

*Colonial Origins
of the
American
Constitution*

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of the
American
Constitution*

A DOCUMENTARY HISTORY

*Edited and with an
Introductory Essay by*
DONALD S. LUTZ



Liberty Fund

INDIANAPOLIS

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Contents

Preface xv

Introductory Essay xx

NEW HAMPSHIRE

- 1 Agreement of the Settlers at Exeter in New Hampshire, 3
July 5, 1639
The covenant that created Exeter's first town government.
- 2 General Laws and Liberties of New Hampshire, 5
March 16, 1680
An apparent legal code for the province of New Hampshire that also lays out the government's institutions and powers.

MASSACHUSETTS

- 3 Agreement Between the Settlers at New Plymouth 31
(The Mayflower Compact), November 11, 1620
The oldest and most famous colonial political covenant.
- 4 Plymouth Oath of Allegiance and Fidelity, 1625 33
The oldest surviving citizenship oath—designed to bring post-1620 arrivals into the Mayflower Compact agreement.
- 5 The Salem Covenant of 1629 35
Another citizenship oath, but one that functioned for several years as the only basis for town government.
- 6 Agreement of the Massachusetts Bay Company at 36
Cambridge, England, August 26, 1629
An equivalent to the Mayflower Compact but written by the colonists in England before they set sail.

CONTENTS

7	The Watertown Covenant of July 30, 1630 <i>Strictly speaking a church covenant, it is also a political covenant because the settlers were establishing a theocracy.</i>	38
8	Massachusetts Election Agreement, May 18, 1631 <i>The oldest colonial provision for a formal electoral process.</i>	40
9	The Oath of a Freeman, or of a Man to Be Made Free, 1631 <i>Until 1631 almost all freemen had been politically bound by the church covenant. This oath covered nonchurch members.</i>	41
10	The Massachusetts Agreement on the Legislature, May 9, 1632 <i>The first formal specification of Massachusetts political institutions and, although brief, still a protoconstitution.</i>	43
11	Cambridge Agreement, December 24, 1632 <i>Town meetings predated this document, but it is the oldest surviving agreement formally establishing the institution.</i>	45
12	Dorchester Agreement, October 8, 1633 <i>Establishes a town meeting and is the oldest document to create an elected council to run government between meetings.</i>	46
13	Cambridge Agreement on a Town Council, February 3, 1634 <i>An ordinance passed by the town meeting creating a town council.</i>	48
14	Massachusetts Agreement on the Legislature, May 14, 1634 <i>A revision of, and enlargement upon, The Massachusetts Agreement on the Legislature [10], which looked like a constitution and essentially functioned as one.</i>	50
15	The Oath of a Freeman, May 14, 1634 <i>Replacement for The Oath of a Freeman [9], which reflects an evolving sense of citizenship by not requiring church membership.</i>	52
16	Salem Oath for Residents, April 1, 1634 <i>An oath for noncitizen residents.</i>	54
17	Watertown Agreement on Civil Officers, August 23, 1634 <i>Ordinance establishing the town's first civil offices.</i>	56

Contents

18	The Enlarged Salem Covenant of 1636	57
	<i>Much longer than the document it replaces, The Salem Covenant of 1629 [5], this covenant dwells on the values and commitments held in common.</i>	
19	Plymouth Agreement, November 15, 1636	60
	<i>A brief, powerful statement of popular sovereignty—inserted later into the Pilgrim Code of Law [20].</i>	
20	Pilgrim Code of Law, November 15, 1636	61
	<i>Not really a code of law but a political covenant/compact that looks like and serves as a true constitution.</i>	
21	Dedham Covenant, 1636	68
	<i>The agreement that established Dedham's town government.</i>	
22	The Massachusetts Body of Liberties, December 1641	70
	<i>Important code of law that contains most of the rights in the U.S. Bill of Rights, at least eight of which originate here.</i>	
23	The Combination of the Inhabitants upon the Piscataqua River for Government, October 22, 1641	88
	<i>A political compact resting town government on popular sovereignty.</i>	
24	Massachusetts Bicameral Ordinance, March 7, 1644	90
	<i>The first explicit creation of a bicameral legislature.</i>	
25	Massachusetts Ordinance on the Legislature, November 13, 1644	92
	<i>An ordinance altering the size and mode of electing the legislature.</i>	
26	The Laws and Liberties of Massachusetts, 1647	95
	<i>A codification of earlier laws, this organic act also functioned as a constitution for the colony.</i>	
27	Massachusetts Ordinance on Legislative Procedure, October 18, 1648	136
	<i>The earliest formal specification of internal legislative procedures in the colonies.</i>	
28	Towns of Wells, Gorgiana, and Piscataqua Form an Independent Government, July 1649	139
	<i>Three towns in an area claimed by Massachusetts later to become Maine use a compact to create a joint government.</i>	

CONTENTS

- | | | |
|----|--|-----|
| 29 | The Cambridge Agreement of October 4, 1652
<i>The Cambridge town meeting lays out the basic values and principles that are to guide Cambridge's elected representatives.</i> | 141 |
| 30 | Puritan Laws and Liberties, September 29, 1658
<i>A revision of the Pilgrim Code of Law [20] and thus, in effect, an amending of the constitution of the Plymouth Colony.</i> | 143 |
| 31 | An Act of the General Court, June 10, 1661
<i>The basic principles of Massachusetts government and also an attempt to define the relationship between colony and king.</i> | 158 |

RHODE ISLAND

- | | | |
|----|--|-----|
| 32 | Providence Agreement, August 20, 1637
<i>A brief political compact resting on popular sovereignty, and the earliest colonial attempt to separate church and state.</i> | 161 |
| 33 | Government of Pocasset, March 7, 1638
<i>The political covenant that established the Pocasset town government.</i> | 163 |
| 34 | Newport Agreement, April 28, 1639
<i>A brief, general compact establishing town government on the basis of popular sovereignty.</i> | 165 |
| 35 | The Government of Portsmouth, April 30, 1639
<i>An unusual foundation document in that town government is grounded on an implicit civil covenant.</i> | 166 |
| 36 | Plantation Agreement at Providence, August 27, 1640
<i>A compact written and adopted by representatives specifically elected to design a system of government by arbitration.</i> | 168 |
| 37 | Organization of the Government of Rhode Island, March 16–19, 1642
<i>A compact that explicitly establishes a "Democracie," or "Popular Government," for the combined towns of Rhode Island.</i> | 172 |
| 38 | Warwick Agreement, August 8, 1647
<i>The representatives of Warwick establish town government on popular approval of a civil covenant sanctioned by the king.</i> | 176 |

Contents

39	Acts and Orders of 1647	178
	<i>This code of law also contains the institutional description that allows it to function as a constitution for the colony.</i>	
40	Charter of Providence, March 14, 1649	204
	<i>Providence is granted a charter for its government by the colony government at the request of the freemen.</i>	
41	General Assembly of Rhode Island Is Divided into Two Houses, March 27, 1666	207
	<i>The colony's legislature amends the Acts and Orders of 1647 [39] to divide itself into two separate houses.</i>	

CONNECTICUT

42	Plantation Covenant at Quinnipiack, April 1638	209
	<i>An interim agreement which, after fourteen months, was replaced by the New Haven Fundamentals [50].</i>	
43	Fundamental Orders of Connecticut, January 14, 1639	210
	<i>A constitution that defined Connecticut's political institutions as both a colony and a state until 1816.</i>	
44	Guilford Covenant, June 1, 1639	216
	<i>Written aboard ship, this covenant forms a people who agree to later create a government (see The Government of Guilford [49]).</i>	
45	Structure of Town Governments, October 10, 1639	217
	<i>A set of amendments that address the status of the Fundamental Orders of Connecticut [43] as a federal system.</i>	
46	Fundamental Articles of New Haven, June 4–14, 1639	221
	<i>A summary of basic political principles, with the discussion surrounding its adoption that reveals underlying reasoning.</i>	
47	Connecticut Oath of Fidelity, 1640	227
	<i>A citizenship oath that brought those who arrived after 1639 into the 1639 founding compact—the Fundamental Orders of Connecticut [43].</i>	

CONTENTS

- | | | |
|----|---|-----|
| 48 | Capitall Lawes of Connecticut, Established by the
Generall Court the First of December, 1642
<i>An ordinance that greatly reduces the number of reasons,
 compared with English common law, for using capital
 punishment.</i> | 229 |
| 49 | The Government of Guilford, June 19, 1643
<i>The detailed political covenant these colonists had agreed to
 establish in the Guilford Covenant [44].</i> | 232 |
| 50 | New Haven Fundamentals, October 27, 1643
<i>The Constitution of New Haven that guided the colony as a
 federation of towns until it united with Connecticut in 1662.</i> | 235 |
| 51 | Majority Vote of Deputies and Magistrates Required for
the Passage of Laws in Connecticut, February 5, 1645
<i>An amendment to the Fundamental Orders of Connecticut [43]
 clarifying the bicameral relationship.</i> | 239 |
| 52 | Connecticut Code of Laws, 1650
<i>This code serves as a bill of rights and as part of Connecticut's
 colonial constitution.</i> | 241 |
| 53 | Preface to the General Laws and Liberties of Connecticut
Colony Revised and Published by Order of the General
Court Held at Hartford in October 1672
<i>Designed to replace the code of laws passed before New Haven
 joined Connecticut (see Connecticut Code of Laws [52]), the
 preface shows that the code is considered to be part of the
 foundation covenant.</i> | 250 |
| 54 | Division of the Connecticut General Assembly into Two
Houses, October 13, 1698
<i>A constitutional ordinance that officially established the
 bicameralism that had been implicit but imperfectly operative
 since 1639.</i> | 253 |

NEW YORK

- | | | |
|----|--|-----|
| 55 | A Letter from Governor Richard Nicolls to the
Inhabitants of Long Island, February 1665
<i>The order that established a representative legislature in
 New York.</i> | 254 |
|----|--|-----|

Contents

- 56 Charter of Liberties and Privileges, October 30, 1683 256
A constitution and bill of rights adopted by the legislature.

NEW JERSEY

- 57 Fundamentals of West New Jersey, 1681 263
A constitution adopted by the New Jersey legislature.

PENNSYLVANIA

- 58 Concessions to the Province of Pennsylvania, 1681 266
An agreement that established the terms of settlement for Pennsylvania.
- 59 Charter of Liberties and Frame of Government of the Province of Pennsylvania in America, May 5, 1682 271
The first Pennsylvania constitution, including a bill of rights, with a preface laying out the principles underlying it.
- 60 An Act for Freedom of Conscience, December 7, 1682 287
Establishes freedom of conscience for all those who profess a minimal belief in God.
- 61 Pennsylvania Charter of Liberties, 1701 290
The Frame of Government (constitution) that replaced the 1696 frame and defined Pennsylvania government until 1776.

MARYLAND

- 62 Orders Devised and Published by the House of Assembly to be Observed During the Assembly, February 25, 1638 297
Procedural rules governing the deliberative process in the legislature.
- 63 Act for Establishing the House of Assembly and the Laws to Be Made Therein, 1638 299
Political compact that formally established the Maryland legislature.
- 64 An Act for Church Liberties, 1638 302
One of the earliest statements on religious freedom, this compact extended that freedom to Catholics in Maryland.

CONTENTS

- | | |
|---|-----|
| 65 An Act for Swearing Allegiance, 1638
<i>A typical oath confirming English citizenship that together with the oath of a local political covenant expresses a dual citizenship in a de facto federal structure.</i> | 303 |
| 66 An Act What Persons Shall Be Called to Every General Assembly and an Act Concerning the Calling of General Assemblies, 1638
<i>A temporary constitution that grounds political institutions on popular sovereignty—proposed by the Lord Proprietary and approved by the freemen gathered in a General Assembly.</i> | 305 |
| 67 An Act for the Liberties of the People, 1638
<i>A brief, temporary bill of rights.</i> | 308 |
| 68 Maryland Toleration Act, April 21, 1649
<i>Established the broadest definition of religious freedom in seventeenth-century colonial America until the establishment of Pennsylvania.</i> | 309 |

VIRGINIA

- | | |
|--|-----|
| 69 Articles, Laws, and Orders, Divine, Politic, and Martial for the Colony in Virginia, 1610–1611
<i>Based on martial law rather than on consent and not in any sense covenantal, the first colonial code of law reflects the importance of religion to Virginia political culture.</i> | 314 |
| 70 Laws Enacted by the First General Assembly of Virginia, August 2–4, 1619
<i>The first colonial political compact of any type, this code of law is also the first passed by a representative body.</i> | 327 |
| 71 Constitution for the Council and Assembly in Virginia, July 24, 1621
<i>Formally establishes a bicameral legislature for Virginia.</i> | 336 |
| 72 Laws and Orders Concluded by the Virginia General Assembly, March 5, 1624
<i>A major amendment to, and update of, Laws Enacted by the First General Assembly [70].</i> | 339 |

Contents

NORTH CAROLINA

- 73 Act Relating to the Biennial and Other Assemblies and
Regulating Elections and Members in North Carolina,
1715 345
*Formalizes the legislature and the electoral process for selecting
representatives.*

SOUTH CAROLINA

- 74 Act to Ascertain the Manner and Form of Electing
Members to Represent the Province, 1721 350
*A legislative act that defines the basis for representation in South
Carolina and lays out a fair electoral process.*

GEORGIA

- 75 Act to Ascertain the Manner and Form of Electing
Members to Represent the Inhabitants of This Province
in the Commons House of Assembly, June 9, 1761 359
*The first formal definition of the electoral process underlying
representative government in Georgia.*

CONFEDERATIONS

- 76 The New England Confederation, 1643 365
*A true confederation and the first attempt to unite several colonies
created by different charters.*
- 77 The Albany Plan of Union, 1754 370
*Although never ratified, the first serious attempt to unite all the
colonies under a common compact.*
- 78 The Articles of Confederation, November 15, 1777 376
*The first U.S. Constitution—a compact that created a
confederation.*
- Appendix: Unadopted Colonial Plans of Union 387*
- 79 William Penn's Plan of Union, February 8, 1697 389
*The first proposal for uniting all the colonies under a general
government.*

CONTENTS

80 Joseph Galloway's Plan of Union, 1774	391
<i>The immediate precursor to the Articles of Confederation.</i>	

<i>Bibliography</i>	395
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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

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).

PREFACE

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-

Preface

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 execu-

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).

tive 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

Preface

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.

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

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 Constitutionalism* (New York: New York University Press, 1932).

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

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