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Title: Heterogeneity and Federal Systems: Group Rights, Individual Rights, and
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Abstract

In society, the term heterogeneity may be used to describe an asymmetrical distribution of political resources, variation in natural talents, different interests or utility functions, or unequal claims to natural resources. When applied to the physical environment, "heterogeneity" can signify important differences in resource characteristics and, as a consequence, the need to look at resource boundaries as well as political boundaries to understand the relationship between natural and social worlds. Political institutions can advance or retard cultural heterogeneity and diversity in the physical environment. Federal systems explicitly embrace complexity, heterogeneity, and complementarity as basic principles of institutional development. As a form of polycentric authority, federalism facilitates cultural heterogeneity by enabling diverse, interdependent peoples who occupy a single geographical space to exercise shared prerogatives of rule. Federalism relies on commonly held principles of collective decision making and shared values. This paper considers the origins of common value and political practice in the example of American federalism, taking Alexis de Tocqueville's observations of American democracy as a point of departure. In America, the "federal principle" developed during the colonial period as individuals and peoples united through the act of covenanting. Covenants can unite independent polities without destroying their existing governments, suggesting that federalism provides one method of political integration that preserves cultural diversity.

Heterogeneity and Federal Systems: *Group Rights, Individual Rights and Minority Citizenship*

"Nothing in history [is] more worthy of sorrow and pity," one of Democracy's most astute analysts, Alexis Tocqueville wrote, "[than a nation experiencing a democratic revolution] without that concomitant change in the laws, ideas, customs, and morals which [is] necessary to render such a revolution beneficial."¹ Democracy manifested in politics and philosophy "the most ancient and permanent trend in history," increasing social equality. Along with the obvious benefits of increasing social equality, Tocqueville believed, came latent, socially destructive habits of heart and mind. In democracy, Tocqueville observed a love of uniformity, an intense pressure to

conform, and an impulse to homogenize society, which, along with possessive individualism propelled equality along a destructive course. Each increase in equality conditioned habits of thinking and acting that make greater social leveling desirable, lending an inflationary quality to equality's progress. Equality had an inescapable hold on history, not only because each material change made greater equality possible, but also because the principles that justified the destruction of privilege made remaining material and political inequalities indefensible. As social equality increased, not only inequality, but difference itself could become intolerable, Tocqueville observed.

Tocqueville predicted that our understanding of right and sovereignty would change profoundly as we increasingly measured equality in terms of uniformity. Demands for uniformity would undermine right, the original object of equality, and individual agency would capitulate to a tutelary state that administered a homogenous mass society. "Equality," Tocqueville concluded, "[can be] an accessory of absolutism . . . [or] the companion of liberty."² His argument is instructive for any society challenged to distinguish equality from uniformity in an effort to preserve cultural diversity in the wake of an irresistible democratic tide.

Equality, Uniformity, and Democratic Despotism

Increasing equality makes it possible to imagine a polity in which "the people" are sovereign, but the principle of equality alone cannot insure self-government. Equality can diffuse throughout society a sincere love of law and sense of civic duty, but increasing social equality can also promote self-regard at the expense of public life. For the "sovereignty of the people" to be more than a revolutionary slogan, equality must pertain to rights to take part in public deliberation and decision-making, the basic activities of self-government. Individual right must not only enable, but also oblige collective action.

In contrast to understanding political liberty as the means for participating in the community's life, democratic citizens can apply the principle of equality only to their individual material conditions. Preoccupied with their private welfare, they disregard their most important possession, the "public," constituted collectively through the exercise of individual rights. If rights are separated from a public purpose, individuals, as equals, form government by consent, as the first, but, perhaps, last use they make of their liberty. When equality took this course, a polity might yet be called democratic, Tocqueville maintained, but it would not be self-governing. Order born of possessive individualism favored the mild oppressions of a tutelary state, "a new physiognomy of servitude," democratic despotism.

In Tocqueville's depiction of democratic despotism, loyalty and confidence in other citizens and communities are sacrificed to a tightening bond between the obedient citizen and governing state. We no longer observe citizens exercising their capacities for self-organization, or loyalties to self-governing communities. Tocqueville instead described a homogenized, equal, multitude "incessantly endeavoring to produce the petty and paltry pleasures with which they glut their lives." They live apart, strangers to all but family and friends. Seeking uniformity to ensure the immediate gratification of simple pleasures, this individual can be easily governed. Instead of destroying such a people through tyrannical oppressions, the government they create masters, compresses, enervates, and stupefies them.³ A self-governing nation is reduced to "a flock of timid and industrious animals, of which the government is the shepherd."⁴

Tocqueville struggled for words to express the oppressive regime that the love of equality encourages. "Despotism" and "tyranny" are inappropriate, he wrote, "the thing itself is new, and

since I cannot name, I must attempt to define it."⁵ He described this society in terms of three sets of relationships: (1) the individual and the multitude of citizens, (2) this social mass and government, and (3) the individual and government. Describing the first relationship, he wrote of "an innumerable multitude of men, all equal and alike, incessantly endeavoring to procure the petty and paltry pleasures with which they glut their lives." This individual lives as strangers to the fate of others, with only "his children and his private friends constitut[ing] for him the whole of mankind." The remainder of society no longer enters such a person's mind and even the bonds of kinship have a limited hold. Tocqueville concluded, "he exists only in himself and for himself alone; and if his kindred still remain to him, he may be said at any rate to have lost his country."⁶

An "immense, tutelary power," stands above such a society, taking "upon itself alone to secure their gratifications and to watch over their fate," with a power that is "absolute, minute, regular, provident, and mild."⁷ Such a power could be compared to the authority of parents, he explained, if it helped the citizen mature, but its purpose is the opposite, to maintain the citizen's dependence in perpetual childhood. Speaking of the relationship between society and government, he contended that the government willing labors for the citizens' happiness, "but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances." What remains for the government to do, Tocqueville asked, "but to spare them all the care of thinking and all the trouble of living?"⁸

The government he described gently clutches each individual, slowly tightening its grasp, shaping every citizen with a barely perceptible power. Describing the relationship between individual and government, Tocqueville wrote that the "supreme power covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd." In this mild despotism, "the will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting." This kind of power "compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd."⁹ Daily such a government "renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself." The principle of equality causes this self-administered oppression, as it prepares citizens not only to endure the commands of the shepherd, but "often to look on them as benefits."¹⁰

As an accessory of absolutism, the principle of equality promotes a public philosophy of individualism that makes popular sovereignty itself an instrument of paternalistic government. A gentle kind of servitude could be established under the framework of popular sovereignty, while maintaining "some outward forms of freedom."¹¹ A tutelary state with a veneer of self-government would satisfy the "two conflicting passions" of the age of equality: the desire to be led and the drive to remain free. By devising "a sole, tutelary, and all-powerful form of government . . . elected by the people, they combine the principle of centralization and that of popular sovereignty; this gives them a respite: they console themselves for being in tutelage by the reflection that they have chosen their own guardians."¹²

From materialism as a manifestation of individualism, democratic people derive a "love of public tranquillity" as an "indiscriminate passion," leading each citizen "to conceive a most

inordinate devotion to order."¹³ An aversion to risk in commerce evolves into a mania for control and order in public life, resulting in policies that promoted equality, but diminished liberty. Although any particular individual might desire the liberty to experiment and innovate, each wishes success assured. Each person demands certainty and uniformity, increasing the tutelary power that reigns supreme, assuring the equal subjection of all to routine and control.¹⁴ So long as citizens seek uniformity and regulation the community is easily governed, and the skills of self-government as easily forfeited. Without the means to address their common problems, the citizens' demands can only be met by increasing the central authority's power. Tocqueville concluded, "the principle of equality suggests . . . the notion of a sole, uniform, and strong government," making centralization the natural consequence of democratic government, while "individual independence and local liberties will ever be the products of art."¹⁵

Tocqueville reached his conclusion that democratic governments will tend toward centralization by paths that connect the principle of equality to individualism, materialism, conformity, and the loss of civic engagement. Self-government, Tocqueville concluded, requires that democratic polities make a practical commitment to liberty as great as their love of equality. Equality is more easily established, more permanent, and, Tocqueville thought, more readily worshipped than liberty. Equality's superficial gratifications are immediate, its deleterious consequences more subtle and long lasting. Equality can increase without liberty. Liberty seems at best inessential, and can even appear to be an obstacle to equality's progress. Equality privately profits the individual, while its costs are diffused throughout the whole political body. Liberty's private benefits seem distant. Its yoke, borne in solitude, exacts duties for the sake of universal, often abstract virtues. The passion for liberty that self-government requires, Tocqueville believed, is as ephemeral and its institutions are as vulnerable as equality is irresistible.

History sets every nation on a course of increasing equality, but equality's path is not everywhere the same. Temporal, cultural, and environmental conditions, as well as a polity's founding principles, ideas, and institutions influence the way in which equality creates and modifies social and political relationships. Within the bounds of pre-existing social traditions and physical conditions, individuals and nations could choose how they would adapt to equality's inevitable advance. But complete self-determination is as impossible for communities as it is for an individual. Each person's life is circumscribed by "a fatal circle . . . beyond which he cannot pass; but within the wide verge of that circle he is powerful and free."¹⁶ Equality's effects will be determined by antecedent conditions, as well as by individual and collective choices. "The nations of our time cannot prevent the conditions of men from becoming equal," Tocqueville concluded, "but it depends upon themselves whether the principle of equality is to lead them to servitude or freedom, to knowledge or barbarism, to prosperity or wretchedness."¹⁷

America, for Tocqueville, represented the shape of things to come, not as a model democracy, but as an experiment in which citizens could reflect on the choices equality posed. America represented a "great experiment," an attempt "to construct society upon a new basis."¹⁸ A detailed exposition of this experiment, Tocqueville explained to his boyhood friend, Louis de Kergorlay, might "indicate to men, if it is possible, what they must do in order to escape from tyranny and degeneration while becoming *democratiques*."¹⁹

America's Covenantal Traditions and the Federal Principle

American society had been constructed on a new basis, employing "theories hitherto unknown or deemed impractical," creating, Tocqueville said, "a spectacle for which the world had

not been prepared by the history of the past." Tocqueville attributed the development of America's federal political institutions to the covenantal tradition bequeathed by America's Puritan founders. Covenants were new in two senses; they not only suggested an alternative to foundations based on force or fate, but also offered an alternative to other conceptions of consent-based origins that were more inclined to Leviathans than self-government.²⁰

In colonial America, citizens covenanted to form a political body, obligating themselves to broadly reciprocal, perpetual relationships. God was called as a witness and, often, as a guarantor of such pacts. In some cases, God was even made a party to the agreement. Once such covenants had been established, the actions of individual citizens were judged not only in terms of positive law, but also according to eternal, transcendent principles to which each person and the political body as a whole were, by their consent, bound. Citizens were obliged not only to do what law commands, but also to undertake what the spirit of their agreements necessitate. Early American covenants acknowledged the relationship of individual right to transcendent purpose and assumed that reasoned private judgment could be harmonized with the revelatory basis of the community.

Equality, a central principle in covenantal thinking, pertained to the ability to give or withhold consent.²¹ In the cosmology of the English and Continental Reformed Protestant who colonized New England, consent was viewed as a natural capacity. The requisite abilities to reason as well as the moral capacity to reason rightly were assumed to be equal for those who signed the *Fundamental Orders of Connecticut*, the secular covenant that Tocqueville's primary example of colonial law. In such documents, equals covenanted to establish political bodies that would preserve their fundamental equality to consent. These covenants created self-governing polities comprised of institutions that required members of the community to continue their participation in religious and secular associational life.

Covenant Theology and a Political Theory of Consent

The Mayflower Compact and The *Fundamental Orders of Connecticut*, agreements from which Tocqueville draws much of his analysis, cannot be fully understood as political instruments outside of the context of Reformed Protestant theology. Likewise, the terms liberty, freedom, and consent had theological as well as political import in colonial New England. Secular compacts embodied a political theory and provided the practical means of governing, but those who authored and employed them deduced the rules of their social agreements from a prior covenant with God. In the founding of Massachusetts Bay, civil order originated in the covenant of grace, a voluntary partnership in which God delivered humanity from depravity to order.²² For some Reformed Protestants the significance of this covenant was limited to its importance for individual salvation, but the New England colonists derived from it social and political implications as well as a theology for the collective enterprise of congregating as a church community. The New England elect not only participated in the internal or personal covenant of grace, but also established external church and social covenants between God and the entire church or political body. Taking the Latin root for covenant, foedus, they applied their federal theology to every aspect of the polity. In Massachusetts Bay settlement the Reformation theology of the covenant of grace developed into a political principle that linked equality and liberty through the principle of consent.

In federal theology, an omnipotent God freely limited an omnipotent power by entering into an agreement, promising not only to deliver the faithful, but also to supply belief, the means

necessary for humans to fulfill their part of the bargain. The covenant of grace is a voluntary agreement entered by partners who are equally free to choose or reject this bond.²³ In this context, freedom and an equal ability to consent are viewed as natural capacities. Federalists assumed that every soul must have been given the capacity for faith and, given the opportunity, every soul must be equally able to use that gift to assume the covenant of grace.²⁴

By emphasizing the voluntary nature of this internal covenant, federal theology imparted equality to a relationship between parties of inherently different status. Whatever their relative power before covenanting and however power is distributed by the terms of the agreement, the parties to a covenant are equals in their power to assume or reject the bond. The covenant between God and humanity transformed an ontological relationship of inequality into a pact based on equality, by assuming that free agents started from absolute independence and consented to bind themselves in mutual obligation.

The covenant of grace lay a reliable foundation for subsequent bonds among human beings. In covenant theory God willingly accepted terms and conditions that permanently limited the Omnipotence's capricious use of power. On God's part, covenant theory maintained, the will to observe such a covenant would accompany the power to honor it, since breaking a covenant was an act of errancy and an infallible God would not be expected to behave in a fallible way. A covenant with God transfigured cosmic uncertainty into predictability by placing God's omnipotent will within the parameters of rationality. As God presumably had the power to keep the divine part of the bargain, individuals who entered the covenant, receiving the grace necessary to keep their bargain, found their pact assured.²⁵ The social consequences of such surety were as profound as the result for individual salvation. In covenant theory, God's universe could be submitted to the scrutiny of science and God's law could be taken up by reasoned choice, not unreflecting instinct. The capacity for faith brought humanity to the threshold of bargaining, but other human faculties, including reason, rationality, and prudence insured the bargain's terms. Consent, the cornerstone of federal theology, united reason and faith.

Federal theology disdained unreflecting obedience. A rational creature that covenanted could not act in a morally responsible way simply by doing what God wills. The covenant between God and humanity represented an agreement, an act in which parties come to terms about the content of the transcendent good, justice and righteousness. Duties that once were commanded would, in covenanting, be freely assumed. Assent was rational because the law conformed to the dictates of reason. Obedience followed reflection because reason had been rightly informed, leaving the enlightened will no rational choice but to obey. Consent, together with the perpetual nature of covenantal commitments, called for a new understanding of sovereignty. A covenant could be distinguished from other forms of law, because its terms are not conditioned by the sovereignty of a lawgiver who is external to the pact. Instead covenants are maintained by the exercise of self-control and self-rule by those internal to the pact.

Covenants in New England

Tocqueville drew his conclusions about colonial government from Congregational government as it was instituted in Massachusetts under John Winthrop's leadership and, in Connecticut, with Thomas Hooker. Tocqueville found that Congregational institutions could not be adequately understood in terms of nineteenth century political distinctions between aristocracy and democracy. Those who treated Congregationalism philosophically in the seventeenth century were careful to show that their views of moral equality justified neither popular ("democratical")

government, nor the complete supremacy of the individual. Congregational government was representative government. In some colonies (e.g. Massachusetts) representation came from God's elect; other colonies (e.g. Connecticut) functioned under more popular institutions.²⁶ In either case, church government and the secular governments that followed emphasized the collective capacities of a political body or a body of the faithful. Each person could be accorded equal respect, regardless of social, political or ecclesiastical position, and each enjoyed an equal natural capacity to give or withhold consent in forming the secular or sacred body. No person, representative or elector, could pronounce authoritatively on divine will by drawing conclusions from a private search for truth.²⁷ No person acted in this or in any other way with unlimited authority.

In 1648-49 New Englanders explained their ways to their brethren in England in the *Cambridge Synod and Platform*. Richard Mather, the work's primary author, described the governing structure of New England's congregational churches, church powers and its relationship to civil government. The *Cambridge Platform* defines the "Ecclesiastical Polity or Church Government" as "the Forme & order that is to be observed in the Church of Christ upon earth, both for the Constitution of it, & all the Administrations that therein are to be performed."²⁸

Scripture, the only sure source of God's revealed will, portrayed the individual as part of a covenanted body. Following the archetype of God's elect in the Old Testament, regenerated individuals "gathered" a church as a result of public profession. Congregational membership represented a visible sign of individual election for regenerate individuals who covenanted among themselves and, as one body, covenanted with God to form a church.²⁹ The mutual consenting involved in a covenant, said Thomas Hooker, is the "sement" which solders together all societies, political or ecclesiastical; "for there is no man constrained to enter into such a condition, unlesse he will: and he that will enter, must also willingly binde and ingage himself to each member of that society to promote the good of the whole, or else a member actually he is not."³⁰

The church covenant established an ecclesiastical government in accordance with God's revealed will. A conscious act also established a due form of civil government to assist the community in its promise to live according to God's law.³¹ The Saints³² "must have a Visible-Political-Union amongst themselves, or else they are not yet a particular church. . . . So, Saints or believers in judgment of charity, are not a church, unless *Orderly* knit together."³³ The means for joining individuals or "*Form* is the *Visible Covenant*, Agreement or consent wherby they give up themselves unto the Lord, to the observing of the ordinances of Christ together in the same society, which is usually called *Church-Covenant*. For wee see not otherwise how members can have *Church-power* one over another mutually."³⁴

The document describes church and civil governments operating in related, separate spheres. "Church government stands in no opposition to civil government," Congregationalists explained. "The power & authority of Magistrates is . . . for helping in & furthering the good works of the church."³⁵ Church and civil elections not only reflected God's will but also proceeded with God's assistance. God defined the authority and purpose of church offices such that the officers themselves did not author laws, but applied "the rules of order and comeliness taken from the Scripture and common sense." New England Puritans held that "neither the church, nor the meanest member thereof is further bound unto these determinations, than they appear to agree with order, and comeliness." Ministers and civil officers are not in anything "to be obeyed for the authority of the commander, but for the reason of the commandment, which the ministers are also

bound in duty to manifest, and approve unto the conscience of them over whom they are set.”³⁶ Office and official were separated in electoral practice, the congregation and church government were formed by consent, and the authority of the elected church elders was limited by higher authority and the approval of the consciences of the electors. While absolute, transcendent laws bound the elders, the approval of conscience was, however, viewed as a public, collective act, rather than a private, individual judgment. A *people*, not an aggregate of individuals, were the source of the officer’s appointment; God was the source of the office and also the source of authority for the people and their representatives.

God, Puritans believed, was not committed to preserving the orthodoxy or purity of any human institution. New Englanders, like all Puritans, distinguished God’s will as revealed in Scripture from an impenetrable hidden will. Humanity could not attain God’s knowledge or a complete knowledge of God and however concise and systematic their theology, it remained limited as did their vision of the purpose of creation. No human effort at discerning truth was infallibly inspired. Electors and officers in human institutions must never lose sight of the absolute boundary between God’s will revealed in scripture and God’s impenetrable hidden will. No individual had access to God’s secret will and claims of immediate, personal inspiration were viewed with suspicion.

“Synods, orderly assembled,” debated and determined controversies of faith and conscience, interpreted Scripture for the purposes of worship and a well-governed church, heard and corrected cases of maladministration and corruption, but did not “exercise Church censures in way of discipline.”³⁷ The synod’s authority was limited to loving arbitration in a general atmosphere that assumed a high degree of consensus. “Synods directions & determinations, so farr as consonant to the word of God, are to be received with reverence & submission.” They are binding “only for their agreement therewith” and “for the powr wherby they are made, as being an ordinance of God appointed therunto in his word.”³⁸

The *Cambridge Platform* describes a federal governing structure among independent churches as well as a federal relationship between civil and ecclesiastical authority. This characteristic, perhaps more than any other aspect of colonial covenantalism, struck Tocqueville as the source of America’s novel political institutions. Covenant theory established a federated church polity, governed by explicit law, interpreted by church elders who were elected by the consent of church members – notions that combined ideas of local self-determination with reasoned consent.

From federal theology emerged a political practice and theory that united principles of authority and autonomy. Far from separating the individual’s “private” domain from “public” commitments, federal theology and civil practice understood the individual’s internal covenant as a public concern that compelled and remained embedded in the external church and civil covenants. The classic expression of the relationship of the internal and external covenants and their significance for individual right and civic duty is John Winthrop’s discussion of federal liberty.

Civil Liberty and Covenant Theory

The circumstances of Winthrop’s speech as well as his theo-political exposition itself illustrate covenantal thinking. Winthrop had been impeached after he intervened in a local dispute involving the selection of militia leadership. In New England not only churches and civil governments were formed by covenants, the militia also used such agreements and selected their

officers by majority vote.³⁹ The militiamen of Hingham selected their captain, who then “fell out of favor with his neighbors.”⁴⁰ They held a second election and chose a different representative. Winthrop, then deputy governor, stepped in, accusing the majority of capriciousness, encouraging insubordination of lawful authority, and a general disregard for the spirit of covenant. The local majority of Hingham succeeding in having Winthrop impeached for exceeding his legitimate powers by intervening in local affairs and impeding the lawful majority’s will. Winthrop was acquitted and at the end of his trial presented the speech on civil liberty that figures so prominently in *Democracy*.

Quoting Winthrop at length, Tocqueville showed that the Puritans viewed the terms civil, federal, and moral as synonymous, implying that these adjectives modified the liberty of people in society according to God’s commandments as well as the polity’s legal restraints. Tocqueville’s synopsis of Winthrop’s position holds that “federal liberty” emphasizes the relationship of individual right to “the covenant between God and man, in the moral law, and the politic covenants and constitutions, among men themselves.”⁴¹ Political right is coextensive with the liberty necessary to make and maintain covenants. In Winthrop’s view the regenerated have submitted themselves to God’s authority, agreeing to do “that only which is good, just, and honest.”⁴² Civic duty, he explained, originates in the freely assumed obligation to follow God’s law. Transcendent law, God’s expressed will as revealed in Scripture, limited political authority as well as individual will.

Covenanting, recognizing the authority of God’s law and agreeing to its terms and conditions, explicitly delineated a range of civil behaviors, separating them from the entire possible range of actions available in nature. In covenanting, conscious choice replaced submission to the tides of the universe, as federal liberty supplanted the natural liberty that humanity holds in common “with beasts and other creatures.”⁴³ Prior to covenanting a person was a creature controlled by the unconscious motion of the universe. Regeneration restored God’s law and, once that law was known, this consciousness made choice and order possible. The liberty available to the conscious being was utterly different from the bondage of unconscious, natural freedom.

Puritan political theory shared a number of basic propositions with the developing contractarian explanation of political authority. Consent was the cornerstone of each theory, but Puritans emphasized God’s role in establishing a regenerated soul as the basis for the liberty to consent. Puritan political theory was explicitly derived from theological doctrine. For Winthrop, humanity’s choices were not merely between “a nasty, brutish, and short” life in a Hobbesian state of nature and life in a secure, productive commonwealth. Winthrop saw the alternative as between depravity, a natural liberty to do whatever a person “lists, . . . a liberty to evil as well as to good,” and order, the liberty to do only the good, just, and honest.

Winthrop’s speech outlined the three covenants of the bible commonwealth, the internal covenant of grace and the external church and “national” covenant that created ecclesiastical and civil authority. According to Winthrop, the individual’s covenant with God contained a promise to create a society in which God’s law is practiced by covenanting with other regenerated individuals. Covenanting required the community’s harmonious intention and action as well as individual consent, for as Winthrop explained, “We must be knitt together in this worke as one man.”⁴⁴ Assuming that the individuals who comprised the congregation had bound themselves in righteousness, it made perfect sense to think that public order should be adjusted to fit the claims of goodness, justice, and honesty. Individual and community were governed for their spiritual

well-being as well as for their material existence by a government constituted to enable people to live good, just, and honest lives. Civil government assisted ecclesiastical government in this endeavor.

Committing themselves to the rule of law within three interrelated expressions of authority, the people of Massachusetts Bay had established civil government that was bound by fundamental law and took its orders from the people who elected representatives to fill offices established by God. In entering this covenant they retained the liberty that “is maintained and exercised in a way of subjection to authority.”⁴⁵ They relinquished natural liberty, which, Winthrop contended, “cannot endure the least restraint of the most just authority.” In a civil society constituted by just authority, actions predicated on natural liberty undermine peace and oppose God. Those who persist in opposing God are evil; any political authority that undermines civil liberty “is not authority, but a distemper thereof.”⁴⁶

The particular distemper of authority that occasioned Winthrop’s speech involved, he believed, a usurpation of power by an unauthorized majority. Winthrop’s adversaries contended that he had exceeded the limits of his office by blocking that majority’s will. All parties to the dispute agreed, however, on the importance of a public hearing and adjudication. Consent prevailed over rule by force and Winthrop permitted his electors to judge his actions. Human institutions were imperfect and everyone bore the responsibility of doing justice, challenging usurpers and correcting the errors of those who filled God’s offices.

In Winthrop’s words Tocqueville found the scaffolding of covenantal theory. The Puritans had created a government based on principles of moral equality and particular kind of political liberty. Members of a community were joined in partnerships as individuals and as a corporate body. Authority originated with a God who initiates an agreement to limit omnipotence, sharing power with human beings. All subsequent covenants follow this form; power was distributed and shared, all authority was expressly limited by the original terms and conditions of the covenant of grace. Individuals consented to follow just authority, but consent did not relieve them of their obligation to continue to evaluate human attempts to do justice. All human institutions were vulnerable to failure. Civil and ecclesiastical governments must take account of human fallibility in deciphering God’s revealed will. The power of reason and choice, combined with human limitation, created a burden too great for complete self-reliance and the costs of utter self-devotion were too great to permit absolute liberty. The human condition was such that Winthrop claimed that individuals depended absolutely on community for their spiritual well being as well as their material good. Human beings not only needed the corporate enterprise, they also acquired a communal obligation in their internal covenant. The condition to do what is good, just, and honest, Winthrop’s paraphrase of God’s stipulation that Abraham “do righteousness and justice,” contained an explicit social dimension in Scriptural exegesis. Individuals could not turn inward to accomplish righteousness and justice outside of society. The church was a means to greater discernment, the minister’s sermon a means to salvation, and civil institutions supported this ecclesiastical order.

Local Liberty and Covenantal Practice

Puritan religious doctrines facilitate a way of life premised on the ideals of consent and voluntarism. Yet as important as the colonists’ religious practices were to New England’s intellectual and institutional environment, they only explained part of America’s developing political culture. The Massachusetts Bay colonists were not only Puritan, but English,

Tocqueville reminded his readers, and the “fruitful germ of free institutions,” townships and local liberty, “was deeply rooted in the habits of the English.” Historian T.H. Breen provides ample evidence supporting Tocqueville’s claim. American traditions of local liberty and popular participation, his research shows, reflect the colonist’s experiences with a centralized government in Stuart England.

Dozens of settlements were established in the first decade of Massachusetts Bay colonization. These settlements are characterized as much by their diversity and independence as by the similarity of the colonists’ education, belief, and language. Breen argues that “local cultural variations – indeed the existence of enduring sub-cultures,” figured more importantly than broad cultural similarities in the daily life of these colonial polities.⁴⁷ The settlements, he shows, established their particular institutions in response to the specific conditions and events they had experienced in England just prior to emigrating from their centuries-old communities. Stuart attempts to centralize control of civil, ecclesiastical, and military affairs, he contends, threatened local liberty, disrupting the fabric of daily life for the common souls of English towns and rural places. English politics not only motivated the Great Migration, daily experience in pre-Revolutionary England established the issues and values that would inform politics in the New World. Common experiences gained from resisting Stuart absolutism helped establish broad areas of agreement about independence and self-determination, but the particular circumstance of a group’s departure determined how local liberty would be expressed and which specific liberties a given community would not compromise.

“Chain migration,” in which the village leadership recruited neighbors for a group exodus, also contributed to the diversity of colonial settlements. Immigrating as a community, the colonists maintained their specific habits and customs, ideas about land division suited to specific environments, as well as local methods of establishing church membership, founding town government, and the relationship between civil and ecclesiastical authority. Town covenants reflected Puritan piety by citing religious principles as cause for civil institutions, but, Breen says, they also clearly claimed for the signatories “a sense of local identity, a rationale for excluding outsiders, and a means of achieving continuity between present and future generations.”⁴⁸ Religious belief may have been the primary source of the colonial commitment to settle disputes through loving arbitration, but Breen finds an important secular result of voluntary agreements that promoted harmony. Such piety, he argues, “also reduced the likelihood that colonial magistrates would intervene in local affairs.”⁴⁹ Secular and sacred covenants overlapped in theory and practice, enabling individual settlements to implement these agreements in ways suited to the peculiarities of their situation. As Tocqueville had suggested, neither the spirit of liberty nor the spirit of religion alone prevailed in New England.

Framing Winthrop’s controversy with the people of Hingham in light of this information, reveals the tensions between colony-wide authority, represented by Governor Winthrop and the General Court, and the equally legitimate source of authority found in popularly controlled local institutions. From a Tocquevillean perspective, the conflict concerns not only questions of jurisdiction, but an even more basic disagreement about the scope of community interests. The broad themes of civil liberty and civic duty enjoyed universal assent, but the community’s exact constitution and the means of assessing the common good were divisive issues that often surface in local decisions such as militia elections.

The factions involved in the Hingham case were polarized enough to divide Hingham church. Winthrop approached the constitutional crisis from a federal mindset. Federal theory

held that “local” concerns often transcended village boundaries not only as physical effects spilling over into neighboring communities, but in their spiritual effects as well. Although the latter were less tangible, for Winthrop they were of far greater significance than any material externality. Just as Congregationalists objected to basing church membership solely on a person’s physical location, “community” was similarly more than a matter of geography. For Winthrop, dissensus and faction within a covenanted community could not be settled by force of majority opinion. A greater level of consensus was necessary and if that required an imposition of authority from outside the dispute, so be it. However Winthrop’s personality might have weighed into the debate, his theoretical position cannot be ignored as a merely elitist tract. Government by consent – ecclesiastical or civil – requires limits on all authority, including a majority with the votes necessary to enforce its will. Federal designs are premised on this fact as well as the belief that significant interdependency (a function of shared belief and shared authority) promotes self-imposed limits. From a federal standpoint (whatever Winthrop himself thought of broadening the electoral franchise), the values of local liberty (or, later, individual liberty) and community cohesiveness are not contradictory aims.

The essence of the federal view could be found in the congregational system itself. Congregationalists portrayed their individual churches as autonomous, but nevertheless linked to a greater body of covenanted communities. In many significant cases congregations acted in coordination to achieve the commonly perceived good, just, and honest path. Such unions were voluntary, demonstrating the federal principle of forming associations of associations as a way of uniting individual bodies while preserving those associations’ integrity. The theology and political theory inspiring such unions was, in Winthrop’s view, easily distinguished from usurpation or centralized control of dependent entities.

Characterizing Winthrop’s orientation as federal does not imply that those who opposed him understood the basic problem of authority in a fundamentally different way. Breen’s evidence suggests that the majority of colonists were primarily concerned first with their own subsistence, including, but seldom exceeding, what happened in their village. Represented in this way such a perspective is communal, but not federal. The available evidence does not tell us if Winthrop’s actions truly jeopardized the integrity of a local institution. It is unclear why the first elected authority lost favor with the majority, but from Winthrop’s perspective those facts carry less weight than the dangers involved in replacing covenantal thinking and its processes of collective decision making with majoritarian politics. His speech makes it clear that federal theory bases legitimate government on more than an assertion of majority power. His opponents apparently shared the broad principles of covenant with Winthrop. They, as he, submitted their complaint to an independent judge and, though they maintained a majority’s power, nevertheless, acceded to the court’s decision. Two centuries later Tocqueville responded to the federal approach Winthrop and the Hingham majority had taken in addressing this factional dispute.

During the first two decades of colonization the Massachusetts Bay Puritans reconciled the covenantal demand for harmony with popular participation and majority rule by adhering to Winthrop’s ideal of federal liberty. As ideas of republican right and the religious ideal increasingly commingled in common discourse, arguments employing “civil liberty” emphasized setting the common good above narrow individual’s interest with fewer references to salvation. Nearer the end of the seventeenth century and throughout the eighteenth this latter, essentially Whig, understanding of civil liberty and common good tension was challenged by a different view. Instead of assuming that the common welfare existed in an unchanging, universal form, more

often Americans began to view the common good as a variable that came out of attempts to accommodate different, often conflicting individual interests. Ironically, this was the “Federalists” position. These two philosophies developed from the philosophical tension that accompanied the Puritans on their transatlantic journey.

Beyond New England: Individualism in Virginia and Middle Colony Diversity

Tocqueville cautioned his readers not to impute New England's ways to the southern and middle colonies. Different motives, public philosophies, and physical environments shaped the institutional development of these regions, resulting in three distinct regional subcultures. The spirit of liberty and the spirit of religion had not combined in the political cultures of the southern and middle colonies as it had in New England.⁵⁰

For Tocqueville the sharpest subcultural contrasts were between the Virginia and Massachusetts Bay settlements. Although the colonists of both regions had embarked from the same country and shared the same language and laws, they were, he said, "two branches in the great Anglo-American family." The colonists of Virginia and Massachusetts Bay differed in their motives and ultimately in the principles they employed to govern themselves. "The men sent to Virginia were seekers of gold, adventurers without resources and without character, whose turbulent and restless spirit endangered the infant colony and rendered its progress uncertain," he explained.⁵¹ In contrast, the Massachusetts settlers did not "cross the Atlantic to improve their situation or to increase their wealth; it was a purely intellectual craving that called them from the comforts of their former homes; and in facing the inevitable sufferings of exile their object was the triumph of an idea."⁵²

Virginia Charters: Aristocracy, Feudalism, and Individualism

In the early stages of the seventeenth century, Virginia, like Massachusetts Bay, had been founded on a philosophy in which the individual strove to serve a higher entity. In Massachusetts Bay the colonists served God and their covenanted community; in Virginia, the founders' private individual goals gave way to serving "His Sacred Majesty," Charles I.⁵³ The public philosophy of "Old Dominion," the King's designation for his loyal colony, combined aristocratic loyalties with feudal principles and commercial goals. This philosophy, mixed with "the rights of Englishmen" produced a number of paradoxes in law and political culture.

In seventeenth century England, the liberties and immunities of Englishmen were not private, individual claims. Membership in larger social units, including the church or a joint-stock company, circumscribed the individual's rights. These bodies possessed their own legal rights. In determining whether individual or social rights took precedence in a conflict, rule in seventeenth century England attended to what the good of the whole demanded. The Virginia Charter (1607) guaranteed the first Virginians all the liberties and immunities of Englishmen, but, in the Virginia setting, the motive and means of colonization replaced the English norm of commonwealth and interdependence with individualism and, paradoxically, dependence.

If the Virginia Company of London promotional literature targeted its market successfully, the lure of unlimited personal gain probably attracted a self-selected group whose expectations and values might not represent the cultural range of seventeenth century English society.⁵⁴ The commercial nature of the enterprise and the venture's advertising alone suggests that those who sailed for Chesapeake Bay were likely to be ambitious, competitive, materialistic individuals seeking easy riches. Virginia colonists most often arrived as unattached individuals or

households. Those finding fortune maintained individual or familial autonomy, even when circumstances called for a collective response. The colonists' physical environment issued affliction as well as bounty. Disease, attacks by native bands, and the internal strife caused by greed and jealousy weighed against the prospects for making a fortune growing tobacco. Those without the initial resources for independence and those whose fortunes failed, pursued their solitary adventures so far as they could, but more often contributed to a dependent class, affiliated with a magisterial family plantation.

In the decades following the initial dispatch of adventurers, a dependent labor force increasingly colonized the Virginia colony. Until 1670 when slaves could be easily imported directly from Africa, indentured white workers comprised the majority of those who came to produce tobacco. Even before the tremendous increase in the African slave population not all indentured workers willingly embarked on their new lives; many impoverished street youths were coerced or lured to Virginia by "spirits," illicit suppliers of impressed labor.

A society based on a core value of economic privatism facing difficult environmental conditions, should not find voluntary cooperation impossible. Good sense might prevail, making cooperation a self-interested virtue, but, in Virginia, agricultural practices reinforced individualism, contributing to a settlement pattern that encouraged isolation and social hierarchy. Tobacco cultivation required a large labor force working an extensive acreage. The scheme of semi-autonomous plantations hindered face-to-face interaction in an increasingly polarized society of elite plantation owners and their dependent labor force. With physical and social environments impeding communication, trust, and a sense of shared enterprise, the colonists found themselves unable to sustain the cooperative efforts necessary to create local schools, provide for common defense, or local markets.⁵⁵ In return for their isolation and extreme individualism, the colonists suffered from invasions, internal violence, and the calamity of natural hazards. Seventeenth-century Virginia illustrates the fragile foundation of a self-governing polity.

Fidelity to their king and the ideal of England's social gradations translated into an aristocratic traditionalism in Virginia politics and society.⁵⁶ Tocqueville believed that the law of primogeniture led to anomalous aristocratic relations in the south, in which "each family was represented by a wealthy individual, who was neither compelled nor induced to labor; and he was surrounded, as by parasitic plants, by the other members of the family, who were then excluded by law from sharing the common inheritance, and who led the same kind of life as himself."⁵⁷ Hereditary wealth, he said, formed an aristocratic body that "kept alive the traditional prejudices of the white race . . . and maintained idleness in honor."⁵⁸ Indentured servitude and, later, slavery, helped maintain this mentality, even as inheritance laws changed and those with newly acquired means found that fortune, not birth, made the Virginia aristocrat. The values of early colonization in Virginia, profiteering and individualism, evolved "into a set of regional virtues, a love of independence, an insistence upon personal liberty, a cult of manhood, and an uncompromising loyalty to family."⁵⁹

The "traditionalistic" political subculture resulting from these values exhibited "an ambivalent attitude toward the marketplace coupled with a paternalistic and elitist conception of the commonwealth. . . . It accepts a substantially hierarchical society as part of the ordered nature of things, authorizing and expecting those at the top of the social structure to take a special and dominant role in government."⁶⁰ The first laws of Virginia, the "Articles, Laws, and Orders, Divine, Politic, and Martial for the Colony of Virginia" (1610-11), reflect this mental stance. Donald S. Lutz describes them as essentially "a list of commands from the military governor."⁶¹

This "relentless attention to order" was necessary to deal with a "value system suited to soldiers and adventurers,"⁶² who lacked the structure imposed by membership in social groups.⁶³ Initially military command was used to unify early settlements, contributing to the colony's aristocratic mindset. Later in the seventeenth century, as possessive individualism overtook loyalty to the king, the only source of transcendent allegiance, the settlements could not muster an army for their common defense. Private defensive measures as well as attempts to contract with enterprising entrepreneurs to hire out the construction of battlements illustrate the feudal quality of the social structure. Privatism and clientelism, the hallmarks of feudalism, were the colony's administrative means.

The means of establishing settlements, charters and patents granted to joint stock companies, also contributed to the development of a traditionalistic political subculture. Charters publicly ceded a right by granting a license or exclusive use to their recipients in exchange for specific reciprocal duties.⁶⁴ Unlike a covenant, charters do not unite equals into a single body. The two parties in a charter, the grantor and grantee, have an asymmetrical relationship. One party has the power of granting the monopoly, and, as various colonists found, also the power to rescind their orders. Instead of merging individuals into a single entity, charters defined two sides to an agreement and placed specific legal limitations on the parties' obligations. Although they were more encompassing than contracts, charters similarly introduced the mentality of limited liability into the relationships they created. While covenants require the attestors to embrace the spirit of the agreement, the charters' signatories operated more in terms of the letter of the law. Charters frequently bonded a number of individuals into a single entity on one side of the agreement, a joint-stock company, for example. The relations among these individuals might be equal, depending on their holdings, and as stockholders they had a vote in company matters. As colonial charters were broad in their instructions for fulfilling the obligations to the granter, this vote amounted to a franchise for self-government.

The charter's asymmetrical relationships combined with the latitude the grant gave the shareholders to govern their affairs. In Virginia these elements created conditions that allowed collective local decisions to acquire an aristocratic cast, without the benefit of aristocratic ties. A more democratic frame of government might obtain in daily life, Tocqueville argued, to the degree that company shares were equally distributed in a setting where geography prohibited the king and his representatives from participating directly in the colony's daily governance. If the monarchy existed as no more than the colony's titular head, cultural attitudes and environmental circumstances in the colonies would determine what kind of democracy developed. In Virginia, "democracy" alternated between the extremes of autonomy and servitude. Truly aristocratic principles created a bond between each rank in the hierarchy and within social classes, but only the façade of this tradition had been conveyed to the Virginia colonies. In the Virginia settlements hierarchy was based on principles of indebtedness, dependence, and egoism that could destroy the foundations of loyalties and trust among peers and between ranks. If Virginians lost the figurative tie of the monarchy, individualism would weaken bonds of social hierarchy.

The execution of Charles I on January 30, 1649 initiated such a change in colonial loyalty. Virginians were clear that Charles II, not the Parliamentary government, should rule England and the Virginia colony. As English authority changed faces in the Parliamentary period, Virginia's connection to the mother country faltered. The colony's vital link to an authority that transcended the individual's fortunes weakened, altering the colony's philosophical foundations and, as a consequence, its administrative practices.

Administrative rhetoric and changes in land grant practices signaled the ascent of possessive individualism and an individual-centered society over the organic hierarchy of a king-centered world.⁶⁵ As tracts of land became available for individual aggrandizement, individual planters could amass great holdings, while a plentiful land market permitted the substantial growth of a yeoman class. This legal revolution reflected and promoted change in the fundamental assumptions of Virginia's colonial life. Possessive individualism, the new controlling spirit, envisioned government as an entity constituted to serve the ends of the individual. Legal historians argue that "the legal bond of loyalty to the king as representative of a larger social organism was maintained until the Revolution," [but] "the life of the 'law' gradually evaporated and left merely a form."⁶⁶ Although the new spirit of the law awaited the Revolution to gain the legal structure necessary to complete this evolution, philosophically, individualism "exert[ed] a growing influence upon Virginia society."⁶⁷

The loss of transcendent loyalties promoted a view of history that contrasts with the covenantal thinking of New England. As one historian argues, "Whenever possible Virginians focused their attention on what they called the colony's 'present state,' a dynamic present following continuously into a future that bore no necessary resemblance to the past."⁶⁸ In the temporal structure of the Virginian's philosophy, "nature itself became a symbol of futurity," presenting daily an opportunity to start anew as long as "nature's bounty sustained future dreams." The American penchant to escape the past and perfect the future struck Tocqueville as one of the psychological results of democracy. If Virginia's evolution from group-centered or king-centered principles to individualism is unexceptional, Tocqueville's thesis would seem to have been borne out.

The middle colonies present a third political subculture based on legal and religious environments of diversity and fluidity. Although middle colony settlement began in the early decades of the seventeenth century, growth came after 1680. Heterogeneity distinguished middle colony development. In addition to linguistic and cultural pluralism, two other forms of diversity characterized these colonies, variety in their legal systems and the multiplicity of Protestant sects as well as Catholic and Jewish communities of faith.

Middle Colony Legal and Religious Diversity

English "common law" played some role in all of the colonies, but the portions of common law that the colonists elected to apply varied from place to place. Virginia adopted many common law practice and Maryland took up English principles as the foundation of their legal systems. In Massachusetts Bay local tradition influenced legal interpretation and the colonist felt free to interpret English precepts in light of Mosaic law and environmental exigency. This reconstructed common law prescribed a set of unchanging, constitutional principles of public law in Massachusetts Bay.⁶⁹

The common law was one of several legal systems in force in England and in use in the colonies. Other systems of jurisprudence in English law and Continental legal systems also influenced colonial authority. In many cases, for example, English common law would play a smaller role in a colony's political welfare than the Vice-Admiralty Court's control of ports and import taxes.⁷⁰ In New York English common law was superimposed on the continuing practice of Roman-Dutch law, the "Bible Codes."⁷¹ New York's judicial and administrative systems were not only complex because three systems of law were in force in the colony-wide political arena, but also because court jurisdiction overlapped smaller county and town divisions. Local

boundaries were themselves fluid as English governors held tenuous authority in the primarily Dutch and Puritan province.

After the conquest of New Netherland in 1664, English officials refrained from suddenly imposing a new legal system on the majority non-English and non-Anglican population. The Duke's Laws of 1665 were not applied to the Dutch colonists and the Long Island Puritans were permitted to reinstate their town laws, codes largely based on Scripture. The Duke's Law permitted flexibility only out of necessity. Within it were procedures that ultimately removed the locus of authority from town to county, solidifying English dominance. Nevertheless these seventeenth century concessions to diversity figured in the New York legal culture of Tocqueville's day.

Tocqueville found traces of administrative centralization in New York and local administrative units that were larger than the townships of Massachusetts. Local diversity was challenged by the 1665 laws which stipulated that the governor's approval was required for locally elected constables and overseers and instituted a system of courts based on a local justice of the peace appointed by the governor as well as a triennial Court of Sessions. The Court of Sessions had broad original jurisdiction, hearing all civil cases that involved more than very small sums and trying criminal cases, including those involving capital crimes.⁷² It heard appeals, reviewed local court decisions, and confirmed the constable and overseers on behalf of the governor.⁷³ In criminal cases the Court of Sessions shared power with the General Court of Assizes, which the Duke's law gave concurrent jurisdiction in cases where the amount of litigation exceeded moderate sums. In some instances substantive law applied in the Court of Assizes differed from the local law applied in the Court of Sessions. Plaintiffs who would pay the higher costs in the Court of Assizes could often select a more favorable court to hear their case.

The Court of Assizes, the Province's highest court, was composed of the governor, his council, and all of the justices of the peace of the province. Its composition permitted the Court of Assizes to exercise legislative as well as judicial authority, a plenary power that allowed it to try criminal cases where the offense had not been prohibited by the Duke's Law; in essence it could try a case after deciding if the action in question was a punishable transgression. By locating legislative and judicial authority in one body and broadening the jurisdiction of the English courts the design of these institutions effectively diminished the local Courts of Constables and Overseers.

The Duke's Law produced a trend in centralization that doomed Puritan town rule in New York. The Dutch, in contrast, managed to resist encroaching English legal institutions for several decades, so long as they maintained a majority in the Province and could protect the Mayor's Court of New York. The Mayor's Court accepted many provisions of the English system, including jury trials, while it continued to exercise its traditional probate jurisdiction under Dutch law. It possessed a criminal jurisdiction on par with the penal authority of the Court of Sessions. A lasting mark of Dutch law in New York was the extensive use of arbitration in settling lawsuits. English governors consolidated political control of the Province by strategic grants of manorial lands to which private manorial courts were attached. Manorial courts provided defense and social control in outlying settlements.

Although the court system of New York became more centrally controlled at the end of the seventeenth century, the legacy of an intricate pattern of local laws, concurrent jurisdictions, and multiple legal systems provided important heterogeneity to governing instruments. Provincial government tolerated a significant degree of local independence within a system of administrative

restraint. Different legal systems were made to work compatibly without having their principles forced into complete conformity. Diverse values and traditions were enabled to coexist until 1686 when the Dominion of New England took control of the colonies in the name of the mother country.

The middle colonies tended to be settled by individuals motivated by economic goals rather than groups attempting to produce a coherent community. Even so, religion effected middle colony development. Religious diversity rather than orthodoxy or religious establishment influenced middle colony development. Historians depict New York, Pennsylvania, New Jersey, Delaware, and western Maryland as the dynamic, pluralistic, commercial forerunners of modern America. They take note of the region's remarkable growth, beginning with the rise of mercantilism in the late seventeenth century and continuing through the Revolutionary Era.⁷⁴

Patricia Bonomi's study of American religious practice in all colonies from 1607 until the Revolution describes in detail the impact of this diversity on colonial life and politics. She credits denominational rivalries and the effect of the Great Awakening with the increasing "interpenetration" of religion and politics throughout the eighteenth century. In the middle colonies the intertwining of civil and religious commitment predates the Great Awakening, suggesting that diversity in community, rather than the Awakening's focus on private judgment influenced public philosophy in these colonies.

No established church dominated the mid-Atlantic region, resulting, Bonomi says, in "a kind of free market for theistic beliefs and practices."⁷⁵ Rather than responding to the variety of sects and denominations with religious indifference, Bonomi finds that many colonists adopted a latitudinarian outlook that allowed them to attend whatever house of worship happened to be located in their neighborhood.⁷⁶ Others responded to diversity with a "positively sharpened religious self-awareness and an enhanced attachment to the doctrinal uniqueness of their own denomination."⁷⁷ Bonomi characterizes religious life in the first half of the eighteenth century as "diverse, competitive, and volatile."⁷⁸ In this setting "denominational rivalries made for a contentiousness that pervaded the entire realm of the provincials' public behavior, and eventually the categories in which they framed political and religious issues became almost interchangeable."⁷⁹ Not only could the dissenting tradition, its justifications and rhetoric, be applied to political liberty, denominational and congregational networks were important devices for political instruction and propaganda.

Covenant Development and the Federal Form

Federal liberty requires an institutional framework that promotes the common good and protects individual rights in practice as well as theory. Synods had long been the means "for establish[ing] . . . truth & peace therein," when the first movement toward a permanent confederation of the colonies came from within such an ecclesiastical inter-colonial associations. Articles to join Massachusetts and Connecticut were drawn up by the Massachusetts council and proposed to Thomas Hooker and Samuel Stone during the Synod at Newton in the summer of 1637.⁸⁰ The plan of union as it was worked out at subsequent meetings was referred to the supreme authority in each colony for approval or amendment. In Massachusetts, it was referred to the "State," in Connecticut, to "the magistrates and *people*." In the summer of 1638, the four towns of Hartford, Windsor, Wethersfield, and Springfield, Connecticut sent commissioners with the amended articles to the General Court of Massachusetts.⁸¹

As negotiations proceeded, Thomas Hooker explained Connecticut's objections to the plan in a letter to John Winthrop. Connecticut's representatives were concerned with the plan's sixth article, which Hooker said "exceed[ed] much the limits of that equity which is to be looked at in all combinations of free states."⁸² An outline of Hooker's concerns reveals that he believed free associations united by imposing mutual limits on their liberty in a way that the combination would be established without annulling the authority of the existing political bodies. A whole was created without consuming its parts, by providing concurrent authorities with overlapping jurisdictions.⁸³

Hooker's letter to Winthrop emphasizes the necessity of limiting the prerogatives of magistrates, establishing law as "the chief rule over rulers themselves."⁸⁴ Setting "the bounds and limitations of [the magistrate's] power and place," Hooker believed, would require more than a broad franchise and democratic procedures. Hooker and Winthrop agreed on the general principle limited government. They differed, however, in their appraisal of various methods of limiting magistrates and majorities. Winthrop argued that magistrates are members of the churches, "and by their covenant are regulated to direct all their ways by the rule of the gospel." Presenting federal theology's position, he explained, "whatsoever sentences the magistrate gives according to these limitations [their church covenant and oath of office,] the judgment is the Lord's *though he do it not by any rule particularly prescribed by civil authority*."⁸⁵

Hooker, in contrast, emphasized the on-going role of the people in a civil association constituted by covenant and oaths of office. In two sermons, one delivered to an adjourned session of the General Court after the articles had been ratified and an election sermon, Hooker detailed the doctrine that would be incorporated into the Fundamental Laws of Connecticut. He deduced three principles of federal sovereignty from Deuteronomy 1: 13. God, he argued had granted the choice of public magistrates to the people themselves. Acting as a people, citizens should exercise the privilege of election not "according to their humours, but according to the blessed will and law of God." Such a people not only must avoid majority whim and tyranny, they must preserve their grant through vigilant care of their collective authority, using their power "to set the bounds and limitations of the power and place unto which they call them."⁸⁶ Using Exodus 18: 17-18, Hooker put forward an analysis of human fallibility and expanded his analysis of popular sovereignty. He explained that an awareness of the potential for error "should make us not to be confident in all those courses that we take up with most care and most [zeal]."⁸⁷ Governors may err and they and their electors must have "teachable hearts."⁸⁸ Electors must learn "how to [honor] our choice of magistrates," and also "how to carry themselves to the governor," to "offer seasonable advise" and be ready to act as a people worthy of the liberty God has granted. He instructed "those that are in the place of government to seek to Heaven for help" and to learn that governing "is heavy and burdensome," and not to be performed safely without the people's participation.⁸⁹

These principles are found in the *Fundamental Orders of Connecticut* that united the inhabitants of Windsor, Hartford, and Wethersfield, in 1638-39 and the *New England Confederation* (1643).⁹⁰ The "United Colonies of New England," as the confederation was called, originated when Massachusetts, Plymouth, Connecticut, and New Haven, each comprised of its several towns that retained their governments, created and approved twelve articles to govern their common affairs. Article three, transcribed by John Winthrop into his journal, describes their federated arrangement: "[T]he plantations which at present or as hereafter shall be settled within the limits of the Massachusetts, shall be forever under the government of the

Massachusetts and shall have peculiar jurisdiction amongst themselves in all cases as an entire body; and that Plimouth, Connecticut, and New haven, shall each of them in all respects have like peculiar jurisdiction and government within their limits . . ."91 A federal framework developed as a result of agreements such as these, which used the church covenant as a common form for linking local and colony-wide governments. The colonists did not set out to implement a federal design; their choice of local independence and use of federal liberty necessitated it.⁹²

Tocqueville analyzed the "proper institutions" of federalism that might achieve this goal. Tocqueville began examining the federal form of the Union by analyzing the origin and mechanics of the New England township. Townships, Tocqueville maintained, lay the foundation for American federalism and became the basis for the compound and extended republic established by *The Federalist* as the appropriate framework for American self-government. By studying the history of New England townships, Tocqueville concluded that colonial compacts and covenants among the first secular institution constituted these political bodies. He also found that the practices and institutions defined in these agreements were the basis for later combinations that linked such political associations into a federation.⁹³

Dating the constitution of New England townships by the Connecticut Code of Laws (1650), Tocqueville found in the Connecticut colony a paradigm for constitutional framing that reflected federal liberty in its laws and adopted a federal design to retain township governments. "In the Laws of Connecticut," Tocqueville said, "we find the germ and gradual development of the township independence which is the life and mainspring of American liberty at the present day."⁹⁴ Among the important feature of township government that Tocqueville found in the Connecticut Code were the mode of election, responsibilities and rights of citizens, and duties and expertise of governing officials.

The Connecticut colony's electoral body consisted of the citizens assembled, often voting publicly by a show of hands rather than by secret ballot. This manner of assembly and method of voting emphasized the public and communal nature of governing.⁹⁵ The purpose of the penal laws, to maintain the "orderly conduct and good morals" of the colony, also evinced these ideas.⁹⁶ Borrowing legal provisions from Exodus, Leviticus and Deuteronomy, for this purpose, the law "invaded the domain of conscience," with some civil punishments overreaching the bounds of religious toleration.⁹⁷ The most salient feature of these laws, Tocqueville argued, was not their zeal, however, but that these measures were self-imposed. Tocqueville did not doubt that these laws reflected human imperfection and in some cases, he said, even discredited reason, but they were freely voted and on the whole, represented "a body of political laws" written in the 17th century, that were "still in advance of the liberties of [his] age."⁹⁸

Tocqueville's analysis shows that federal or covenantal thinking was employed in the compacts that created state constitutions, and ultimately joined the states in a federal union. The people continued to govern the whole political system as the federal framework developed.⁹⁹ Municipal government was a logical and practical necessity for a self-governing people, Tocqueville asserted. Federalism developed by transferring the spirit of federal liberty from localities, to the states, and, finally, from the states to the Union.¹⁰⁰ Compacts joined various governments, leaving existing governments intact. As Tocqueville describes this evolution, townships created larger communities, the states, in a manner analogous to the actions of individuals who establish communities with their equals. In each case, the individual person, township, colony, or state, retained rights and incurred obligations, by enlarging the sphere in which federal liberty would be used.¹⁰¹

The Union's political life as well as its authority originated in the townships through the process of linking local governments into a newly compacted political body. Rather than deriving their powers from a central authority, "the townships, on the contrary, . . . gave up a portion of their independence to the state," sharing their power with the governing bodies they created to handle their common concerns.¹⁰² They were seldom subordinated to their state or to the Union and the citizenry believed that the state had no right to interfere in local affairs. When a state called on citizens to support state projects, citizens viewed themselves as the beneficiaries and providers for statewide needs. In examples of statewide public works, townships were obliged to provide money and supplies; where uniform police regulation was warranted, townships also enforced the law. These obligations, Tocqueville observed, were analogous to citizens' duties to take part in collective action. The township retained an independent right, reflecting the federal liberty of earlier covenants through its administration of policies established by collective decisions taken in state government. Neither township nor citizen was completely free, but obligations were freely assumed in each political arena.¹⁰³

Tocqueville viewed the resulting federal framework as virtually self-regulating. In America's federal democracy, he said, "power exists, but its representative is nowhere to be seen."¹⁰⁴ In this setting, people felt "an equal love and respect for the laws of which they consider themselves the authors," viewing the authority of government "as necessary, and not divine."¹⁰⁵

The Lessons of American Covenantal Practice

While colonization led to distinct regional sub-cultures and covenantal theory was most authoritative in New England, the three regions held many ideas and organizational forms in common, making federal organizational structure common by the middle of the eighteenth century. In the last quarter of the century, just prior to the Revolution, the intertwining of religion and politics led to a confederation in the Anglican bishop controversy (1767-1770).¹⁰⁶ The confederacy was instituted in 1766 and a general meeting took place at Elizabeth Town, New Jersey in November of that year for the purpose of limiting English encroachment on the various dissenting American Protestant churches. The convention's leaders hoped to extend the confederation throughout the colonies, and initiated plans to draw in the congregations of Massachusetts, New Hampshire, Connecticut, and Rhode Island, as well as Reformed ministers in New York, New Jersey, and Pennsylvania.¹⁰⁷ Religious differences remained profound for many participants, yet they found enough common ground to sustain their alliance for nearly a decade. Agreeing to meet annually, each religious association sent two ministers as delegates every year to conventions in New Jersey or Connecticut until 1775.¹⁰⁸ The members of this "Congress" constituted a colonies-wide organization that prepared the way for later initiatives including the *Articles of Confederation*. In this way covenantal, or federal, principles bequeathed the rationale and practical means for uniting people and polities for common purposes, without negating established boundaries, identities, or their existing forms of moral and political authority.

If federal liberty requires a federal institutional environment, the obverse also remains true: federalism required the mental stance of federal liberty. If citizens lack the sense of self-control, self-government, and civic obligation found in federal liberty, the federal form of government is vulnerable to majority dominance and the centralizing tendency of democratic despotism. Without the common ground of covenant, a polity based on the open contestation of opposing ambitions is even vulnerable to civil war. In Tocqueville's view, "the federal principle" not only

described specific institutional arrangements, but also indicated the qualities of mind required of citizens who use them.

The principles of this social theory, ideas such as local liberty, the common and private property rights that patents and charters create, and a conception of individual and self that differed from mere egoism, were contributed by both branches of the Anglo-America settlement, New England and Virginia. The process of combining these ideas, their eventual affect on institutional development, and the manner in which they were adopted or adapted to a variety of circumstances created the foundations for other attempts to integrate diverse political bodies. For Tocqueville uniting such diversity in a general government was a staggering achievement.

The principles of government based on federal liberty -- federalism -- assumed each individual to be a moral whole, while also giving equal weight to the social dimension of our existence. In politics, citizens placed their interests in the broad context of the community's welfare rather than interpreting their liberty only in terms of narrower perceptions of self-interest. In covenanting societies, cognizance of this broader community framework ultimately relied on shared moral commitments, deduced from religious teachings, to which each covenantor had explicitly given assent. The moral grounds of covenant, Tocqueville believed, could be drawn from religion's "simple ideas" -- a belief in a transcendent authority, a belief that humanity's purpose transcends mere existence, and a belief in the equal worth of all souls. These principles, Tocqueville argued, were common to all religions and they, not specific religious forms, were the inviolable foundations of covenants.

Federal liberty was the public philosophy that enabled a combined spirit of religion and spirit of liberty to become the spirit of the laws. Covenants must be understood as living agreements infused with meaning that reflected the experiences and beliefs of those who assented to them in successive generations. Experience, Tocqueville made clear, must continue to inform our shared standards as they are applied to new circumstances. America's federal framework and the self-governing consciousness it reflects also developed from colonial institutions of practical politics such as the township. In America, Tocqueville observed, the township arises as a natural association, joining the Puritan religion and these settlers' experience in self-government.¹⁰⁹ Together, the natural association of the township and the relationships of self-rule and shared rule implied in Puritan covenants became the moral foundation of federalism.

Federal liberty's central principle, the liberty to consent, along with religion's simple ideas balanced experience and belief. The balance between liberty and belief was fluid and fragile. It might be maintained only if citizens expressed the philosophy of federal liberty publicly in daily activities of self-government and applied their experiences with humility to their imperfect expressions of faith.

The federal framework and the public philosophy of federal liberty together stimulated civic education and engagement, enabling each generation to seek balance appropriate to its experiences. Voluntary associations were a means by which citizens learned and assented to the community's guiding principles. When individuals participated in the voluntary associations, they learned more of "the various notions and opinions current among" a people, notions that reflected the foundational ideas constituting their polity and experience with self-government. Participation in either constitutional or collective choice not only renewed an individual's attachment to founding ideas, but also tested those ideas, permitting reflection and change as well as renewal. Participation in voluntary associations taught the habits of heart and mind that a vital democracy

required – a public philosophy that was secured by ideas developed through common assent and common action.

Applying Covenantal Experience to Contemporary Challenges

Tocqueville contended that colonists such as Winthrop and the framers of the *Fundamental Orders* "were more conversant with the notions of right and the principles of true freedom than the greater part of their European contemporaries."¹¹⁰ Yet it would be difficult to cite evidence that Winthrop ranked liberty of conscience and individual right, as we understand those terms, among the proper virtues of spiritual or political bodies. Even Thomas Hooker, Winthrop's more egalitarian Connecticut counterpart, could hardly be credited with democratic sensibilities befitting Tocqueville's 19th century observations; certainly neither Winthrop's nor Hooker's Jeremiads heralded the forms of liberty and equality expected today. Those dealing with democracy's dilemmas today cannot advocate Puritan institutions or beliefs as an appropriate basis for contemporary political relationships.

Tocqueville would not have believed it impossible to return to the Puritan ideal of right, nor would he have advocated such a course could be realized. He cautioned against facile attempts to apply "the lessons of the past" to new circumstances, calling many of the Puritan's specific institutions "fantastic and oppressive." He would regard even well intentioned efforts to re-assert beliefs and institutions renounced as deficient as at least naive and vain, if not equally dangerous threats to liberty. Tocqueville admonished the members of his own generation to abandon their shortsighted conceits about re-establishing the age of aristocracy. His words apply to any simplistic revivalist course.

Care must therefore be taken not to judge the state of society that is now coming into existence by notions derived from a state of society that no longer exists. . . . The object is, not to retain the peculiar advantages which the inequality of conditions bestows upon mankind, but to secure the new benefits which equality may supply. We have not to seek to make ourselves like our progenitors but to strive to work out that species of greatness and happiness which is our own.¹¹¹

If these specific institutions and beliefs of colonial polities are unsuitable for a different time and place, what of covenantal thinking may be adapted to present circumstances? How might Tocqueville's insights be conducive to developing our own kind of greatness and happiness? Democratic societies taking a federal form based on covenants worked because of shared standards of value and shared beliefs about the methods of employing those values in the associational life that comprises "politics." The federal principle produced political institutions that preserved the governing authority of the constituent parts of political union, but the federal constitution, Tocqueville contended was based on "legal fictions," and would be "ill adapted to a people which has not been long accustomed to conducting its own affairs, or to one in which the science of politics has not descended to the humblest classes of society."¹¹² As important as federal institutions were, the shared beliefs that made them operable were more important; how those who used a constitution believed it worked mattered as much as its legal provisions. These were among the major cautions and lessons taught by the American experience, but covenantalism itself represented more than a means to these ends.

Covenantal agreements revealed beliefs about human capacities, humanity's relationship to creation, and the human relationships that reflected this cosmic bond. As purposeful creations, human beings were obliged to form human associations compatible with the capacity for moral

judgment given to them by their Creator. The foundational covenant with God supplies the model for human partnerships and the authority designed to enforce them. Covenantors conceive the cosmic bond as a freely entered agreement, establishing a perpetual partnership. Human relationships conforming to this ideal are also based on consent and similarly implied continuous applications of covenantal principles as the relationship developed.

Covenants create a kind of relationship, federal liberty represents a philosophy of rights and obligations, and the federal principle provides a type of institutional design based on these principles and practices. Covenants create agreements that exact obligations from parties who must continue to engage each other thoughtfully inquiring into and addressing their common aims and problems. The perpetual relationships created by covenants develop according to the shared philosophy of the parties, federal liberty. Federalism institutionalizes these relationships, forming associations of associations by creating a framework in which an individual might be a party to several covenants simultaneously. Such associations combine to achieve common purposes according to the federal principle, a method of linking associations and individuals without destroying their existing obligations, identities, or governing structure.

The importance of federalism and its covenantal base eludes those who envision political authority as necessarily concentrated and search for the power center that directs dependent, peripheral units of government.¹¹³ Federal agreements reflect conscious choices -- to consent and bind oneself freely -- even when the federal framework that they inspire appears to evolve organically or seems fixed by tradition and culture. Citizens using the federal principle accept continuous institutional development as the proper orientation to complexity. The idea of "planning" takes an unusual form in federal designs, as "ad hoc" development, a "patchwork" of institutional arrangements, as well as overlapping and fragmented authority all represent realistic responses to evolving civic problems. In a federal setting, self-governing citizens are free to covenant, creating the sorts of relationships necessary to their common benefit. Federal frameworks facilitate the continuous institutional design expected of people who use collective instrumentalities, including the governments they empower, to solve their common problems.

Covenants, federal liberty, and the federal principle offer a basis and structure for human associations in a heterogeneous world. Rather than envisioning larger authorities that absorb smaller associations, political integration along covenantal lines preserves the internal diversity of a whole formed and maintained by the willing consent of parties who retain their capacities for constitutional and collective choice. Newly created agreements need not destroy or supplant existing relationships. For individuals, union might create new obligations and a new identity as a member of the newly constituted entity, but new agreements do not erase existing identities. For associations, newly constituted joint authority does not destroy the authority of existing associations. Governments unite, yet their existing authority remain intact; individuals unite, but do not lose their capacity to give or withhold consent. Using the federal principle, individuals and peoples constitute a governing structure in which there are no higher or lower centers of power, only larger and smaller arenas of decision-making and action.¹¹⁴

The federal principle and covenantalism offer an alternative institutional form and way of thinking about the rights of minority cultures, and, more generally, the problem of political integration. The rights of minority cultures are often placed in opposition to the rights of individuals and the authority of nation-states, each viewed as having absolute dominion in its sphere. In the present debate on "multiculturalism" group rights are conceived as state administered claims, largely lacking the mechanisms for collective decisions by members of the

group itself. In federations based on federal liberty and covenantal thinking, such agency would be assumed to be appropriate as would instruments that enable a group as a whole to deal collectively with common problems in a manner that enhances rather than diminishing the powers of individual group members.

The federal principle provides the appropriate means for understanding and addressing the claims that cultural groups make against larger government units only if “federalism” is understood within the context of covenantal theory. Covenantal communities exist not merely as distributors of rights, but as entities with claims against the individuals that comprise them. While communities may be the medium for achieving our individual aims, they nevertheless may not subordinate those aims to empty conceptions of a “general will.” These observations raise a particular challenge to liberal assumptions that government cannot articulate rights to citizens in a collective capacity and also raise doubts about the communitarian approach to the primacy of group rights.

Madison and Hamilton objected to simplifications of the federal principle on similar grounds, arguing that collective bodies could not replace the relationship between citizen and government. For them, the federal principle signified more than the distribution of powers in a national government and required more than a plurality of governments enacting the decisions of magistrates. The covenantal theory that they expressed as the “federal principle” described a matrix of concurrent authorities exercising shared, limited, and distributed powers in collective and constitutional arenas of political decision making. Among these authorities were individuals acting in the capacity of ordinary citizen. *The Federalist* emphasized the various methods of creating a body “orderly assembled” and how individuals and assemblies relate in the political process that results from compound authority. In light of America’s covenantal history, the methods used to reach decisions as a collective body as well as this focus on the relationships among such bodies and the relationship of the citizen to other individuals and their myriad political associations distinguish the “federal form” from either the contractarian vision of liberal individualism or the communitarian notion of the greater good.¹¹⁵

Covenantal theory offers a different way of assessing the status of collective bodies and the individuals who comprise them. When covenantal agreements animate the collective response, the federal principle offers an alternative mode of thinking about collective choice and individual liberty. To be a viable means for integrating diverse political actors, federal institutional arrangements require a particular view of rights and liberties as well as commitments and responsibilities for collective decision-making and action on the parts of all participants. When these conditions are met, federal institutions may bridge group and individual political claims in a manner conducive to just relations in a heterogeneous world.

Footnotes

¹ Alexis de Tocqueville. [1830-1835] 1945. *Democracy in America Vol. 1 and 2*, 1945. Henry Reeves, trans. New York: Vintage, orig. pub. 1830-1835, 1: 8-14. All citations are to the Reeves translation unless otherwise noted.

² Alexis de Tocqueville. [1858] 1955. *The Old Regime and the French Revolution*. Garden City, N.Y.: Doubleday Anchor Books. 254.

³ Ibid.

⁴ Ibid. 2: 337

⁵ Tocqueville, *Democracy*, 2: 336.

⁶ Tocqueville, *Democracy*, 2: 336.

⁷ Tocqueville, *Democracy*, 2: 336.

⁸ Tocqueville, *Democracy*, 2: 336.

⁹ Tocqueville, *Democracy*, 2: 337

¹⁰ Tocqueville, *Democracy*, 2: 336-337.

¹¹ Tocqueville, *Democracy*, 2: 337.

¹² Tocqueville, *Democracy*, 2: 311.

¹³ Tocqueville, *Democracy*, 2: 318.

¹⁴ Tocqueville, *Democracy*, 2: 310.

¹⁵ Tocqueville, *Democracy*, 2: 313.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.* 1: 26

¹⁹ *Oeuvres Complete: Correspondance D'Alexis de Tocqueville et de Louis de Kergorlay*, "Letter to Louis de Kergorlay, 26 December, 1836." ed. J. P. Mayer Paris: Gallimard. Vol. 13, 1: 431.

²⁰ In another sense, covenants are not at all new, but represent one of three basic ways of organizing politics and thinking about humanity's purpose and human relationships found in the history of the ancient Near East to the present day. See Daniel J. Elazar. 1995. *Covenant & Polity in Biblical Israel: Biblical Foundations and Jewish Expressions, Volume 1, Of the Covenant Tradition in Politics*. New Brunswick: Transaction Publishers. See especially pp. 35-42 in which Elazar distinguishes societies based on covenant from those developing organically as a "natural aristocracy," or politics created by conquest.

²¹ *Democracy* 1: 48

²² While there is no need to rehearse the theology of the Reformation, a general overview -- even at the risk of oversimplification -- may help the reader who is unfamiliar with these ideas. In essence these Reformed Protestants believed that God's will is hidden and unknown, except as that all powerful God reveals that will by fiat to human creation. God's human creation has, in errancy, willfully separated from the creator and cannot reconcile this relationship by human will alone. God's will, which has always been unknown, except what God chooses to reveal in Scripture. Even the means for interpreting God's revealed will, natural reason, is diminished and God's commandment as found in the law or light of nature dimmed by flawed understanding, leaving humanity easily deceived by the uncertainties of sense and memory. In this state human efforts, "works," will

²³ Miller, *Colony*, pp. 220-221.

²⁴ *Ibid.* 67

²⁵ In truth, as the Jeremiads of the New England Puritans show, salvation never felt so certain as theory argued it should. Humanity continued to be human, faith continued to be tested, and the line between grace and doubt continued to waver.

²⁶ *Ibid.*, 20-31; See also Ralph B. Perry, *Puritanism and Democracy* (New York: The Vanguard Press, 1944).

²⁷ The Puritan conception of equality raises important concerns about gender, power, and authority. Works that consider equality and the conception of the individual as it relates to women include Janet Coleman, ed. *The Individual in Political Theory and Practice* (Oxford: Clarendon Press, 1996) and Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988). For a depiction of the colonial family see John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (Oxford: Oxford University Press, 1970). This work suggests that the family functioned as an association guided by "federal liberty" laying out a political role for women that is similar to the important place held by women and family in Greek political thought shown in Arlene Saxonhouse, *Women in the History of Political Thought* (New York: Praeger Publishers, 1985).

²⁸ *Cambridge Synod and Platform* Ch 1 p. 203.

²⁹ *Cambridge Platform* Ch 4 p. 207; See also Perry Miller, *Seventeenth Century* p. 439.

³⁰ As quoted in Perry Miller. 1956. *Errand*, p. 89.

³¹ Miller, *Seventeenth Century*. p. 148

³² *Cambridge Platform* Ch 3 p. 205 defines Visible Saints as "such, as have not only attained the knowledge of the principles of Religion, & are free from gross & open scandals, but also do together with the profession of their faith

& Repentance, walk in blameless obedience to the word, so as that in charitable discretion they may be accounted Saints by calling . . . "

³³ *Cambridge Platform* Ch 4 p. 207

³⁴ *Cambridge Platform* Ch 4 pp. 207-208.

³⁵ *Cambridge Platform* Ch 17 p. 235.

³⁶ Miller, *Errand*, p. 46 quoting John Robinson (a Separatist who was strongly influenced by Nonseparating Congregationalism and whose philosophical presentation of the discipline's main principles was transported to New England) in Robert Ashton, ed., *John Robinson's Works* (Boston, 1851) 3: 61.

³⁷ *Cambridge Platform* Ch 16 p. 233.

³⁸ *Cambridge Platform* Ch 16 p. 234-235.

³⁹ See T. H. Breen. 1980. *Puritans and Adventurers: Change and Persistence in Early America*. New York: Oxford University Press, who explains that in New England, local liberty was the rule in creating church and town governments and in creating military organizations. Using covenants, New Englanders formed a militia and chose their own officers. The Massachusetts General Court held ultimate authority for the officers' commissions, but in practice, local nomination amounted to final election. The events leading to Winthrop's famous speech present an important exception.

⁴⁰ Breen, *Adventurers*, p. 23

⁴¹ Tocqueville, *Democracy*, 1: 44-45.

⁴² *Ibid.*

⁴³ *Ibid.* Donald S. Lutz (*Origins*, p. 74) chronicles these two aspects of liberty, natural freedom and civil liberty in other founding documents, as well.

⁴⁴ John Winthrop, "A Modell of Christian Charity," in Perry Miller and Thomas H. Johnson, eds. *The Puritans: A Sourcebook of Their Writings* 1: 198.

⁴⁵ Tocqueville, *Democracy*, p. 45.

⁴⁶ Tocqueville, *Democracy*, 1: 44-45.

⁴⁷ Breen, *Adventurers*, p. xii

⁴⁸ *Ibid.*, 18.

⁴⁹ *Ibid.*

⁵⁰ Many of Tocqueville's observations of America's regional subcultures have been studied more closely, supplying considerable support for his more general suppositions. Patricia U. Bonomi's (1986. *Under Cope of Heaven: Religion, Society, and Politics in Colonial America*. New York: Oxford University Press.) research suggests how Maryland's Catholicism and grudging toleration not only shaped the American Catholic church, but also influenced arguments for religious liberty, extending Tocqueville's analysis of American Catholicism's compatibility with democratic values. She also discusses the effects of social equality and the absence of settled church leadership on Middle colony settlements and the developing American frontier, subjects Tocqueville treats in both volumes of *Democracy*. Tocqueville's observations concerning the combined effects of extreme individualism, aristocratic pretensions, and slavery on southern culture are generally supported by T. H. Breen's (op. cit) research.

⁵¹ Tocqueville, *Democracy*, 1: 31. Tocqueville relies on Captain John Smith *General History of Virginia, New England, and the Summer Isles, by Captain John Smith Sometime Governor in Those Counties and Admiral of New England*, London 1627; William Stith, *The History of The First Discovery and Settlement of Virginia Being an Essay Towards a General History of This Colony*, Williamsburg 1747; and Robert Beverly, *The History and Present State of Virginia*, London, 1705. T.H. Breen has commented on historians and histories of Virginia at length. His analysis of the Virginians' perception of time is suggestive when juxtaposed with Tocqueville's chapters on the "Philosophical Methods of the Americans" and the "Indefinite Perfectibility of Man."

⁵² *Ibid.* 33.

⁵³ Wilcomb E. Washburn. 1965. "Law and Authority in Colonial Virginia, in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 125

⁵⁴ Perry Miller, *Errand*, pp. 99-140.

⁵⁵ Breen finds that the colonists could not sustain defense efforts and instead attempted to contract out these services. All efforts failed.

⁵⁶ Daniel Elazar as cited in Lutz, *Origins*, p. 57.

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- ⁵⁷ Tocqueville, *Democracy*, 1: 380.
- ⁵⁸ *Ibid.* 1: 381
- ⁵⁹ Breen, *Adventurers*, p. 126.
- ⁶⁰ Daniel J. Elazar. 1984. *American Federalism: A View from the States*. 3rd ed. New York: Pp. 118-119.
- ⁶¹ Donald S. Lutz, *Origins*, p. 57.
- ⁶² Breen, *Adventurers*, p. 126.
- ⁶³ Wilcomb E. Washburn. 1965. "Law and Authority in Colonial Virginia, in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 122.
- ⁶⁴ The present discussion of charters and covenants is indebted to the work of Donald S. Lutz, *Origins*, pp. 16-22.
- ⁶⁵ Wilcomb E. Washburn (1965. "Law and Authority in Colonial Virginia, in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 127) demonstrates this point by showing that the ancient "headright" system of land grants, by which land was allotted to individuals according to a fixed ration of the number of persons paying their way, or brought by the expense of another, to the colony, was abandoned for a "treasury right" system of land acquisition, which allowed individuals to acquire large tracts of land in exchange for money.
- ⁶⁶ Wilcomb E. Washburn .1965. "Law and Authority in Colonial Virginia, in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 129.
- ⁶⁷ Wilcomb E. Washburn .1965. "Law and Authority in Colonial Virginia, in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 129.
- ⁶⁸ Breen, *Adventurers*, p. 169.
- ⁶⁹ Mark DeWolfe Howe. 1965. "The Sources and Nature of Law in Colonial Massachusetts," in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 15
- ⁷⁰ L. Kinvin Wroth., 1965. "The Massachusetts Vice-Admiralty Court," in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p.p. 32-73. The Admiralty Court had jurisdiction in the Stamp Act, (1765) the Tea Act, (1773) and the Boston Port Act (1774), for example.
- ⁷¹ Herbert Alan Johnson, "The Advent of Common Law in Colonial New York" in *Law & Authority in Colonial America* George Athan Billias, ed. New York: Dover Publications. p. 74
- ⁷² The Duke's Law restricted the local Courts of Constable and Overseers to trying only small cases where the amount of the controversy did not exceed $\lambda 5$
- ⁷³ This device guaranteed close local supervision of the town courts.
- ⁷⁴ Donald S. Lutz (*Origins*, p. 55) shows that the middle colonies of 1660 had only one-seventh of the population of either New England or the south. By 1776, they would achieve parity with the other two areas, by growing at twice their rate. Patricia U. Bonomi (*Cope*, p. 90) details the diversity of religious sects and nations represented in the (collective) 530 percent increase in the white population of New York, New Jersey, Pennsylvania, and Delaware, explaining that the middle region had more congregations per capita than other regions serving numerous sects and non-English peoples.
- ⁷⁵ Bonomi, *Under Cope of Heaven*, p. 81
- ⁷⁶ Bonomi, *Under Cope of Heaven*, p. 72.
- ⁷⁷ Bonomi, *Under Cope of Heaven*, p. 72.
- ⁷⁸ Bonomi, *Under Cope of Heaven*, p. 80.
- ⁷⁹ Bonomi, *Under Cope of Heaven*, p. 9.
- ⁸⁰ John Winthrop. 1996 [December 1638]. *The Journal of John Winthrop* Richard S. Dunn, James Savage, and Laetitia Yeandle eds. Cambridge: Harvard University Press. 1. 229
- ⁸¹ *Winthrop Journal* 1. 278 n. 15.
- ⁸² Thomas Hooker 1860 [1638] "Letter in reply to Governor Winthrop" in *Collections of the Connecticut Historical Society*, V1. Hartford: Published for the Society. p. 10. Editors of Winthrop's journal, Dunn, et al, explain that meeting records are lost, "but it is plain that Connecticut wanted a loose alliance, whereas Massachusetts wanted a tighter union, with some sort of 'preeminence' accorded to Massachusetts as the senior partner." *Winthrop Journal*. 1:2 798 n. 15.
- ⁸³ Thomas Hooker 1860 [circa 1639] "Letter in reply to Governor Winthrop" in *Collections of the Connecticut Historical Society*, V1. Hartford: Published for the Society. p. 11-13.
- ⁸⁴ Thomas Hooker "Letter" p. 12.

⁸⁵ Thomas Hooker "Letter" p. 17. n. 8. (ital. orig.) Winthrop spoke to the uses of covenant and oath as sufficient limitations on the magistrate's prerogatives on several occasions, but his reply to Henry Vane's concerns in this issue are best known. In Massachusetts Bay as in other settlements, the joint-stock corporation charters were adapted to the purposes of constitutions. The signatories regarded the participants in the colonial enterprise as individuals who had consented to a social compact. In Massachusetts Bay, the enterprise was a religious founding and, thus, the elders who interpreted the church-covenant were also fit civil magistrates, filling God's offices, bound by covenant and oath to use their power to fulfill the colony's obligation to God. Massachusetts Bay had been established by covenant when "we agreed to walke according to the rules of the gospell." (as quoted in Miller, *Errand*, p. 41). The government of Massachusetts Bay was established under "her Majesty's patent or grant for our mutual safety and welfare," but this charter did not establish the community as a people, only their mutual covenant could serve that purpose. Magistrates were part of the whole political body established by the covenant. As a part of corporate society, their actions did not express the will of a ruling state, but rather the whole corporate society of which they were a part. Their offices were established by God and their actions in office reflected their covenant to do God's will, including efforts to establish a Godly community. Colonial matters had not been entrusted to "unlimited and unsafe rule" because God's fundamental law prevented church and civil officers from exceeding their power and place. The colony could deal with infractions as they had with other controversies, through the prayerful judgments of the offender's peers, the church elders. No special provision was necessary to enforce this measure of control in a Christian commonwealth, because the covenant to which they were bound was not merely a social agreement. Ultimately Massachusetts Bay responded to the demand that the colony's laws be codified, by adopting the *Body of Liberties* in 1641. The power to remove officials from office for exceeding their power and place became an increasingly democratic arrangement as Winthrop (who was himself impeached in 1646 by what he considered a faction) expected.

⁸⁶ Sermons by Mr. Hooker. p. 20.

⁸⁷ Sermons of Mr. Hooker p. 21.

⁸⁸ Sermons of Mr. Hooker p. 21.

⁸⁹ Sermons of Mr. Hooker p. 21.

⁹⁰ Lutz, *Origins*, p. 31-32.

⁹¹ *Winthrop Journal*, p. 434.

⁹² Ibid.

⁹³ See Lutz, *Origins*, pp. 25-31.

⁹⁴ Tocqueville illustrated this observations with the Plymouth Colony and its *Mayflower Compact* (1620). This political covenant called on God as a witness, explained why the agreement to be made was necessary, created a people from those who authorized the agreement, created a new institution -- a "Civil Body Politick" -- and defined the type of people the agreement would help them become. Donald S. Lutz's detailed study of these early covenants and compacts supports and extends Tocqueville's observations. Lutz argues that if the *Mayflower Compact* had a description of the institutions to be used for collective decision making, it would be a complete document on which a political community could be founded. He demonstrates that the first such modern constitution, the Pilgrim Code of Law, approved in 1636, compiled and organized all the political practices and institutions in use in the Plymouth colony since 1620, including *Mayflower Compact*. Ecclesiastical consociations provided a model for civil confederations. Each used the church covenant form as church and political federations developed concurrently. [Tocqueville, *Democracy*, 1:36, 42. See also Lutz, *Origins*, pp. 25-26.]

⁹⁵ In 1634 Massachusetts Bay adopted measures providing for representation of its towns in the General Court. Plymouth adopted the same institutional form in 1638. The governor and councilors, known as the bench, and the towns delegates, at first called committees, then known as "deputies," sat as one body, with the governor presiding. Decisions, which were made by majority vote in the General Court, established laws, usually by proposing a measure in one session, but not taking final action until the following session. In 1644, the General Court of Massachusetts divided into two houses and Connecticut adopted the same system the following year. Massachusetts Bay did not adopt a system of laws until 1641 when it enacted a hundred provisions called the *Body of Liberties*, after submitting them to the towns before adoption by the General Court.

Freemen, members of the Congregational Church, met annually in one session as the "court of election," choosing the governor, assistants, treasurers and (after 1643) colonial commissioners. The freemen could also

repeal laws passed by the legislature and enact their own measures. Freemen were fined if they were absent from the court of election and failed to vote an absentee ballot.

Only freemen voted in the General Court of election, but since deputies were paid by the towns sending them, the idea that those who pay should elect, all heads of families, freemen or not, could vote for deputies and on other town business, providing they met minimum property qualifications and took an oath of fidelity. The oath declared them to be among the inhabitants of the colony and signified their consent to be governed by the laws they made as a collective body. The freehold qualification reflected their stake in colony business and provided some assurance that, as persons of at least minimal means, their vote could not be bribed by an unscrupulous candidate. The property qualification appeared to be a measure of their insulation against bribery and was often waived for inhabitants known to have sufficient virtue to withstand such temptations. (See John Abbot Godwin. 1870. *The Pilgrim Republic*, Boston: Houghton Mifflin, pp. 404-405 and Lutz, *Origins*, pp. 75-76)

In Massachusetts only one man in four was a church member; there and in New Haven only church members held a franchise. No such restrictions existed in Plymouth or Connecticut, but the ratio of freemen to non-freemen was about fifty per cent greater in Massachusetts than in Plymouth (see Godwin, *Pilgrim*, p. 415) Massachusetts was the site of several closely contested elections and several historians suggest that by the middle of the seventeenth century, many inhabitants were moved to seek freeman status by the spirit of partisanship, rather than signs of grace. In Plymouth, voters seem to have been far less divided on their choice of governor and the work and responsibility of public positions motivated many to avoid citizenship in order to avoid the duties a freeman could not decline without paying a fine (Godwin, *Pilgrim*, p. 415).

Covenantal theology would explain the justice in permitting only church members to have voting rights by distinguishing the "national covenant" for the civil body from the church covenant of the visible saints. A community was in a national covenant only because members of the church covenant -- the visible saints -- administered the laws. Only if this were true could the community claim to have kept its agreement with God to establish a form of civil order according to God's terms as revealed in Scripture. Existence in such a community should be no hardship for non-freeman, covenantal theology contended, because the laws they were compelled to obey concerned only outward rectitude, not belief. Such laws as the saints enacted were the laws of nature which governed all humanity, covenanted or not, and knowledge of the truth and justice of these laws required no capacity beyond the general use of reason shared by all. A regenerate obeyed the law out of positive freedom, not fear, but all humanity had reason enough to follow the dictates of the law of nature and reason should motivate non-freemen to defer to the judgment of the regenerate, if they lacked the greater understanding of God's law that election to the covenant of grace implied.

Massachusetts Bay also eventually experienced the negative consequence of limiting the franchise to those who had accepted the full church covenant. The half-way covenant, an arrangement instituted as a means to initiate the third generation on the path toward salvation, did not convey a franchise. By the third quarter of the seventeenth century, many inhabitants were content to accept half-way status as a means of evading the obligations of citizenship (Miller, *Colony to Province*, p. 127)

⁹⁶ Lutz, *Origins*.

⁹⁷ Tocqueville, *Democracy* 1: 41-44.

⁹⁸ Tocqueville, *Democracy*, 1: 41.

⁹⁹ Tocqueville, *Democracy*, 1: 44; see also Lutz, *Origins* pp. 18, 31-32.

¹⁰⁰ Tocqueville, *Democracy*, 1: 44; Lutz, *Origins*, 18, 31-32.

¹⁰¹ Tocqueville, *Democracy*, 1: 67-68; 169-171.

¹⁰² *Ibid.*, 1: 67.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, 1: 74; see also 170.

¹⁰⁵ *Ibid.*, 1: 9.

¹⁰⁶ Bonomi [*Cope*, p. 216] finds that "religious doctrine and rhetoric . . . contributed in a fundamental way to the coming of the American Revolution and to its final success," by demanding action in a righteous cause of colonial resistance. Church networks enabled the revolutionary message to permeate all parts of society, but the rhetoric of religious motives prevented the revolutionary excesses suffered in other popular movements. Bonomi concludes, "ministers did the work of secular radicalism and did it better: they resolved doubts, overcame inertia, fired the heart, and exalted the soul" [*Cope*, p. 216]

¹⁰⁷ Bonomi [*Cope*, p. 206] characterizes the confederation as a political convention organized not only for the purpose of preventing Anglican encroachment on ecclesiastical authority, but also to safeguard dissenters' rights more generally and limit English cultural influences and political power.

¹⁰⁸ Bonomi, *Under Cope of Heaven*, p. 206.

¹⁰⁹ *Ibid.* 1: 62

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* 2: 351-352

¹¹² *Ibid.*

¹¹³ Daniel Elazar (op. cit. and 1997. *The Covenant Tradition in Politics, 3: Covenant and Constitutionalism*. New Brunswick: Transaction Publishers. See especially the introduction and chapters 4 and 5) discusses the tendency of political scientists to view political power in this "center-periphery" modality.

¹¹⁴ Daniel Elazar (1979. "The Role of Federalism in Political Integration," *Federalism and Political Integration*. Daniel Elazar, ed. Ramat Gan, Israel: Turtledove Publishing. 15) describes the federal form as a matrix characterized by a diffusion of power for the purposes of liberty and a uniting of powers for the energetic pursuit of common ends.

¹¹⁵ Vincent Ostrom expresses a covenantal view of federalism clearly. He writes, "The point of Hamilton's analysis in essays 15 and 16 of *The Federalist* is that reference to other units of government, as such, is insufficient in the constitution of a federal system of government; the nexus of relationships must instead be extended to the persons of individuals. But this does not mean reference to individuals alone. Rather, the nexus between a limited national government and individuals also requires reference to the political nexus of individuals to instrumentalities of state government within each state, to the nexus of individuals to other units of local government other units of local government within each state, and to the nexus of other associated relationships that constitute the social infrastructure. Each nexus . . . must be taken into account in considering the relationships of structures and processes of government in the political community. . . ." See Vincent Ostrom. 1994. *The Meaning of American Federalism: Constituting a Self Governing Society* San Francisco: ICS Press. pp. 126-127.