At the same time, English colonists in America became used to writing their own documents to flesh out the particulars of their governments. This was partly the result of necessity—time and distance between England and America did not permit close control from England. It was also the result of choice. The religious dissenters who were prominent in the first waves of migration came to America to establish their own communities where they could practice their religion free from outside interference. This desire plus the structure of their churches led them to use self-written covenants as part of their political definition. It is a very short step to move to a blending of these two traditions wherein Americans would find themselves writing single, amendable documents as the focus of their political systems and calling these documents constitutions. The Pilgrim Code of Law, for example, begins by referring to both the charter from the king and the Mayflower Compact as its legal basis.

We will, in this volume, be concentrating on what has been termed here the second tradition. We will be looking at those documents of political foundation written by the colonists themselves. The charters are already well known and easily accessible.3 The documents written by the colonists are not well known and are generally not easily accessible, even where they are identified. Nevertheless, the reader should keep in mind that the documents presented in this volume are only part of the picture, although they are the most neglected part of the picture.

Nor should the reader conclude that every document of political foundation is here included. No doubt there are others that remain buried in obscure collections, and perhaps future researchers will argue that some that are known and not included in this category should be. All that is claimed for the present collection is that it probably represents most of such documents, and that those reproduced here are typical for, and representative of, American colonial documents of political foundation.

We have spoken of a "constitutional tradition." We have suggested that the Pilgrim Code of Law (1636) was one of the first constitutions in the English language. We also speak of the Massachusetts Constitution of 1780 and the Pennsylvania Constitution of 1776 as if such titles were not problematic. All three kinds of statements assume that we know what is meant by the term "constitution." From the outset it is best to consider this term something to be determined rather than something assumed; it is because we start off thinking we know what a constitution is that we have not given these colonial documents the close textual analysis they deserve.

To illustrate this point, consider the 1776 Virginia Constitution. It is always reproduced in our century with the title at the beginning as "The Constitution of Virginia." This is immediately followed by the first part of the document, which is entitled "Bill of Rights." Sixteen sections later we come to the second part, which is labeled "The Constitution or Form of Government, Agreed to and Resolved Upon by the Delegates and Representatives of the Several Counties and Corporations of Virginia." Here we have a puzzle. If the part after section sixteen of the Bill of Rights is the Constitution, then is the Bill of Rights properly part of the Constitution? And if not, why is the entire document called a constitution? If the Bill of Rights is part of the Constitution, then why is the second part labeled the way it is? The 1776 Maryland Constitution uses the same format, as do those of New Hampshire (1784) and North Carolina (1776). Pennsylvania (1776) and Vermont (1776) label the second part "The Plan of Government" or "The Frame of Government," as does Massachusetts (1780). Furthermore, this latter document, considered the most influential state constitution ever written, describes itself internally as a "compact" and not a "constitution." It is worth noting that the originals of these early state documents were not printed with the word "Constitution" in their respective titles. Are these early state documents that we habitually label "constitutions" really constitutions or something else?

It is neither feasible nor appropriate to answer this question here in detail, but many of the early state constitutions were considered by their authors to be compacts. This raises the question of what a compact is and in turn leads us to the early colonial documents, for

many of them were compacts. At the same time, many of these colonial documents were not compacts. In order to understand these colonial documents, we must first define the terms commonly used internally to describe them. Second, we must provide categories that will allow us to distinguish the various types of documents.

Let us address the second task first because it is more fundamental. If these are foundation documents, it is reasonable to ask what it is that each document founds. There are four distinct foundation elements, and any document can contain one, all, or any combination of these elements: (1) the founding or creation of a people; (2) the founding or creation of a government; (3) the self-definition of the people in terms of shared values and goals so that the founded people may cross generations; and (4) the specification of a form of government through the creation of institutions for collective decision making. Let us consider each in turn.

Sometimes a document of foundation will create a people but not a government. It is as if those signing or agreeing to the document were saying, "Here we are, a new people, one distinct from all other peoples, declaring that we are ready to take our place on the stage of life." The individuals composing the people were, of course, already alive as individuals, but the document creates a new life—that held in common. One could also speak of their creating a society, but this term is not quite strong enough because it implies simply a pattern of social interaction, whereas to create a people is to imply the creation or affirmation of a culture as well. A society may have rules for interacting, but it is the common values, goals, and shared meaning for a life together that define a people. While some social scientists will point out that all known societies have required shared values and meaning in order to function, the crucial fact of a foundation document containing shared values is the celebration and conscious affirmation of that which is shared. There is the implication of a link with something transcendent that ties them together as a people. It is the difference between working together to build a wall to keep out enemies and creating a church in which to worship the god of the land enclosed by the wall.

Other documents will create a people and then establish a government in only the most general terms. The Providence Agreement (1637) [32] is a good example. A group of individuals unanimously agree to form themselves into a people, and then to be bound as a people by decisions reached by a majority among them—including the form of government. It is easy to discern the dead hand of John Locke in the distinction between the unanimous creation of a people and the majoritarian basis for their government, even though in 1637 Locke's *Second Treatise* was still more than half a century in the future. The Plymouth Combination (Mayflower Compact) of 1620 [3] has the same Lockean format, as do other documents in the collection.

Those documents that contain the element of self-definition are particularly interesting. It is unusual for a document to create a people without also outlining the kind of people they are or wish to become, although some documents do contain further illumination of a people that already exist. This self-description of a people is the foundation element usually overlooked, yet from this element what we later call bills of rights will evolve.

Three Virginia documents [69, 70, and 72] contain this foundation element and are typical in that the values of the people are implicit in the prohibitions enumerated. Commitment to godliness, order, and cleanliness are obvious. Despite its name, the Massachusetts Body of Liberties (1641) [22] also implies commonly held values, largely through a set of explicit prohibitions. That it is called a "Body of Liberties" points toward what this element will become. In other documents the values and self-definition of a people will be spelled out explicitly with no need for inferences on the part of the reader. Whether explicit or implicit, this foundation element represents what Voegelin sometimes called a people's self-illumination, and later in our history we will be unable to exclude this element from what we will come to call a constitution.

The fourth foundation element, the specification of a form of government, present only embryonically in documents like the Plymouth Combination (1620), gradually comes to occupy a larger proportion of our foundation documents. The word used internally to identify this element is often "constitute." That is, within colonial documents the writers usually "agree" to form a people or a government but "constitute" a form of government. That this part of early state constitutions, the part describing specific forms and institutions, is usually termed "The Constitution or Form of Government" thus becomes quite understandable. It is the fourth foundation element grown to prominence in a foundation document, and it is still being introduced by the term used in early colonial documents of foundation. Some colonial documents contain only this fourth element, others combine it with additional foundation elements. In either case, we can watch the development of American political institutions found later in our constitutions—institutions like popular elections, majority rule, bicameralism, separation of powers, and checks and balances.

Because one or more elements may be present in a given document, if only in embryonic form, it is often arguable just how the document should be categorized with respect to these foundation elements. As a further aid to comparative analysis, it is both useful and interesting to consider the various terms used internally in the documents, a task to which we now turn.

Part 2 definition of terms

It has been said that humans have a tendency to develop a multiplicity of terms for things that are prominent in their lives so as to distinguish subtle yet important variations. Thus, for example, Eskimos are said to have many words to identify types of snow, and in classical Athens there were many forms of community identified, each with its own descriptive term. If we follow this same logic, it is apparent that the English-speaking people of the seventeenth and eighteenth centuries considered political agreements to be of great importance because they regularly used over a dozen different terms, sometimes interchangeably, but more often to distinguish subtleties they considered noteworthy. We will need to examine some of these linguistic alternatives for two reasons: because we require an understanding of what the issues were and because the more general words we have inherited were not used to describe the document as written. For example, when we examine the documents in this volume, we discover that the word "covenant" is only

occasionally used to describe a document by those writing it, even though many of the documents were understood to be covenants by their respective authors and had the covenant form internally. “Covenant” was too broad a term, and the authors often preferred a more restrictive, precise title.

The same is true for “compact.” The term is not used in any of the titles of these colonial documents, at least not by those who wrote them. The Mayflower Compact was not so named until 1793 and was referred to by the inhabitants of the colony as the Plymouth Combination, or sometimes simply as The Combination. To make sense out of these documents, then, we will first need to define the broad categorical terms of covenant, compact, contract, and organic act, and then recover the understanding in use at the time for charter, constitution, patent, agreement, frame, combination, ordinance, and fundamentals.

A contract, on the one hand, usually implied an agreement with mutual responsibilities on a specific matter; that is, a contract implied a restricted commitment such as in a business matter and involved relatively small groups of people. The contract could be enforced by law but did not have the status of law.

A compact, on the other hand, was a mutual agreement or understanding that was more in the nature of a standing rule that, if it did not always have the status of a law, often had a similar effect. A compact implied an agreement that affected the entire community in some way, or relations between communities. The word had the root meaning of “knitting together” or “bringing the component parts closely and firmly into a whole.” A compact, therefore, was an agreement creating something that we would today recognize as a community. Because a compact was not as precise as a contract and more like a settled rule than an agreement with specific, reciprocal responsibilities, we do not find talk of a Mayflower Contract.

A covenant could be viewed as having two distinct though related meanings. As a legal term in England, it referred to a formal agreement with legal validity made under the seal of the Crown. This denoted an agreement of a serious nature witnessed by the highest authority. The religious counterpart to this secular or civil covenant was any agreement established or secured by God. The formal agreement made and subscribed to by members of a congregational church in order to constitute themselves as a distinct religious community had God as the witness and securer of the agreement. A religious covenant thus was essentially an oath, and if it established a political community, political obligation was secured by the oath rather than by merely resting upon the fact of consent having been given. Note that both the civil and religious meanings of covenant were related in that each was characterized by being witnessed and therefore secured by the highest relevant authority. Presumably any compact with both God and the Crown as securer would be simultaneously a civil and religious covenant. A civil covenant would require the presence of the royal seal, while a religious covenant could be invoked merely through the internal use of an oath.

Even with this restricted discussion two things become apparent. First, calling John Locke a "contract theorist" would have been considered a misnomer by colonial Americans. He was more properly a "compact theorist," and in fact we find that his *Second Treatise* always uses the word "compact" and not "contract." Second, the relationship between a covenant and a compact was a direct one. Both were based on the consent of those taking part. Both created a new community. Both implied a relationship that was stronger, deeper, and more comprehensive than that established by a contract. A compact, however, required simply the consent of those taking part, while a covenant required sanction by the highest relevant authority as well. In this regard, compact is the more modern of the two concepts, while covenant was the more natural term to use in a religious or a medieval context where the authority hierarchy was well defined and had a clear apex. A compact could be turned into a covenant merely by calling upon God to witness the agreement, which also turned consenting to the agreement into an oath. If a people found themselves in a situation where a mutual agreement had to be drawn up but it was not possible to obtain the royal seal in order to give the document legal status, the easiest solution for a religious people was to call upon God as a witness to bind those signing until the king's legal sanction could be obtained. If, for some reason, a people reached a mutual agreement that was covenant-like but chose to call upon neither God nor the king, they must, for some reason, have considered themselves completely competent to establish the document's legality. This last instance would be one in which legality was viewed as resting on the authority of the people, indicating an understanding of popular sovereignty. A compact was just such an agreement, one resting only on the consent of those participating. For this reason, Blackstone could say, "A compact is a promise proceeding from us, law is a command directed to us."[4] The fact that most of the early colonists were a religious people—a religious people primarily from Protestant religions who were experienced in forming their own communities and familiar with the covenant form for doing so—becomes an important part of the background to American constitutionalism. That these people were often thrown by circumstances into situations where they had to practice this skill of community building through covenants and that the charters under which they sailed often required that they provide for self-government, or at the very least permitted such activities, must be viewed as another historical circumstance of considerable importance for American constitutionalism.

An agreement between God and his chosen people, then, was a covenant. The judicious Hooker refers to "Christ's own compact solemnly made with his church."[5] While the covenant to which Hooker was referring was not the Jewish covenant, the Protestants writing the colonial documents in question viewed their work as equivalent to the Jewish biblical covenants. It was certainly equivalent in the sense that calling upon God to witness a civil union not only turned a compact into a covenant but also indicated an accord with the broader covenant in the Bible, between God and his chosen people. Giving one's consent to join a civil community with this kind of covenant was in part an act of religious commitment, and elections to identify "the elect" among those in the civil community were also acts of consent with religious overtones.[6]

Consent becomes the instrument for establishing authority in the community and for expressing the sovereignty of God. God transmits his sovereignty to the people through

the broader covenant, and they in turn convey his sovereignty to the rulers on the basis of the specific covenant creating the civil community. The people's consent is the instrument for linking God with those holding temporal authority, whose authority then is viewed as sanctioned by God. Because this temporal authority comes through the people, however, the rulers are beholden to God through the people and thus are immediately responsible to them. This, the original basis of popular sovereignty, had been independently developed by both Protestant and Catholic thinkers during the sixteenth and seventeenth centuries.7

Given these characterizations, it can be seen that a covenant is simultaneously a compact as it contains everything essential to a compact. A compact, however, is not simultaneously a covenant because it lacks the explicit link with the higher authority even though the idea and form for a compact are derived from covenants, and the kind of community established is similar enough so that one could call a compact a near-covenant. Furthermore, there are circumstances in which an apparent compact is really a covenant in the complete sense. For example, suppose a people form a society under a covenant in either or both God's and the king's name. They then later form a government for this society in a document that does not mention any authority other than themselves as a people. Because the first document that formed them as a people also automatically establishes them as expressing the higher authority whenever they act through their own popular sovereignty, all subsequent documents by that people could be considered covenants as well because the link with the higher authority is understood. Nor is this implied covenant status always left for the reader of the document to infer. The Pilgrim Code of Law (1636) [20] is a good example. After establishing, in the first paragraph, the legal basis for holding the assembly that will write the Code, the first sentence in the second paragraph says: "Now being assembled according to the said order, and having read the combination made at Cape Cod the 11th of November 1620 ... as also our letters patents confirmed by the honorable council, his said Majesty established and granted the 13th of January 1629...." The combination of November 11, 1620, referred to here is, of course, what we now call the Mayflower Compact. The letters-patent refers to the charter from the king that was then in effect. The former document is a religious covenant, and the latter is a civil covenant. This sentence in the Pilgrim Code of Law serves a double function: first, of establishing the legal basis for their having the power to write such a Code; and second, of bringing the Code under the umbrella of the earlier covenants thereby making it an implied covenant.

It is perfectly possible for a contract to be elevated to compact or covenant status. For example, the king could put his seal on a contract; perhaps charters come most easily to mind in this regard. Such a document, however, would imply quite a different kind of community from a simple covenant. Because all the details of the relationship would be spelled out, the result would be less a community in which the partners are required to go beyond the legally defined relationship to fully develop the relationship and more one in which the partners are minimally required to fulfill the obligations specifically mentioned. Such a contractually based compact, or covenant, would not be a true covenant as understood in the Jewish tradition and would become a target for legalistic wrangling over the meaning and intent of specific words and phrases. The emphasis on

the letter rather than on the spirit of the agreement would destroy community as implied by covenant or compact and result in something less—an association for specific, limited ends. True covenants and compacts, without any contractual elements, are thus communitarian oriented, while contractual variants are inclined to be legalistic. One characteristic of contractual variants was the tendency for them to become longer and longer specifications that were more and more precise and limiting. This characteristic, however, should not be pushed too far as an identifying property of a contractual society because there is another, noncontractual, form of agreement that might resemble it superficially—an organic act.

An "organic act" is one that codifies and celebrates an agreement or set of agreements made through the years by a community. In this way, a "common law" comprising legislative and judicial decisions made over a number of years can be codified, simplified, and celebrated in dramatic form, thereby also renewing the consent-based oath upon which obligation to the community rests. The early state constitutions adopted in 1776 could be viewed as organic acts as well as compacts as they usually summarized and codified what the colonists of each state had evolved over the previous 150 years. In the case of Connecticut and Rhode Island the colonial charters were formally readopted as constitutions—charters that had in these two instances been essentially written by the colonists. Massachusetts did not adopt or readopt anything in 1776 but continued to live under the 1725 charter as a continuous community. Examples of an organic act include The Laws and Liberties of Massachusetts (1647) [26], the Puritan Laws and Liberties (1658) [30], and the Connecticut Code of Laws (1650) [52].

These organic acts are long and contain precise terms for limited categories of behavior. Various provisions, for example, might regulate behavior in church, activities after dark, or dealings with Indians. While highly legalistic, they are laws after all, they are not contracts for there are generally no provisions for reciprocal obligations. They are instead compacts because they are community-wide agreements on how to behave.

We now have the basic characterizations for the analytic categories of religious covenant, civil covenant, mixed religious-civil covenant, compact, contract, and organic act. As was noted earlier, these terms were generally not used to describe colonial foundation documents, at least not by those writing them. It is necessary, therefore, to provide a brief characterization for each of the terms that were prominently used—agreement, combination, frame, fundamentals, ordinance, patent, charter, and constitution.

An "agreement" in the formal, political sense referred to an arrangement between two or more persons as to a course of action, a mutual understanding, or a common goal. The term was usually used to describe a document that we would recognize as a covenant or compact. Indeed, documents frequently used the phrases "to agree," "to compact," and "to covenant" interchangeably in their internal wording. Treaties were sometimes termed agreements. While an agreement was legally binding on the parties making it, the term more properly implied a sense of harmony, or concord, that transcended a purely legal relationship. To refer to a treaty as an agreement meant at the very least there was no dissension, but it usually implied more—a level of mutual pleasure that approached

atonement, whether in the sense of reconciliation or of propitiation. An agreement, then, at least during the period in question, was far more than a contract. It clearly suggested a relationship that moved beyond the letter of the agreement toward mutual support and pleasure, something close to the "knitting together" implied by a compact or the spirit of community carried by a covenant.

A "combination" was viewed as a bringing together of two or more entities into a whole. The banding together, or union, of persons was usually for the prosecution of some common, broad objective. The term was often used interchangeably with agreement and compact and sometimes with alliance and treaty. As a legal term it had neither consistent nor widespread use, but American colonists were quite consistent in using it as the equivalent for agreement as just outlined. The document later to be known as the Mayflower Compact, which was clearly a covenant in form, was known to those who wrote it as the Plymouth Combination.

During the era in question, a "frame" referred to an established order, plan, scheme, or system, especially of government. It strongly implied a definite form, regular procedure, order, and regularity. It also implied an adapted or adjusted condition in the sense of changing to take into account new factors or conditions affecting the older form, plan, or system, while not rejecting that older one. Thus, a frame tended not to be a document of initial founding as much as it was one of refounding and hence was similar to an organic act. Document 59 is one where "frame" is used in its title.

The use of "fundamentals," as in New Haven Fundamentals (1643) [50], implied the base upon which something is built. It was used primarily to refer to immaterial rather than physical things, and thus was used to describe leading principles, rules, laws, or articles that served as the groundwork for a political system. Such a statement of principles might be an addition to a covenant or compact, a preface to a frame or ordinance, or it might constitute the agreement itself.

An "ordinance" usually referred to an authoritative command, although in a more restricted sense, narrower scope, and less permanent nature than a law or statute. The term was sometimes used to refer to the founding or instituting of something, but in the sense of making conformable to order, rule, or custom—as in placing or arranging in proper sequence or proper relative position. It would not be improper to view an ordinance as sometimes attempting to establish "orders" of people according to class, merit, ranking, status, importance, duties, or rights. As with fundamentals, political ordinances could be covenantal, compactual, contractual, or something else depending on the content. The words "ordain" and "order" were used as operative words in documents that legally produced an ordinance.

A "patent," as in letters-patent, had the root meaning of a public letter or document as opposed to a private one, usually from a sovereign or person in authority. It had a variety of uses—for example, to put on public record some contract; to command or authorize something to be done; or to confer some right, privilege, title, property, or office. A patent usually implied a monopoly of some sort, as in exclusiveness of use. Obviously a

patent was related to a contract, but it was also related to a law in that it was handed down by some authority. It was unlike a contract in that it did not necessarily imply reciprocal duties but often simply recorded a grant with no duties assigned the grantee.

The word "charter" is derived from the Latin word meaning a leaf of paper, a writing, a document. Often it was a legal document or deed written on a single piece of paper by which grants, cessions, contracts, and other transactions were confirmed or ratified. It was also used to refer to a written document delivered by the sovereign or legislature to grant privileges to, or recognize the rights of, an entire people, a certain class, or specific individuals. Magna Carta comes to mind here as an example because it recognized the rights of the nobility, vis à vis the king. In his *Leviathan*, Hobbes says that charters are not laws but exemptions from the laws, an idea that also fits in with the purpose of Magna Carta or other bills of rights. Charters were also used to grant pardon and to create or incorporate boroughs, universities, companies, or other corporations. They were a written instrument or contract applied especially to documents or deeds relating to the conveyance of property. The word "charter" was used as a linguistic alternative for privilege, immunity, or publicly conceded right. To say that something was "chartered" was to say that it was founded, privileged, or protected. Charters and letters-patent were similar, although the latter term was broader in that it could refer to any authoritative document. A charter was invariably a patent, while a patent was not necessarily a charter. "Charter" was also closely related to "contract" as a legal term because it effectively constituted a contract between the authority granting it and the person(s) to whom it was granted. Unlike a simple contract, however, a charter often included so many statements of a general nature that it transcended the notion of a contract. A contract, for example, would not be an appropriate description for a document that contains statements as broad and vague as "and the proprietors shall establish a government whereby differences among the planters may be settled."

Although rarely used to describe early colonial documents, the word "constitution" is worth discussing in order to compare its usage with some of the other terms we are examining. Related to the term "constituent," which refers to that which makes a thing what it is in the sense of being formative, essential, characteristic, or distinctive, "constitution" is more immediately drawn from "constitute," which means to establish, ordain, or appoint in the sense of providing legal form and status. The word "constitution," properly speaking, referred to the action of making, establishing, decreeing, or ordaining something, usually in the sense of its having been made by a superior civil or ecclesiastical authority.

Additionally, a constitution had been used historically to denote limitations. For example, the Constitutions of Clarendon in England, a set of propositions drawn up at the Council of Clarendon in 1164, defined the limits of civil and ecclesiastical jurisdiction. Used in this way it was similar to a charter as exemplified in Magna Carta. The term "constitution" had also been used to describe the mode in which a state was organized, especially as to the location of sovereign power as well as to describe the fundamental principles according to which a nation, state, or body politic was organized and governed. For example, there was the Declaration of the Estates of Scotland (1689): "Whereas King

James the Seventh did by the advice of wicked and evil counsellors invade the fundamental constitution of the kingdom, and altered it from a limited monarchy to an arbitrary despotic power...."; or Lord Viscount Bolingbroke's definition, "By Constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason ... that compose the general system, according to which the community hath agreed to be governed." 8

In summary, we find the word "constitution" associated with making or establishing something, giving it legal status, describing the mode of organization, locating sovereignty, establishing limits, and describing fundamental principles. Not surprisingly, it was often used in association with charter, law, statute, ordinance, frame, and fundamentals. In our usage today "constitution" implies and incorporates at least part of all these other terms plus some of what we associate with compact. Although the usage of the word during the seventeenth century sounds familiar to our ears, the various components had not yet been brought together in any complete fashion. Also the term "constitution" was not used to refer to a specific document as we are inclined to do today. The English had developed the concept of a written constitution, but the writing was scattered over thousands of documents and no one was quite sure which documents should be included. When Americans finally brought all the elements together in a single document in 1776, the term "constitution" was to include far more than had been outlined by Bolingbroke. Indeed, the early state constitutions would derive their elements from agreements, compacts, and covenants as well as from frames, charters, fundamentals, and ordinances. The word "constitution" is not used in any of the documents duplicated in this volume, although the word "constitute" is used in several.

Part 3 analytic overview

Although one major purpose for publishing these foundation documents is to lead others to analyze them both individually and together, it is not inappropriate to initiate that analysis by presenting here some of the apparent developments that they embody. Let us briefly outline some of the things that a reading of these documents together leads us to conclude.

1. Political covenants were derived in form and content from religious covenants used to found religious communities.

2. A complete political covenant had the following elements: (a) an oath calling on God as a witness or partner; (b) the creation of a people whose members are identified by those who signed the covenant; (c) the creation of a civil body politic, or government; (d) the specification of the shared goals and values, a shared meaning, that defined (self-defined) the basis for the people living together; and (e) the creation and description of institutions for collective decision making.

3. The political covenant form evolved rather quickly into the political compact form. A political compact is identical to a political covenant except for the absence of an oath in a

compact. The elimination of the oath resulted in the force of the document, and therefore the basis of political obligation, resting entirely on the consent of those signing it. The move from political covenant to political compact is thus a shift to de facto popular sovereignty.

4. The political compact eventually evolved into what we now recognize as the American form of constitutionalism. In this evolution, the first two compact elements—the creation of a people and of a government—become part of the American Constitution's preamble or the first few provisions in the Bill of Rights; the self-definition element evolves into a bill of rights, although parts of the self-definition are often found as well in a preamble or introduction; and the description of institutions for collective decision making grows into the body of the constitution proper, which becomes the major part of the total political compact's length. The early state constitutions, which contained all of these foundation elements, described themselves internally as "compacts."

5. The oath did not cease to be politically relevant but became the basis for creating and identifying citizens outside of the formal documents of foundation and sometimes in place of them (documents 4, 5, 9, 15, 16, and 47 are examples). During the colonial era it was not unusual for an oath to be used as the entire founding document. Anyone taking the oath was effectively performing the same act as signing the end of a political covenant or compact. Beyond the promise to be a good citizen, however, these "founding" documents had little further specification. Many colonial foundational documents have oaths for citizens and elected officials internal to them in addition to other foundation elements. Today we still use an oath to produce citizens and to activate the formalities of citizenship (such as the oath-taking in court), so in a real sense we still view our Constitution as equivalent to a covenant because it rests on the actual or implied oaths of all citizens. That is, because new citizens are required to take an oath to uphold the Constitution, it must be assumed that citizens born here did something that was equivalent to an explicit oath at some point in their life.

6. During the colonial era, the terms "agreement" and "combination" were used interchangeably with "covenant" and "compact," both internally and in the titles of documents, to describe what were in fact either political covenants or political compacts.

7. With few exceptions, when the covenant or compact forms were used it was the people who were acting.

8. During the colonial era, when the legislature acted in a founding or foundation amending capacity, the resulting documents were interchangeably termed an "ordinance," an "act," or a "code."

9. With few exceptions, the content of the ordinance form was limited to one or both of the last two foundation elements.

10. During the colonial and early national eras, the terms "frame," "plan," and "constitution" were used interchangeably to describe that part of a political compact that created the institutions of decision making.

11. In approximately two-thirds of the colonial foundation documents the last two founding elements are separated, i.e., one element is found in a document without the other. In approximately one-third of the documents these elements are found together in the same document. Thus, colonists were twice as likely to separate these two elements as they were to combine them, which later led to some confusion as to whether state constitutions should include bills of rights. Some combined these founding elements in the body of the document; many separated the two elements into two sections, calling only that section containing the last element the "constitution"; and some did not contain a bill of rights at all. It is interesting that when the elements were combined in the early state constitutions, the bill of rights was always at the front of the document immediately after or as part of the preamble.

12. The colonists were willing to let the legislatures speak for them in matters of self-definition and the creation of governmental institutions but not when it came to forming themselves into a people or founding a government. The exception to the latter is found in those documents founding a federation or confederation of existing towns or colonies. This distinction led to the natural expectation that legislatures could write state constitutions that addressed only the last two elements. When these documents were complete compacts and therefore included the other elements as well, the expectation was that the documents should be approved by the people as well. When the first group of elements was not present, popular ratification was not always expected.

Part 4 editorial decisions

Whenever one is faced with transcribing historical documents there are a number of decisions that need to be made. One is whether to use the original spelling and grammar. In the case of these documents it was decided to introduce as few emendations as possible and to identify the emendations that might have been introduced earlier by others. One emendation introduced by this transcriber involves the occasional deletion of lists of names at the end of a document. These instances are noted by comments in brackets. Anything else in brackets constitutes an alteration introduced by an earlier transcriber that this one cannot eliminate by reference to the actual text. In many instances this is because the original text no longer exists and we are limited to some transcription in its place. The use of a bracket sometimes indicates a blank or an indecipherable word or words in the original text. In some cases the text that was transcribed had been systematically altered by an earlier transcriber. For example, the oldest surviving text may have been printed during the eighteenth century using the printer's convention of substituting the German *u* for *v* or *i* for *j*. For a while it was common practice when transcribing to emend these printer's conventions, and where an earlier transcriber has done so and that is the text being here transcribed, such transpositions are noted in the introductory remarks to the document or in the footnote at the end.

In every instance the effort has been made to locate a facsimile or accurate transcription for each document. Because there are often competing versions, the texts that are being used for transcription here have been identified in a footnote at the end and then faithfully transcribed. The original text often does not have a formal title at the beginning. In these instances the title used is either the one by which the document has traditionally come to be known, or else a simple descriptive title has been attached. Such traditional or descriptive titles are placed in brackets; any title not in brackets is in the original document.

If one is going to engage in close textual analysis it is crucial that the complete text be made available. This is the practice followed in all but a few documents in this volume. Several of these, such as the Connecticut Code of Law, are so lengthy that to reproduce them completely would extend this volume by several hundred pages. In those limited instances where the complete text is not transcribed, that fact is noted, what is missing is identified, and the place where the complete text can be found is indicated. The editing of these few documents has been based on the presence of repetitive material or material in a given text that is judged at best marginal to the political content. In the occurrences where editing has been used, it was judged better to present a partial text of an important but little-known document rather than to make exclusions because of length.

The order of the documents in the book is based on the universal and essentially invariant practice in early American history to list the colonies (and later the states) in their geographical order from north to south and then to arrange the documents for each colony or state in the historical order of their adoption—from earliest to most recent. Reproducing the documents simply in historical order would result in mixing up those from different colonies, which would make an examination of developments in a given colony quite difficult. Also, because the central colonies were developed much later than those in New England or the South and the latter two areas did not develop at the same rate, a simple historical ordering would also juxtapose documents that had in common only the accident of date. Nor would ordering the colonies alphabetically serve any purpose because it would place, for example, Rhode Island just ahead of South Carolina—a juxtaposition that would lose the benefits of a direct geographical juxtaposition of Rhode Island with Connecticut and South Carolina with Virginia.

Finally, a note is in order concerning dates. The calendar in use through most of the seventeenth century began the new year on March 24—the spring equinox. This resulted in every day between January 1 and March 23 being a year earlier than on our current calendar. Historians frequently list a double date such as February 19, 1634/1635 to indicate that it is 1635 according to our system of reckoning but 1634 according to the system used by the colonists. In every instance in this volume the date given in the title of a document reflects our current calendar system. The date internal to the document may reflect one year earlier. Also, it was common to list a date as “the second day of the first month” or “the second day of the seventh month.” Because the New Year fell in March, the second day of the first month translates as March 2, whereas the second day of the seventh month translates as September 2.

Endnotes

[1.] In fact, this is a recovery of the implications of earlier work by historians. Prominent among the earlier works is that of Andrew C. McLaughlin, *The Foundations of American Contitutionalism* (New York: New York University Press, 1932).

[2.] Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

[3.] The charters and the early state constitutions can be found in Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,* 7 vols. (Washington, D.C.: Government Printing Office, 1907).

[4.] William Blackstone, *Commentaries* 1 (1765), 45.

[5.] Richard Hooker, *Of the Laws of Ecclesiastical Polity,* bk. 5, sect. 15 (New York: Everyman's Library, 1954), lxii.

[6.] For an excellent introduction to the role of covenants in the Jewish political tradition, see Daniel J. Elazar, "Covenant as the Basis of the Jewish Political Tradition," *Jewish Journal of Sociology* 20 (June 1978): 5–37; and Delbert R. Hillers, *Covenant: The History of a Biblical Idea* (Baltimore: The Johns Hopkins University Press, 1969). For the appropriation and development of the covenant idea by Protestants, see Champlin Burrage, *The Church Covenant Idea: Its Origin and Development* (Philadelphia, 1904); and E. Brooks Holifield, *The Covenant Sealed: The Development of Puritan Sacramental Theology in Old and New England, 1570–1720* (New Haven: Yale University Press, 1974). For the nature and development of covenants in America, one might consult any of a great number of volumes. Among the better volumes is Peter Ymen DeJong, *The Covenant Idea in New England Theology, 1620–1847* (Grand Rapids, Mich.: E. B. Erdmans, 1964).

[7.] For the Catholic tradition, see Otto Gierke, *Political Theories of the Middle Ages* (Cambridge: Cambridge University Press, 1900); and Gierke, *Natural Law and the Theory of Society: 1500 to 1800* (Cambridge: Cambridge University Press, 1934). For the Protestant tradition, see Sanford A. Lakoff, *Equality in Political Philosophy* (Boston: Beacon Press, 1964), especially chap. 3.

[8.] Viscount Bolingbroke, *On Parties* (1735), 108.

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