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# NATURAL LAW AND COVENANT THEOLOGY IN NEW ENGLAND, 1620-1670\*

*John D. Eusden*

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ADDICTION TO STEREOTYPES has often prevailed over insight and research in studies of Puritan political life. Many investigators have described the early New England communities as "Bible commonwealths," theocracies, or would-be kingdoms of righteousness. These terms are partly true, but they tend to obscure the profundity of Puritan political philosophy by accentuation of biblicism, rigid morality, and the role of the clergy. The purpose of this essay is, first, to show that early New England leaders were as receptive to arguments drawn from nature and reason as they were to those from the Pentateuch and a moral code. The thesis offered is that the Puritans used natural law categories, understood in their own way, and that, although they were essentially products of the seventeenth century, they partly anticipated the political thought of the eighteenth.

Secondly, it is hoped that this study of natural law among a Protestant group will help to probe the relationship between the faith which is rooted in Rome and that which stems from the Reformation. Too often it is assumed that Roman Catholicism draws openly on nature and reason and that Protestantism sanctimoniously does not. Next, and most important for the study of Puritanism itself, this essay can help to put the idea of the covenant — that central, permeating idea of Puritanism — into true perspective by asking how covenanted men actually constructed political communities. Lastly, it may be that the essay will aid in the delineation of the emerging "American character" in the realm of governmental theory and jurisprudence.

Two names dominate the *dramatis personae*: John Cotton, influential minister of the First Church in Boston, and John Winthrop, long-time governor of the Massachusetts Bay Colony. Of significance nearly equal to Cotton and Winthrop are Nathaniel Ward, chief framer of the 1641 Body of Liberties for the Bay Colony; William Bradford, governor of Plymouth Plantation; Thomas Hooker, preacher and potentate of Hartford; John Norton, official apologist for New England Congregationalism; John Eliot, evangelist and occasional political writer; and John Davenport, founder of New Haven. The analysis is drawn from the writings and sermons of many

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\* The author is indebted to his Yale colleagues, Sydney E. Ahlstrom and Edmund S. Morgan, who read and criticized this paper. Parts of it were read at the 1959 summer conference of the National Council on Religion in Higher Education, Princeton, N. J.

others besides these; reference will also be made to the statutes, preambles, and declarations of the General Courts in the early settlements.

The political and social thought of early American Puritanism was drawn from four sources: the Bible, the covenant tradition in Reformation theology, the common law of England, and the long Western tradition of natural law. We propose to examine briefly the significance of each and to probe in greater detail the relationship of covenant theology and natural law.

## I

The use of biblical passages in the texts and margins of colonial statutes has led many to conclude that the laws of the Puritan communities were drawn from the scriptures. This interpretation accords neither with the practicality of the early New Englanders, nor with their conception of the Bible. No Puritan believed that the scriptures contained the details of a holy community, ready to be put into operation in seventeenth century Salem, Boston, or Hartford. As Cotton wrote, "It is foolish vanity to ask a warrant in scripture for a form of government, for human wisdom may teach this."<sup>1</sup> The Puritans consciously eschewed certain practices which might have been used were a Bible commonwealth to be erected. No Old Testament "judgeship," or rule of a single man supposedly chosen by God, was allowed despite similarities between the settlement of Canaan and the settlement of the New England wilderness. William Coddington, representing a minority faction, was once chosen to be judge in Joshua-like fashion over the little Rhode Island community of Pocasset. The presence of the "great Jehovah" was declared as a seal for the compact. But Coddington's spiritual and temporal sovereignty was overthrown in less than a year by Samuel Gorton and others who argued that the common law offered a better foundation for a community.<sup>2</sup>

The statutes of the Massachusetts Bay Colony showed the use of the Bible in legislative activities. Scriptural citations appeared in John Cotton's "Moses His Judicials" of 1636, which was a working model for a code (never adopted by the General Court); the Body of Liberties of 1641; the Laws and Liberties of Massachusetts of 1648; and the 1660 edition of the Laws and Liberties. Only Cotton's model or notes, however, employed biblical references profusely. In the other compilations, whole areas of community life were handled without any reference to the Bible. Scriptural passages were given as authorities

1. JOHN COTTON, *SUBJECTION TO CHRIST* 64 (1657), as quoted by CHARLES M. ANDREWS, 1 *THE COLONIAL PERIOD OF AMERICAN HISTORY* 455 (1934-38).

2. CHARLES M. ANDREWS, 2 *THE COLONIAL PERIOD OF AMERICAN HISTORY* 9-10.

only in those laws that dealt with capital crime, the maintenance of schools and churches, and inheritance. Common law references were frequently found alongside the biblical. Indeed, even in Cotton's notes, there was obvious dependence on the common law and the colony's charter. The minister of the First Church appeared to be straining after practices already in effect.<sup>3</sup>

The Fundamental Agreement of the Colony of New Haven, largely the work of John Davenport, offered additional evidence on the place of the Bible in lawmaking. That Agreement seemingly relied heavily on the scriptures. Near the beginning of the document, the following questions and answers appeared:

Whether the scriptures do hold forth a perfect rule for the direction and government of all men in all duties which they are to perform to God and men, as well as in families and commonwealth, as in matters of the church? This was assented to by all . . . whether all the free planters do hold themselves . . . to be ordered by the rules held forth in the scripture? This also was assented unto by all.

However, only five biblical citations were mentioned in the New Haven Agreement — Exodus 18:2; Deuteronomy 1:13, 17:15; and 1 Corinthians 6:1, 6-7. All these were chosen by Davenport to show "what kind of persons might best be trusted with matters of government."<sup>4</sup> The point of the passages was that wise, experienced, God-fearing men should be chosen as rulers; that they should be selected from the people; and that they should have the ability to preserve peace in the community by settling disputes among members. The Bible was not cited as a political source book which provided the governmental minutiae of the Agreement, nor did Davenport and his associates proclaim that future political policy must be drawn from scriptural chapter and verse.

Now there were certain aspects of community life, reasoned the Puritans, for which the Bible was relevant and specific. The scripture spoke clearly and with authority on the matter of punishment for heinous crimes. The Pentateuch prescribed the death penalty for adultery and unnatural vice, and this ruling could be transferred to the present. But even here, in the most clear-cut application of biblical law to a seventeenth century community, the scripture had to be supplemented by other norms. In the case of sodomy, for example, which brought capital punishment according to Leviticus 18:22 and 20:13, there was debate over the definition of the crime and over what aspects of it were to be punished with death. The Bible simply was not clear.

3. See Isabel Calder, *John Cotton's "Moses His Judicials,"* 28 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 86-94 (1930-33 transactions).

4. *The Fundamental Agreement, or Original Constitution of the Colony of New Haven, June 4th, 1639, OLD SOUTH LEAFLETS, No. 8, 7-8.*

Master Ralph Partridge of Duxbury remarked: "I dare not be confident," and went on to confess that he felt more sure when he relied on "the judicial proceedings of the judges in England." Charles Chauncy added, "the punishment of these foul sins with death is grounded on the law of nature and is agreeable to the moral law."<sup>5</sup>

If the Puritans did not use the Bible as a great statute book, of what use was it in the founding of New England communities? Essentially, the scriptures provided the early New Englanders with a way of thinking about law and authority. The Puritans held, first, that the Bible was proof-positive of the necessity of law in society. The preamble of the 1648 Laws and Liberties spoke thus: "So soon as God had set up political government among his people Israel he gave them a body of laws for judgment both in civil and criminal causes." As it was in the old Israel so it must be in the new, for — continued the preamble — "a commonwealth without laws is like a ship without rigging and steerage."<sup>6</sup> Secondly, the Bible afforded a precedent for legal "deduction," or reasoning from fundamental laws. The Bible contained the word of God on matters of law and government for ancient Israel, but, as Cotton put it in a letter to Winthrop, these were "primitive laws." The current meaning of the old biblical laws had to be searched out and, if possible, made relevant to seventeenth century New England. This was not an easy process. A governor or a General Court must decide which biblical norms and rules applied and then interpret them to meet the contemporary situation. There was biblical precedent for making "such deductions from Moses' laws as were explications, and applications." This is what David had done in 1 Samuel 30:24-25 when he made a statute that provided for the equal division of spoil among those who waged battle and those who stayed behind to guard the baggage or equipment. David had deduced this from God's words to Moses in Numbers 31:27. Cotton referred to this example and wrote that contemporary lawmaking must proceed from the law of the Bible "by necessary consequence, or by just proportion" to the actual law.<sup>7</sup>

The primitive biblical laws would not do by themselves. They contained a kernel of practical wisdom, but the kernel must be harvested and threshed through deduction and reasoning. The Bible called legislators to proceed with one eye on the scriptures and the other on the complexity of the present need. "The matter of the scripture," wrote Winthrop, "be always a rule to us, yet not the phrase."<sup>8</sup>

5. WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION, 1620-1647*, at 407, 409 (ed. Samuel E. Morison, 1952).

6. MAX FARRAND (ed.), *THE LAWS AND LIBERTIES OF MASSACHUSETTS*. REPRINTED FROM THE COPY OF THE 1648 EDITION . . . A 2 (1929).

7. Letter of John Cotton to John Winthrop, 5 WINTHROP PAPERS 193 (1947).

8. 4 WINTHROP PAPERS 348 (1944).

## II

The early American Puritans were rightly known as a covenanted people. They believed that God and man had entered into an agreement or "combination" with each other and that the relationship was significant for the life of an individual, the church, and the political community. A true analysis of covenant thinking in early seventeenth century Puritanism must begin with the paramount theological notion of the covenant of grace. This was the covenant which the Puritan clergy traced to the book of Genesis where God had early proclaimed His nurture and love for His chosen people. The covenant had been first offered in Genesis 3 with God's promises to man after the Fall: God had spoken to the serpent declaring that the seed of the woman would bruise the head of the serpent (v. 15). Genesis 14-17 presents one of the major climaxes of the theme in connection with Patriarch Abraham. God said to Abraham, "Moreover I will establish my covenant between me and thee, and thy seed after thee in their generations, for an everlasting covenant, to be God unto thee, and to thy seed after thee."<sup>9</sup> God had renewed His covenant with men time and again in the ages following Abraham.

The covenant begun in the Old Testament continued with fresh vigor in the New. The most overpowering example of the covenant of grace had occurred in God's offering of Himself in the life and death of Jesus Christ. The covenant of grace in the New Testament was the same in substance as that found in the Old, but it was of larger extent — being no longer restricted to the Jewish nation — and its "administration" was held to differ. As Peter Martyr had put it, the variance is not in the *genus*, but in the accidents.<sup>10</sup> All Puritans preached that because of Christ, the covenant of grace had become clearer, more effective, and, as it was often put, "more lively." Peter Bulkeley declared to his Concord parishioners, in sermon after sermon, that the ancient covenant was now theirs in vivid form. He came down heavily on Galatians 3:29: "And if ye be Christ's, then are ye Abraham's seed, and heirs by promise."

The principal message of the covenant of grace was God's promise of protection and salvation. God would reach out to shield His covenanted children from the hardships of the world; He would turn reverses into triumphs. More important, the Lord of the new Israel would save His children from the effects of sin. He would overcome their pride and waywardness. The covenant of grace was essentially a doctrine of comfort and assurance.

9. Genesis 17:7. Biblical quotations are taken from the English translation of the Genevan Bible (1608 ed., "Barker's Bible").

10. As referred to by PETER BULKELEY, *THE GOSPEL COVENANT. OR, THE COVENANT OF GRACE OPENED* 196 (1651).

Its meaning was drawn from the Hebrew word for covenant, *berith*, signifying a testament or promise.<sup>11</sup> The covenant of grace did not mean a contract or a compact in which men and God were bound together, each being required by the terms to do something for the other. There was no *quid pro quo*. The emphasis was squarely on God's initiative and love in proclaiming that "I will be their God, and they shall be my people." (Jeremiah 31:33, Hebrews 8:10) No passage of scripture better illustrated the relationship which the Puritans believed they had with God because of His covenant or promise than 1 Peter 2:9-10: "But ye are a chosen generation, a royal priesthood, an holy nation, a people set at liberty, that ye should show forth the virtues of him that hath called you out of darkness into his marvelous light, which in time past were not a people, yet are now the people of God: which in time past were not under mercy, but now have obtained mercy."

The American covenant preachers were insistent that the covenant of grace was unconditional. Man did not win the blessings of the covenant from God. He must have faith and trust in the gracious self-giving God who emerged in the Puritan interpretation of the Old and the New Testament. *Innitere Deo*, as the formal tracts of the times put it, lean or rest on God. Man's task was to prepare for the bestowal of the covenantal blessing. He had to make ready for the receipt of grace. Man in no way wrung the covenant from God.

The Puritans sermonized without end on the matter of spiritual preparation. In essence these were sermons about the problem of religious experience. The preachers stressed above all the need for confession or acknowledgment of personal unworthiness before God. The Christian must repent sincerely and ask God's forgiveness in humility. He must then give himself over to holy and righteous living. The matter of the receptivity of God's grace so dominated the preaching of the Puritans that the blunt definition at the opening of William Ames' *Medulla*, or *Marrow of Sacred Divinity*, was never challenged. *Theologia est doctrina Deo vivendi*, theology is the doctrine of living to God. This doctrine was fulfilled, ultimately, when one surrendered oneself to God and to His will. The "giving up" of oneself was perhaps the crucial message of Puritan preaching on Christian life and religious experience.<sup>12</sup>

11. William Ames wrote in *THE MARROW OF SACRED DIVINITY* 101 (1642), a treatise that was to dominate the thinking of New England for decades, "It is called a covenant because it is a firm promise . . . Yet because it consists of a free donation, and is confirmed by the death of the giver, it is not so properly called a covenant as a testament, Heb. 9:16."

12. It is doubtless true that the Puritan concern with religious experience ran close to Arminian doctrine which held that man initiated the covenant relation with God. On this matter, see PERRY MILLER, *THE NEW ENGLAND MIND. THE SEVENTEENTH CENTURY* 365 ff. (1939); "Preparation for Salvation" in *Seventeenth-Century New England*, 4

The covenant of grace was primarily associated with the matter of individual salvation, but its central meaning was not lost in Puritan conceptions of the church and political society. The 1636 renewal of church covenant in John Cotton's Boston congregation was made within a confessional perspective. The divine led his people in a declaration of "a great unworthiness to be owned as the Lord's covenant people . . . acknowledging our inability to keep covenant with God, or to perform any spiritual duty unless the Lord Jesus do enable us thereunto, by his spirit dwelling in us," and a proclamation that "we do give up ourselves unto that God . . . the one only true and living God."<sup>13</sup> John Eliot described what he felt to be the basis of the political community in this way:

It is the commandment of the Lord, that a people enter into covenant with the Lord to become his people, even in their civil society . . . and therefore the Lord hath showed his everlasting love unto them, and caused them inwardly by faith, to give up themselves unto him, to be forever his, to love, serve, and obey him.<sup>14</sup>

The Puritans were convinced that the Lord would reveal His will to his covenanted people as they established a new community in the New England wilderness. Isaiah 33:22 was a favorite text: "For the Lord is our judge, the Lord is our lawgiver: the Lord is our king, he will save us."

In the spirit of Reformed theology, the Puritans held that governors and

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JOURNAL OF THE HISTORY OF IDEAS 41 (1943); and *The Marrow of Puritan Divinity*, in *ERRAND INTO THE WILDERNESS* (1956). There were subtle differences among New England preachers on the issue of preparation. Thomas Hooker and Thomas Shepard, especially the former, tended to emphasize man's preparative role, while John Cotton saw man as a passive agent. However, I think the concern of Puritan scholars with "incipient Arminianism" in early seventeenth century New England has been overdone. All the American covenant preachers clearly stressed an unconditional covenant based on God's free offering of himself. Hooker made effective use of John 6:44, "No man can come to me, except the Father, which hath sent me, draw him." See EVERETT H. EMERSON (ed.), *REDEMPTION. THREE SERMONS. BY THOMAS HOOKER* 69 (1956). Hooker's concern with experience and "man's part" was primarily an assertion of New Testament repentance, a matter of absolute necessity in any theory of Christian salvation (Cotton and Hooker were one on this). Repentance was the stretching forth of the hand, in contrition and in confession of need, to receive the gift that was undeserved. The stretching forth did not create the gift; indeed, God had made you so that you could stretch forth your hand. Hooker preached revealingly: "The humbled sinner stands possessed of Christ: for he that is not humbled and broken hearted, hath nothing to do with Christ, nor comfort coming from him. I use this phrase, he stands possessed of Christ, rather than that, he possesseth Christ; because the work lies on Christ's part." *Id.* at 72. Hooker was closer to Cotton than we have been led to believe. The Arminianism of the age was found across the Atlantic in the preaching of William Perkins, John Preston, William Gouge, and William Gataker, and later in America with Samuel Willard and Increase and Cotton Mather.

13. 3 WINTHROP PAPERS 223.

14. 9 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 143-44 (3rd series, 1846).



magistrates were responsible to God. As leaders of the covenanted community, the duty of rulers was to seek the will of God and to rule in the fear of God. John Davenport laid down this principle in an election sermon: "The fear of God is a sanctifying gift of grace wrought by the Holy Ghost . . . [whereby men] exalt him above all and are inclined to the obedience of his revealed will in all things." But *how* is the will of God made known to those in authority? It revealed itself, the Puritans argued, returning to a fundamental point in their theology, through religious experience. Rulers must be truly covenanted men, living to God — they must reside *coram Deo*, before the eyes of God. Davenport continued his address to those in authority, "Be wise therefore ye rulers, and consider that your life, and all your good, your prosperity and protection lies, not in this or that politic design, or whatsoever else under the sun, but alone in God's gracious presence with you."<sup>15</sup>

The ultimate significance of the covenant of grace for political life rested on an essential Reformation concept, namely, that freedom accompanies justification by faith. St. Paul had written in Romans 3:21: "But now is the righteousness of God made manifest without the law." The apostle referred primarily to the law of the Jews, but the Puritans applied the verse to political life as well. New England preaching stressed that God would reveal His will to those whom He had called, to those who had faith, to those who earnestly sought His presence — to those who were in covenant. The responsible rulers of the new Israel were free from the old laws because of their faith; they were called to create new laws depending on the divine guidance made known to them. There were checks on rulers, but more important than limitation was commission. The king of kings had called the Puritans to fashion a society in which his glory would be shown forth in more splendid form. Bold new lawmaking was called for.

The reader versant with the literature of early seventeenth century New England might wonder if too much is being claimed for the covenant of grace. Did not the Puritans believe in a political covenant separable from the covenant of grace? Is it not being said here that the theological has consumed the political? Doubtless the Puritans did believe in a political covenant, based on a rudimentary notion of contract, which was to be distinguished from the covenant of grace. Nearly all the political statements of Puritan clergy and magistrates, the compacts and agreements of the original settlements, and the preambles to later law codes began with references to an agreement or a contract among the people. In Plymouth it was declared, "[We] do by these presents solemnly and mutually in the presence of God

15. John Davenport, *A Sermon Preached at the Election of the Governor at Boston in New England, May 19th, 1669* 8; 12 (1670).

and one of another, covenant and combine ourselves together into a civil body politic."<sup>16</sup> And later in Connecticut, "[We] do therefore associate and conjoin ourselves to be as one public state or commonwealth; and do for ourselves and our successors and such as shall be adjoined to us at any time hereafter, enter into combination and confederation together."<sup>17</sup> John Winthrop in his mid-ocean sermon on the *Arabella*, "A Model of Christian Charity," referred to the necessity of compact or agreement among fellow citizens in the commonwealth about to be established. He wrote and spoke on many occasions that all political societies invoked a notion of contract. Thomas Hooker saw the contractual principle of voluntary association and agreement as the basis of not only political relations among people, but also ecclesiastical and familial.<sup>18</sup>

It is important, however, to note that the Puritans did not use the covenant as a basis for extended speculation about the origins of society and the state. They did not stress an ancient, original contract between men whereby the first body politic had arisen out of man's blissful freedom in a state of nature. Nor did they insist that a political contract was necessary to preserve the "natural rights of man" which had been present in the state of nature. Nor did they hold consistently that the political covenant was a contract between citizens and those chosen to be rulers.

The words *covenant* and *contract* did not appear at all in the 1641 Body of Liberties or in the 1660 Laws and Liberties. There was no other term used in these laws which implied that a contract stood as the basis of man's original political society, or that the laws now codified were to establish the natural rights of man, or that the laws now promulgated were to be understood as a contract between ruled and rulers. In the 1648 Laws, the word *covenant* appeared only twice — and then in the same sentence in the introductory epistle where the reference was clearly to the covenant of grace.

The early seventeenth century New Englanders are not to be confused with divines at the very beginning of the next century who, although sometimes called "Puritan," manifest a new age in political thought. John Wise and Jonathan Mayhew clearly do not speak about the state as did Cotton, Ward, and Winthrop. Master John Wise, for example, the lone Pufendorfian of Massachusetts, believed a contract explained the nature of government and society.

16. BRADFORD, *op. cit. supra* note 5, at 76.

17. *The Fundamental Orders of Connecticut*. 1638(9), *op. cit. supra* note 4, at 1.

18. THOMAS HOOKER, A SURVEY OF THE SUM OF CHURCH DISCIPLINE Pt. I, 45-55, 69, 185-92 (1647).

Every man, considered in a natural state, must be allowed to be free and at his own disposal; yet to suit man's inclinations to society, and in a peculiar manner to gratify the necessity he is in of public rule and order, he is impelled to enter into a civil community, and divests himself of his natural freedom, and puts himself under government . . . he is driven to a combination.<sup>19</sup>

Wise argued that the original contract was drawn up to protect man's natural liberty and equality. Then, he continued, a "new covenant" must be made

Whereby those upon whom sovereignty is conferred engage to take care of the common peace and welfare; and the subjects, on the other hand, to yield them faithful obedience; in which covenant is included that submission and union of wills by which a state may be conceived to but one person. So that the most proper definition of a civil state, is this, viz. a civil state is a compound moral person.

These points were only dimly foreshadowed in the idea of political covenant in early American Puritanism. Too often scholars, noting that the early New Englanders "covenanted together," have injected Enlightenment political thought at the cost of eliminating Reformation theology.<sup>20</sup>

According to the early seventeenth century Puritans, the political covenant was, first, an agreement that a particular group at a particular time should form a political community. The implication was simple and obvious: Henceforth these covenanters should be a people of the same body politic. This was the meaning of the term, "plantation covenant."<sup>21</sup> A covenant was a practical method of procedure and organization, particularly necessary in the establishment of a new political community. The reasoning was not based on a rationalist, contractual theory of the state, but on theological convictions. Those who were making an agreement to be a people had come together to give substance to their convictions. They made their "combination" in order — as a people — to ask for divine pardon, to seek guidance from God, to proclaim His sovereignty, to enact those laws which would

19. JOHN WISE, *A VINDICATION OF THE GOVERNMENT OF NEW ENGLAND CHURCHES* 46 (1717, 1958).

20. CHARLES M. ANDREWS, 1 *THE COLONIAL PERIOD OF AMERICAN HISTORY* 292, links John Wise with the *Mayflower* compact: "The compact . . . was based on the social compact idea, which Parson Wise defended, in his disquisition on the compact or covenant . . . saying that 'all men naturally free and equal, going about voluntarily to bring themselves into a political body, must needs enter into divers covenants.'"

21. See *op. cit. supra* note 4, at 7, for an interpretation of plantation covenant in New Haven.

create the new Israel and reflect the glory of their creator and redeemer. It was put this way in Rhode Island:

We whose names are underwritten do here solemnly, in the presence of Jehovah, incorporate ourselves into a body politic, and as he shall help will submit our persons, lives, and estates, unto our Lord Jesus Christ, the King of Kings and Lord of Lords.<sup>22</sup>

The Fundamental Orders of Connecticut stated: "Combination and confederation . . . [is made] together to maintain and preserve the liberty and purity of the gospel of our Lord Jesus which we now profess."<sup>23</sup>

The early New Englanders believed furthermore that they were in solemn league with God and that He would empower them to fulfill their appointed purpose. John Winthrop emphasized this sense of the political covenant while en route to New England:

Thus stands the cause between God and us, we are entered into covenant with him for this work, we have taken out a commission, the Lord hath given us leave to draw our own articles, we have professed to enterprise these actions upon these and these ends, we have hereupon besought him of favor and blessing: Now if the Lord shall please to hear us, and bring us in peace to the place we do desire, then hath he ratified this covenant and sealed our commission.

In the *Arabella* sermon, Winthrop also stressed the meaning and necessity of Christian love among those who had made an agreement to be a people and who were in covenant with God. This points to a final meaning of the political covenant in Puritanism. It was not enough to make a combination and to declare an allegiance with the Almighty. The citizens of the new Israel covenanted with themselves to proclaim their intention of living under the biblical command of neighbor love.

We must entertain each other in brotherly affection . . . for the supply of others' necessities, we must uphold a familiar commerce together in all meekness, gentleness, patience and liberality. We must delight in each other, make others' conditions our own, rejoice together, mourn together, labor, and suffer together, always having before our eyes our commission and community in the work, our community as members of the same body, so shall we keep the unity of the spirit in the bond of peace, the Lord will be our God, and delight to dwell among us, as his own people, and will command a blessing upon us in all our ways, so that we shall see

22. 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 77 (2nd series, 1818).

23. *Op. cit. supra* note 17, at 1. These words are omitted in the selected quotation from the *Fundamental Orders* in CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 174 (1953), who tends to overlook the theological point of Hooker's political thought.

much more of his wisdom, power, goodness and truth than formerly we have been acquainted with, we shall find that the God of Israel is among us.<sup>24</sup>

The political covenant was political, then, only in the narrow sense that it was an agreement to form a body politic. Beyond that its meaning was theological, stressing the contrition and confession of the community, the acknowledgment of "God's cause with us," and the acceptance of the command, thou shalt love thy neighbor. These ideas were the foundation of the Puritan concept of the political community. They were associated with, if not drawn directly from, the covenant of grace which told of that elemental concern for Puritanism: God's way with men.

### III

We have spoken of the boldness and the freedom which was present in the Puritan conception of law as a result of the covenant of grace. These qualities were especially present in the Puritan use of the common law tradition of England. This section must begin with qualifications, for the difference between the law of England and of early New England can be exaggerated.<sup>25</sup> There can be no doubt that the Puritans made great use of the common law rules and customs and parliamentary statutes — the two chief ingredients of the common law tradition. The early Puritans knew no other law. The charter of the Bay Colony enjoined its holders "to make . . . statutes and ordinances, directions and instructions not contrary to the laws of this our realm of England."<sup>26</sup> The clause was never considered a hindrance, but rather a reminder of a glorious and indispensable heritage. In the 1641 Body of Liberties and the 1648 Laws and Liberties of Massachusetts, certain sections were almost exact models of English laws. The compulsory fixing of wages in the 1648 Laws was based on the Statutes of Labourers, and the division between tanning and currying was patterned

24. John Winthrop, "A Model of Christian Charity. Written on Board the Arabella . . . 1630," 2 WINTHROP PAPERS 294 (1931). Thomas Hooker likewise stressed the common good of all as a basis of political covenant in *A SURVEY OF THE SUM OF CHURCH DISCIPLINE*. The Puritan notion of a covenant with God bears superficial resemblance to Huguenot thinking in the *VINDICIAE CONTRA TYRANNOS* (1579). But the *VINDICIAE* had a revolutionary ring not found in American Puritanism; furthermore, the Huguenot notion of a covenant with God lacked the sense of "nearness" which the Puritans claimed God had manifested towards them.

25. See DANIEL J. BOORSTIN, *THE AMERICANS. THE COLONIAL EXPERIENCE* 24-26 (1958). Consult RICHARD B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW. WITH SPECIAL REFERENCE TO THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (1930).

26. 1 HUTCHINSON PAPERS, *PUBLICATIONS OF THE PRINCE SOCIETY* 20 (1865). Nearly the same language was used in the Plymouth charter and in others.

after the numerous laws dealing with London livery companies.<sup>27</sup> Whenever the laws of the New England colonies were attacked, a feverish attempt was made by magistrates to show that New World laws accorded with those of the mother country.<sup>28</sup>

The Puritan colonists displayed their greatest dependence on the common law tradition of England in matters of local government and justice. The New England town meeting produced a system of government similar to that of small English communities where public affairs were transacted in the vestries and ward moots. Suffrage laws generally followed English practices. In both Old and New England, only freeholders could vote for their representatives in Parliament and General Court, but England never made the right to vote dependent on a religious qualification, as was the case in Massachusetts, Connecticut, and New Haven. Charles M. Andrews summarizes in this fashion:

It is curious how little in the way of forms and methods of government either in the towns or the colonies, the Puritans invented or contrived for themselves. The practices which they adopted trace their origin to the gilds, corporate boroughs, and trading companies of the mother country just as their laws are often the reproduction of common law dispensed in the English local courts, with which they were frequently in contact.<sup>29</sup>

On the other hand, there were many English legal practices which were eradicated or changed in the new world at the very beginning of colonization. The Puritans fled to their wilderness Zion to avoid many of the laws of the homeland, and they naturally would not reinaugurate the legal sources of their oppression. As Edward Winslow wrote, "There were some things supported by them [the laws of England] which we came from thence to avoid, as the hierarchy, the cross in baptism, the holy days, the book of Com-

27. Theodore F. T. Plucknett, review of MAX FARRAND (ed.), *THE LAWS AND LIBERTIES OF MASSACHUSETTS*. REPRINTED FROM THE COPY OF THE 1648 EDITION . . . (1929), 3 *NEW ENGLAND QUARTERLY* 159 (1930).

28. A typical event occurred in 1646 when the Massachusetts General Court considered a remonstrance and petition from Robert Child and others who were dissatisfied with the government of the colony. The petitioners claimed that the General Court did not abide by the common law of England. The *Declaration of the General Court (1646)*, 1 HUTCHINSON PAPERS, PUBLICATIONS OF THE PRINCE SOCIETY 223-47 (1865), attempted to show the conformity of colonial laws with those of the homeland.

29. ANDREWS, *op. cit. supra* note 2, at 105 note 1. The influence of English local custom (as opposed to the law of King's Bench, Common Pleas, and the Exchequer) is ably defended by Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth-Century New England*, 31 *COLUMBIA LAW REVIEW* 416 (1931). For a helpful classification of theories, see Zechariah Chafee, Jr., *Colonial Courts and the Common Law*, 68 *PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 132-59 (1944-47).

mon Prayer.”<sup>30</sup> It is not startling that the New England leaders refrained from establishing ecclesiastical courts which would administer a “spiritual” justice as opposed to a “temporal” justice in the common law bench and in Chancery. The Puritans had too vivid a memory of the persecution suffered at the hands of the Anglican hierarchy acting through the Court of the High Commission with its hated *ex officio* oath. Spiritual discipline was to be handled in New England by the churches through censure and excommunication. Duly chosen magistrates and civil judges, who presumably had the fear of God in their hearts and who strove to reflect the glory of God, would support, augment, and occasionally initiate discipline. Magistrates could not censure and excommunicate, but they could banish.<sup>31</sup> Church and state cooperated to produce an effective set of controls. But the New England leaders never allowed a separate ecclesiastical court system to exist, as it did in England where a legal procedure at variance with the common law had grown up and where the ecclesiastical courts claimed jurisdiction over all religious disputes and so-called spiritual goods, such as church property and tithes.<sup>32</sup> The role of the “godly magistrate,” in league with the church official, was crucial in the spiritual life of the colonies. Civil rulers were qualified to appoint fast days and to proclaim times of thanksgiving. Even marriage was a civil contract, and the ceremony was not to be performed in a church.<sup>33</sup>

The overriding reason for the Puritan change in English practices was the conviction that a new society was being erected. Fresh laws to meet situations vastly different from those of the home country were required. Winslow wrote about the matter with delicacy:

As for the law of England I honor it and ever did, and yet know well that it was never intended for New England . . . all that is required of us in the making of our laws and ordinances, offices and officers, is to go as near the laws of England as may be . . . as the garments of a grown man would rather oppress and stifle a child if put upon him, than any

30. Edward Winslow, *New England's Salamander, Discovered by an Irreligious and Scornful Pamphlet*, 2 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 138 (3rd series, 1830).

31. See EMIL OBERHOLZER, JR., DELINQUENT SAINTS. DISCIPLINARY ACTION IN THE EARLY CONGREGATIONAL CHURCHES OF MASSACHUSETTS 216 ff. (1956).

32. See JOHN D. EUSDEN, PURITANS, LAWYERS, AND POLITICS 89-94 (1958), for the attack of Sir Edward Coke on the ecclesiastical courts, a matter which helped to cement the alliance in England between Puritans and common lawyers.

33. GEORGE L. MOSSE, THE HOLY PRETENCE 101 (1957) holds that John Winthrop gave the magistrate “almost unlimited elbow room in the preservation of the godly society.” William Bradford said of marriage that it was “a civil thing, upon which many questions about inheritances do depend, with other things most proper to their cognizance and most consonant to the scriptures (Ruth 4) and nowhere found in the gospel to be laid on the ministers as a part of their office.” *Op. cit. supra* note 5, at 86.

way comfort or refresh him, being too heavy for him: so . . . the laws of England . . . are too unwieldy for our weak condition.<sup>34</sup>

Nathaniel Ward, framer of the 1641 Body of Liberties, rumbled in a stronger mood, "Our common law doth well, but it must do better before things do as they should."<sup>35</sup>

The New England colonies had no place for the English system of record keeping by church parishes. Far better to make the recording of births, marriages, deaths a province of civil government. In England the majority of wills and estates was processed by the ecclesiastical courts, whereas in New England separate probate courts existed from the very beginning. These were local courts accessible to the people with officers chosen from the citizenry of the community. In the economics of early New England where capital was scarce, a greater fluidity was needed in credit and financial transactions. Consequently all specialty debts were assignable by endorsement, a much looser practice than prevailed across the Atlantic. Flexibility also existed in New England's law of the sea which did not follow the admiralty code of England, but rather proceeded from *ad hoc* laws laid down by the General Courts of the colonies. Courtroom procedure also varied. Juries were given more latitude and were allowed in cases of doubt to confer in open court with anyone who might offer guidance or clarity. Jurymen could bring in a verdict of *non liquet* ("it is not clear") if either "Guilty" or "Not guilty" was inappropriate. A new trial was more readily obtained in New than in Old England. In the Puritan colonies the presentation of a bill of review, which combined common law and equity proceedings, usually procured a new hearing of a case.<sup>36</sup>

The changes were legion, and many of the Puritan leaders were concerned lest the innovations be discovered. In the late 1630's John Winthrop was against the codification of the laws of the Bay Colony because the discrepancies would be all too visible. Massachusetts might be accused of breaking its charter command to make no law "contrary to the laws of this our realm of England."<sup>37</sup>

A precise answer to the problem of the "reception" of English law is not easily given. On the one hand, the lawmakers of early New England turned naturally to the common law; but, on the other, the ancient English legal customs and statutes were not considered absolute, comprehensive authorities. Mr. Plucknett, writing about the Massachusetts laws of 1648

34. Winslow, *op. cit. supra* note 30, at 137-38.

35. NATHANIEL WARD, *THE SIMPLE COBBLER OF AGGAWAM IN AMERICA* 36 (1647).

36. Plucknett, *op. cit. supra* note 27, at 159.

37. *Charter of the Massachusetts Colony, op. cit. supra* note 26, at 20.



and their relation to the common law tradition, describes them as a "scissors and paste" compilation.<sup>38</sup> The Puritan leaders took what they needed from the laws of the homeland.

The legal discrepancies between seventeenth century England and America are sometimes explained by the fact that there were few skilled common lawyers in the colonies. A statement of the General Court of Massachusetts spoke to this point: "For ourselves, we must profess our insufficiency for so great matters . . . If we had able lawyers amongst us we might have been more exact."<sup>39</sup> This was the actual situation of the colonies, but it was also a tongue-in-cheek explanation. Even if the Puritans had had the best legal minds in their midst, they would not have acted otherwise. A more important reason for American changes in and breaches of the common law was the Puritan conviction that justice was to be sought on a higher level than that offered by common law customs and parliamentary statutes. The early Americans did not believe in the inviolable sanctity of the common law as did Sir Edward Coke and the many English Puritans who were his allies in Parliament and the common law courts. Defenders of the New England laws looked frequently for authority to the "higher" English Court of Chancery, which judged not according to common law but according to equity, *secundum aequum et bonum*. Beyond chancery lay the tradition of natural law. It was here that the Puritans placed a firm reliance when establishing the laws and government of communities on the Charles, the Connecticut, the Merrimack, and the Quinnipiac.

#### IV

The early New England leaders were frequent users of the term "natural law" or "law of nature." John Winthrop spoke of the "double law by which we are regulated in our conversation one towards another . . . the law of nature and the law of grace."<sup>40</sup> Davenport urged civil governors, "Let the sovereign

38. Plucknett, *op. cit. supra* note 27, at 157. Mr. Plucknett states that the 1648 Laws and Liberties show "voluntary reception of a good deal of common law, freely modified to meet local conditions." For the examples of modification cited above, I am indebted also to Horace E. Ware, *Was the Government of the Massachusetts Bay Colony a Theocracy?*, 10 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS 155-60, 162-63 (1904-06 transactions); HELEN J. CRUMP, COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY 39, 46-47, 50-53 (1931); and PAUL S. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 55-56 (1898). A late eighteenth century American had this to say: "Our ancestors . . . very early established a constitution of government by their own authority; which was adapted to their situation and circumstances . . . Their common law was derived from the law of nature and of revelation; those rules . . . which arise from the eternal fitness of things." Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), in MARK D. HOWE, READINGS IN AMERICAN LEGAL HISTORY 17 (1949).

39. *Op. cit. supra* note 28, at 227.

40. Winthrop, *op. cit. supra* note 24, at 283.

dictates of nature, be constantly attended by you.”<sup>41</sup> Even in a discussion of church polity, natural law was found to be helpful and necessary. John Norton, defending the New England way of church life, held that synods could be reasoned from “nature as guide,” for according to natural law a difficult controversy was taken from a lower court and given to a higher.<sup>42</sup> Without exception, the early American Puritans found nature and its law to be suitable for argument and comfortable in doctrine.

An exploration of the content of Puritan natural law must begin with the crucial matters of interpretation and perspective. All references to natural law found their place within the confines of the Puritan doctrine of God and man. Or, more bluntly, the natural had no meaning for the early New Englanders apart from the theological. This meant, first of all, that Puritan speculation about natural law and use of natural law were always coupled with an assertion of divine sovereignty. Nature was simply another realm in which God had manifested His laws for men and their communities — the natural was never opposed to the divine. The early Americans did not claim, as some English Independents of the Civil War period did, that God’s rule was veiled or indirect in the realm of nature, and that what transpired in nature was beyond God’s firm control.<sup>43</sup> The singular, forthright, comprehensive rule of God, who held the helm of the universe in His hands, extended to nature and its laws.

Secondly, natural law was always subsumed under the Puritan notion of covenant. The chief idea in the covenantal thought of Puritanism was, again, the covenant of grace wherein God had promised and offered salvation, comfort, direction to those who responded to Him in faith. In the covenant of grace God had given His elect certain standards of judgment or norms for decision. The standards and the norms were a part of God’s free, gracious dealing with His chosen ones; they were bestowals or blessings from the redeeming Lord. The word *natural* thus referred to criteria which were germane in the elect — or natural to those in the covenant of grace. But another referent was also present. God had bestowed blessings on man before redemption, apart from the covenant of grace. These were likewise called natural. Man, understood in the light of the book of Genesis, had received good things from God at the beginning of human history. God had given Adam norms and standards which were useful in his life in the Garden of

41. Davenport, *op. cit. supra* note 15, at 14 (see also *id.* at 4).

42. JOHN NORTON, *THE ANSWER* 129 (1648), transl. and intro. by Douglas Horton (1958).

43. See A. S. P. WOODHOUSE, *PURITANISM AND LIBERTY. BEING THE ARMY DEBATES* (1647-9) intro. (2nd ed., 1951). Also EUSDEN, *op. cit. supra* note 32, at 25-27.

Eden when he and Eve comprised the first human community. The seventeenth century founders of Salem, Plymouth, Concord, and Hartford carried with them these first blessings. Indeed *all* men, including those who stood outside the covenant of grace and would never enter it, participated in this primordial bestowal. Heretics, pagans, Roman Catholics, and all manner of Gentiles had received from God the same norms of decision which God had given to Adam the common ancestor.

Natural law for the American of the early 1600's thus existed at two levels. There were the natural laws of human behavior which God had given to men who participated in the covenant of grace; and there were the natural laws which were the property of man as man, apart from the covenant of grace.

The early New Englanders did not have the physical world in view as they expounded natural law. There was no reveling in the glories of surrounding nature, no joysoe expostulation on the beauty of the sky and the earth as Jonathan Edwards was to offer in the next century as an example of God's majesty. The world of sky, earth, sea, and snow was too formidable in the minds of the early seventeenth century colonists to permit such wanderings of mind. Nor did the observable laws of this harsh grandeur provide guidance for man and his life in society. Natural law did not mean for the Puritans some great overriding principle which both explained and directed man's behavior, such as Platonic justice, Benthamite utility, Hegelian dialectic, or Kantian categorical imperative. Nor, finally, was there any similarity to scholastic definitions which saw natural law as the means of human participation in the divine plan for the ordering of the universe. It is clear beyond a peradventure that when the Puritans preached and wrote about natural law, they referred to the standards of judgment, norms of policy, guides for decision which God had given man.

Unfortunately, the terminology used by the Puritans to describe natural law and its levels was neither precise nor consistent. English and Scottish colleagues in the Reformed tradition were more careful with language when considering natural law. Robert Rollock, the first principal of the University of Edinburgh, used the term "covenant of nature" to designate those norms which Adam had received in the Garden of Eden and which all men now possessed.<sup>44</sup> Among early American Puritans, I have found no reference to a covenant of nature with such an exegetical treatment. Allusions are plenteous to a covenant of works, of course, but this covenant did not apply to criteria which man *qua* man had been given but rather to a form of reli-

44. ROBERT ROLLOCK, *A TREATISE OF GOD'S EFFECTUAL CALLING* (1603), transl. by Henry Holland.

gious life contrasted with the covenant of grace. The covenant of works stood in opposition to the covenant of grace; it produced a life dependent on the moral law, obedience, and salvation by works. It had failed and always would fail because it did not look to grace, faith, and God's unconditional offering of Himself. There could be no "living to God" in a covenant of works. The covenant of works as understood and applied by the American Puritans had little bearing on their interpretation of natural law.

John Davenport was more concerned than any other New Englander with the matter of terminology. He made a distinction in his famous election sermon of 1669 between the "natural" and the "positively moral." The natural was the law which man drew "from the light and law of nature." The positively moral was the law which rulers in the covenant of grace promulgated for the ordering of their communities.<sup>45</sup> Although Davenport used the second term with general reference to the human or positive laws of a political society, he specifically identified the positively moral with the norms or the standards given by God to the covenanted elect.

Rather than use Davenport's terms, which did not receive acceptance in New England and which were not carefully worked out, it is better perhaps to invent terminology for the two kinds of natural law in American Puritanism. We shall call the one "Adamic natural law" — that which man has because he is man quite apart from any covenant relation to God. The second will be called "covenant natural law," referring to the standards which man possesses after redemption as he accepts in faith the offerings of the covenant of grace.

What is the content of Adamic natural law and covenant natural law? Of what use were they in the founding of New England communities? And, finally, what role did they play in the development of American jurisprudence?

The Adamic natural law was small in scope and was the less important for the Puritans. We may begin where most of the early Americans began and, in fact, where many political thinkers have begun. God has given man an obvious standard in the law of self-preservation. Man will naturally preserve the life that God has given him; man has discovered that preservation can be achieved best by uniting in a society where lives and possessions are conserved and protected. American Puritanism sounds a Hobbesian note at this point: Man joins man in society and the state in search of protection. He does not create community because he is naturally a political animal and craves association, as Aristotle and company would have it. Political community comes into being out of necessity; it is only in community that lives can be preserved.

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45. Davenport, *op. cit.* *supra* note 15, at 4.

The Puritans fashioned the natural law of self-preservation into a useful tool for political reasoning. That which destroyed the community within which man's life was best preserved was adjudged against the Adamic natural law. The Puritans took on many occasions an old principle of the Roman law, *salus populi est suprema lex*, the preservation of the people is the supreme law, and made it a part of their first kind of natural law. John Winthrop's reasoning on several admiralty cases, recorded in his *History*, demonstrated the point. Since many of the admiralty decisions of the colonies were at variance with English proceedings, Winthrop was careful to list exhaustive reasons for the decisions of the General Court. In one case, five reasons were given. The first was *salus populi est suprema lex*; it was this natural law which primarily enabled the General Court to proceed, according to Winthrop, even though its actions did not accord with English law of the sea. *Salus populi* had definite priority over reason number three, which asserted that the General Court possessed full power because it represented the people, as the English Parliament represented the people in the common law tradition of England.<sup>46</sup>

The Adamic natural law of American Puritanism contained at least two other standards of judgment or guides for decision in the political community. Man had received from God the natural standards of moderation and justice.

The Puritans believed that man naturally obeyed a law which forbade extreme forms of action and that this law had pertinence for man's communal life. Many political problems could be solved by following the natural, moderate course. Nowhere is the appeal to moderation stronger than in the criticism of the English Civil War. Nathaniel Ward charged his English brethren — both those who sided with Parliament and those who stood with the crown — with a "misprision of reason, upon a misprision of reason." He warned that "distracting nature, calls for distracting remedies; perturbing policies for disturbing cures." "I could never conceive," he said, "why a rational king should commit treason against a reasonable Parliament, or a faithful Parliament against their lawful king."<sup>47</sup> It could be said that Nathaniel Ward had an atypical obsession with the idea of balance, but nearly all other New England Puritan leaders joined him in an appeal to moderation as a natural criterion which would end the armed conflict in the mother country. There arose, thus, near the midcentury the phenomenon of American Puritans attacking the Great Rebellion on the basis of one interpretation of natural law, and many English Puritans defending it on the basis of another.

46. HELEN J. CRUMP, *COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY* 42-43 (1931). *Salus populi* was also an argument used effectively against Roger Williams and Anne Hutchinson.

47. WARD, *op. cit. supra* note 35, at 44, 34.

The New England leaders also believed that man possessed an innate law of justice. There were many references in tracts and sermons to Romans 1 and 2 where Paul spoke briefly of the Gentiles' conscience and of their ability to do by nature what the law required. The preamble of the 1648 Laws and Liberties, for example, made the usual statement that God was "nearer" to the Jews and that "their laws were more righteous than other nations."

Yet [the preamble continued] in the comparison are implied two things, first that other nations had something of God's presence amongst them. Secondly, that there was also somewhat of equity in their laws . . . which appears in that of the Apostle *Rom. 1.21. They knew God &c:* and in the 2.14. *They did by nature the things contained in the law of God.*<sup>48</sup>

There was a natural sense of justice among all men, rough-hewn though it might be. Sometimes the sense was termed "natural righteousness." The political concomitant, the Puritans were convinced, was that nearly all of man's positive laws for organized political life displayed a primitive form or a vestige of equity or justice. Man had a native sense of what was right and what was wrong. Using this sense, he could make, and had made, laws to enforce the right and enjoin the wrong. This was true whether the man in question was Christian or not, elect or nonelect.

The Adamic natural laws were more than norms. They constituted in fact some of the basic qualities of man *qua* man. To be sure, the law of self-preservation was shared with all living things, but as man translated this into the political law of *salus populi est suprema lex* he showed a natural ingenuity that was shared by very few, if any, members of the animal kingdom. The natural laws of moderation and justice were more deeply imbedded in man than in any other living thing. Man as an entity was identified by the Adamic natural law as well as helped in his political tasks.

The Puritans ceased their speculation on the first level of natural law with these simple enumerations and descriptions. Why did they not go on? Why not use this natural law to build the ideal Puritan state? Could not deductions be made and then applied to the task of founding a new Zion in the wilderness? Perhaps even other laws could be discovered by a diligent study of man and his nature. These things the Puritans could not do. They could not because, despite what has been said, they ultimately distrusted man's nature. They could not because they believed that man as man always perverted the good, useful natural laws which he had been given. As the 1648 Laws and Liberties put it, borrowing the thought and language of St. Paul: "The nations corrupting his ordinances (both of religion and

48. FARRAND (ed.), *op. cit. supra* note 6, at A 2.

justice) God withdrew his presence from them proportionably whereby they were given up to abominable lusts."<sup>49</sup> They could not go on with this kind of natural law, because they believed in the Fall.

The Puritans knew that the natural law was continually being broken by sinful men. The natural law of moderation, for instance, helpful in the pamphlet war over the justification of the Great Rebellion, was finally irrelevant in the practical world of pride and power. Nathaniel Ward wrote in his *Aggawam* of "a good king that undoes not his subjects by any one of his unlimited prerogatives" and of "a good people, that undo not their prince, by any one of their unbounded liberties, be they the very least." This was the Adamic natural law. But, said Ward, "I am sure either may [undo] and I am sure neither would be trusted, how good soever."<sup>50</sup> The law of self-preservation, the very first norm of the Adamic natural law, could easily be turned into a law of self-aggrandizement which would deny the meaning of the original law to others. This whole first level of natural law must be augmented by a second set of norms and standards of judgment which would account for the realities of sinful men in political community.

The second level of natural law is that which may be called covenant natural law. It was given by God to those men who acknowledged and confessed their sins and, in the profoundest meaning of the covenant of grace, had accepted the command of *innitere Deo* — lean on God. This was the special law which God had given to His chosen people who were erecting a commonwealth in a new world, a state which would display the resplendent glory of the Lord. It was not the property of man *qua* man. It was the property of and natural to those who lived in the contrition, comfort, commission, and command of the covenant. The preamble of the 1648 Laws and Liberties spoke, as we have noted, of God's presence as a natural law among "other nations." The preamble put the matter of covenant natural law in the form of a question:

Now, if it might have been so with the nations who were so much strangers to the covenant of grace, what advantage have they who have interest in the covenant, and may enjoy the special presence of God in the purities and native simplicity of all his ordinances by which he is so near to his own people?<sup>51</sup>

What additional norms had been given to those who had, in the words of the preamble, an "interest in the covenant"? At least three identifiable

49. *Ibid.*

50. WARD, *op. cit. supra* note 35, at 35.

51. FARRAND (ed.), *op. cit. supra* note 6, at A 2.

standards of judgment emerged in the Puritan consideration of the second level of natural law. First, natural law for the covenanted people of early seventeenth century New England meant that political power was limited. The limitation of power was the chief covenant natural law, and the remaining two were derivative from it. Absolutism had prevailed in the history of men, and at times there might have been justification; but it had no place among a people who knew the reaches of human sin. Cotton wrote:

Give mortal men no greater power than they are content they shall use, for use it they will: and unless they be better taught of God they will use it even and anon . . . A prince himself cannot tell where he will confine himself, nor can the people tell: But if he have liberty to speak great things, then he will make and unmake, say and unsay, and undertake such things as are neither for his own honor, nor for the safety of the state. It is therefore fit for every man to be studious of the bounds which the Lord hath set.<sup>52</sup>

A ruler or a group of rulers who attempted to wield absolute power acted against the covenant natural law.

The corollary of this law was that a people must be vigilant lest a prince or an oligarchy inaugurate a rule without bounds. It was in this sense that the Puritans held that power was in the people. The new Israel to whom the covenant blessing had now been bequeathed was responsible as a whole for controlling the sinful power drive of man. The Puritans did not use the corollary of power in the people as a call to erect a government where the inalienable rights of man would be implemented or where democratic participation in government would prevail. The idea of power residual in the people later became a positive basis for the construction of democracy; but in the early seventeenth century it had primarily a negative meaning. The state of man required, as Cotton expressed it, "the people in whom fundamentally all power lies, to give as much power as God in his word gives to men."<sup>53</sup> The idea of power belonging to the people was a bulwark against the sinfulness of man as displayed in political absolutism.<sup>54</sup>

The second norm in covenant natural law was that governmental power should be in the hands of civil, not ecclesiastical, rulers. Davenport described

52. JOHN COTTON, AN EXPOSITION UPON THE THIRTEENTH CHAPTER OF THE REVELATION 71-72 (1655).

53. *Id.* at 72. See also EDMUND S. MORGAN, THE PURITAN DILEMMA. THE STORY OF JOHN WINTHROP 94 (1958).

54. John Davenport said the power of government was in the people "radically and virtually," "communicatively," and "limitively." *Op. cit. supra* note 15, at 5-6. Thomas Hooker, more than any other Puritan, hinted at the democratic meaning of power residual in the people, but he deduced no theory of man's rights. His emphasis was primarily negative, stressing the responsibility of the people to control excesses.



this norm as a "positively moral" law for the community, a law better suited for covenanted New England than one which prescribed priestly rulers or the judge-like rule of one man. Most Puritans believed that their charters from the crown, which provided for a governor, assistants, and a General Court, were in accord with this law. No ecclesiastical officer had the power to "disannul civil dignity." The laws of 1641, 1648, and 1660 all made this point: "Nor shall any church censure degrade or depose any man from any civil dignity, office or authority he shall have in the commonwealth."<sup>55</sup> If theocracy be taken to mean the rule of the priestly class, the Puritans were against it. They offered rather a basic separation of church and state in the matter of actual government.

Lastly, in contradiction to prevailing stereotypes, the New Englanders held that covenant natural law provided for the hearing and honoring of minority views on the governing of the body politic. In matters relating to the church, both its belief and its polity, the record of the early Puritans displayed, of course, a high level of intolerance. This was not the case in the realm of civil laws for the colonies — and even the laws relating to religion could be questioned, although any realistic petitioner must have known that his remonstrance was likely to do him more harm than good. Many protestations against positive laws were made by petition and by less formal means during the first half century. They engendered much criticism, but no majority held that criticism should be repressed. The Body of Liberties and both editions of the Laws and Liberties declared:

It is, and shall be the liberty of any member or members of any court, council or civil assembly in cases of making or executing any order of law that properly concerneth religion, or any cause capital, or wars, or subscription to any public articles, or remonstrance in case they cannot in judgment and conscience consent to that way the major vote of suffrage goes, to make their *contra-remonstrance* or *protestation* in speech or writing, and upon their request, to have their dissent recorded in the *rolls* of the Court, so it be done christianly and respectfully, for the manner . . .<sup>56</sup>

The right of protestation represented in American Puritanism a conviction that there should be no unqualified rule of the majority. Here we behold a genuine early seventeenth century contribution to democratic government. It stood also for something deeper, something germane to the Puritan charac-

55. FARRAND (ed.), *op. cit. supra* note 6, at 20. See also JOHN COTTON, *THE BLOODY TENENT, WASHED, AND MADE WHITE IN THE BLOOD OF THE LAMB* 102 (1647), where church officers are declared subject to civil authority in *judicium politicum*.

56. FARRAND (ed.), *op. cit. supra* note 6, at 45-46. See also Plucknett, *op. cit. supra* note 27, at 159.

ter: a willingness to hear criticism, albeit said criticism may never become governmental policy. John Winthrop, despite his seeming autocratic ways, was willing on many occasions to hear and accept the judgment of others.<sup>57</sup> It is perhaps not too much to say that the Puritans believed that no man or group possessed ultimate wisdom on the organization and operation of the state. Wisdom belonged to God alone. The rulers of the new Israel must promulgate laws and direct the state with purpose and firmness, but they could not ignore the convictions and viewpoints of others with whom they were joined in the covenant of grace.

These three natural laws of a covenanted people demonstrate the political realism of early American Puritanism. The second level of natural law shows an unmistakable Augustinian strain in the political thinking of the New Englanders. The Puritans believed that they had received the covenant blessings given to Abraham, Isaac, and Jacob — blessings made more vivid for those who were now in Christ. They considered themselves to be redeemed men. But they knew that pride and lust for power beset all men, even those who could call themselves saints. Most significantly, sin beset the saints who became involved in the administration of the body politic. Hence, God had given the foregoing natural laws to those whom He had singled out for glory in order that they might have norms which would guide them in the ordering of political communities.

The two kinds of natural law considered thus far — the Adamic natural law and the covenant natural law — were undoubtedly useful in political reasoning, but they needed supplementation. The limitation of power in the body politic was a principle of great worth, but this particular covenant natural law did not tell how the power of rulers should be curtailed in positive law. Similarly, in Adamic natural law, there were no details offered for the implementation of the law of self-preservation. In the absence of specificity, a matter which has plagued all philosophies of natural law, the Puritans offered two further sources of authority. They turned to the details of the Bible and, of far greater significance, they employed a law of reason which represents their most developed and most influential form of natural law.

The Bible, as stated before, did not furnish laws for the early Puritan communities. It did possess, however, details which redressed the deficiencies of natural law. The Puritans, it must be stressed, saw no discrepancy or conflict between the commands of scripture and the dictates of natural law.<sup>58</sup> Even if the Adamic and the covenant natural law could not be matched point

57. See MORGAN, *op. cit. supra* note 53, at 114.

58. See the preamble to Plymouth laws of 1658, 11 RECORDS OF THE COLONY OF NEW PLYMOUTH 72 (ed. David Pulsifer, 1861).

for point with biblical passages, the Puritans were sure that nothing in their conception of natural law contravened "the matter of the scripture." The same Lord and Creator had given both norms — how great and how tortuous were the exegetical pains to establish this point! According to John Norton, for example, the natural law decreed that ministers should be paid liberally in accord with the status of the community; he found the same principle in Luke 10, where the mission of the seventy was described, and he even found it in Genesis 47, where Joseph bought all the land of Egypt with the exception of the priestly holdings.<sup>59</sup>

In many instances, the Bible actually supplied the needed details of a natural norm. John Davenport, urging that "the sovereign dictates of nature, be constantly attended," referred immediately to Matthew 7:12. He was speaking in the main about justice, a norm of the Adamic natural law; the full meaning of this natural law, he declared, was found in the gospel's words, "So whatever you wish that men would do to you, do so to them; for this is the law and the prophets."<sup>60</sup> In the "Model of Christian Charity," John Winthrop used numerous scriptural passages to supplement in greater detail his discussion of the rule of justice and of natural law in general. Scripture was a helpful, additional source. But, to emphasize an earlier point, not even biblical addenda granted full authority for the many laws needed in the actual governing of political communities.

The truth is that the Puritans did not expect to find comprehensive authorities for their statutes and ordinances. After all, they were engaged in a new experiment, a grand errand, a mission in which all things would be new to a considerable degree. Governors and general courts would have to travel legal ways where there were no precedential signposts. The Bible, the common law tradition, and the two forms of natural law were not enough. Rulers and legislators had to reason their way to the laws required for the new Israel. A law of reason became the supreme authority for the Puritans. Immediately it should be said that this law of reason was not any objective, easily discernible norm operating infallibly among all men. It was peculiar to Puritan theology. The law of reason was for the early New Englanders part of covenant natural law. Indeed, it was the highest part.

The other parts of the covenant natural law had been given by God because of human sin, a condition of man which only a covenanted people could truly know and confess. The law of reason had a positive connotation. It was bestowed upon a covenanted people because they had been chosen by God, chosen despite and in the midst of their sin. It was the revelation of

59. NORTON, *op. cit. supra* note 42, at 158.

60. DAVENPORT, *op. cit. supra* note 15, at 14.

God's will to those who had confessed and were now comforted and commissioned. It was not a law of *reasonable men*. According to the Puritans, there never existed a reasonable man with the usual corollary that said man was thereby prudent, dependable, and just. It was rather the law of *reasoning men in covenant*, men struggling to know the divine will, never fully revealed but envisioned and applied in faith.

Perhaps the author can take again the liberty of assigning a term for this meaning of reason. I offer the phrase "covenant equity." The Puritans were confident that they as a covenanted people could frame just laws for the new Israel. Justice would be forthcoming because God had given His covenanted people the gift of understanding sufficient of His will to erect a body politic. Men who had been saved and were now living to God, participating fully in the covenant of grace, had the power of comprehending God's will. The law of reason was the reason of redeemed men instructed by the Holy Spirit. It was a law known in the recesses of religious experience.

In a formal sense, the covenant of grace did not give authority to New England magistrates and rulers. Their authority was based upon the plantation covenant or agreement to form a body politic and upon consequent selection by the people. But it is clear that if rulers were not in the covenant of grace the Puritans believed their hope for a state which glorified God would vanish. Davenport stated:

See that they whom you choose to be rulers, be men interested personally in Christ: For when they that are called to ruling power, cease to exert it in subserviency to the kingdom of Christ, there will be an end of New England's glory, and happiness, and safety.<sup>61</sup>

What reasoning men in covenant should do at the moment took precedence over all other forms of authority. John Winthrop declared that "such laws would be fittest for us, which should arise *pro re nata*," for the matter that has occurred.<sup>62</sup> On the basis of covenant equity, John Davenport urged constant review of present legislation: "If upon revisal of your body of laws any one be found to be unjust and oppressing, let it be expunged, and altered."<sup>63</sup> Covenant equity meant that what had once been done in law

61. *Id.* at 11.

62. Winthrop memorandum of 1639, in WILLIAM H. WHITMORE (ed.), *THE COLONIAL LAWS OF MASSACHUSETTS*. REPRINTED FROM THE EDITION OF 1660, at 7 (1889). Winthrop was close to an ancient principle of the civil law, *ex facto jus oritur*. See his discussion of making the punishment fit the crime, *Arbitrary Government*, in 4 WINTHROP PAPERS 474 (1944).

63. Davenport, *op. cit. supra* note 15, at 14. William Aspinwall's preface to the 1655 edition of John Cotton's *Abstract of the Laws of New England* emphasized that civil laws were to be regarded as prudential rules. Cotton was persuaded that only God — never man — could be conceived as a lawgiver.

could be undone if a better way were seen. When it was time to revise the 1641 Body of Liberties, the 1648 Laws and Liberties stated:

We have inserted them [the Body of Liberties] into this volume under the several heads to which they belong yet not as fundamentals, for diverse of them have since been repealed, or altered, and more may justly be (at least) amended hereafter as further experience shall discover defects or inconveniences for *Nihil simul natum et perfectum* [nothing springs up and is at the same time perfect]. The same must we say of the present volume, we have not published it as a perfect body of laws sufficient to carry on the government established for future times, nor could it be expected that we should promise such a thing.<sup>64</sup>

## V

The American Puritans may claim a place within the ranks of natural law political thinkers. They believed that men inherently possessed certain political standards of judgment which were guides for decisions in the body politic. It could be argued that the Puritans were even precursors, that the norms of self-preservation, moderation, and justice anticipated the extensive natural law elaborations of the late seventeenth and eighteenth centuries. There are similarities between early American Puritanism and the work of Pufendorf, Locke, Montesquieu, Rousseau, and those who later speculated on the qualities of man seen in the "state of nature." The Adamic natural law of the early Americans was hardly original, but this can be said: It helped to keep alive the ancient Stoic and Roman juristic emphasis on innate criteria which man had for use in the state. The American Puritans stand with those few figures in the Reformation who continued to give natural law a prominent place in their thought. They are, in this sense, akin to Melancthon and to Richard Hooker.

On the other hand, the early New Englanders have no place within the natural law tradition, be it that of the second century, sixteenth, eighteenth, or twentieth century. The Puritans were never content to deal only with man and his nature. They asked of man's relation to God and of God's dealing with man. They found that the common-sense norms which man possessed by nature were of little use in the actual construction of a political community. Salem, Plymouth, Ipswich, and New Haven were not built on the Adamic natural law. Bradford, Winthrop, Ward, Cotton, and Davenport went beyond the sanguine natural law postulation of useful qualities in man to ask, what is man? Man was God's creation. That which was natural to

64. FARRAND (ed.), *op. cit. supra* note 6, at A 2.

man was what God had given to man in the divine acts of creation and redemption. In the realism of their faith the Puritans knew that man was sinful. Natural law must have its source in this natural, but shattering and disheartening, condition of man. And in the assurance of their faith, they believed that God had raised His people from misery into newness of life. This blessed condition produced the highest source of natural law — the law of redeemed reason, or covenant equity. God's merciful salvation of man was the permeating factor in all Puritan thought about the self, the church, and the state. Thus, the early Americans can be considered natural law thinkers, but only with severe qualifications. In the end, they were much more concerned with the grace of God than they were with man's nature. Indeed, the former had created and controlled the latter. The nature of man was a legitimate concern but only if one had first known the extent of God's grace.

The early New Englanders helped to establish a spirit of freedom and boldness that has characterized much of the history of American law. The legislators of the colonies were guided by ancient and honorable authorities, such as the common law tradition and the commandments of scripture, but the Puritans were not historical relativists. The past was a guide, but it could not possibly provide laws for the newness of the times. The Puritans stood their ground between two positions which have been in conflict throughout legal history, particularly in the history of the common law judiciary in England. Is the law to be found — let the ways of the past speak? Or is it to be made — let the new be fashioned? *Ius dicere* or *ius dare*? The Puritans believed in both *dicere* and *dare*. The late Jeremiah Smith of the New Hampshire Supreme Court was once asked, "Do judges make law?" He replied, "'Course they do. Made some myself." The early New Englanders had made some too, as they operated in the freedom of covenant equity. But they were mindful of and undergirded by their legal inheritance.

The process of secularization — that recurrent, inevitable process — has eroded the theological insights of the seventeenth century. Today the tasks of lawmaking and law interpreting are essentially bipolar: Legislators and judges stand at one pole and sociological phenomena at the other. Lines of action and reaction flow between. For the Puritans the whole matter of the law was triadic. The influence of social phenomena must be known and understood, and men in authority must act; but at the apex controlling and giving meaning to all conditions and to all activity was the will of God. Nathaniel Ward, Ipswich divine and New England's best lawyer, wrote about the making of law: "If man's wisdom cannot reach, man's experience must mend."<sup>65</sup> He did not mean man's social experience, although he never elimi-

65. WARD, *op. cit.* *supra* note 35, at 36.

nated this as a factor for political consideration. Fundamentally he called attention to man's experience in the covenant of grace.

The theology of early American Puritanism was unable to keep pace with its sociology. The urging of rulers to search out the will of God in the covenant of grace had a place in small, faith-centered, church-oriented communities during the early 1600's. But these communities began to change as soon as they were established, a fact which few Puritans appreciated. It was not long until leaders and citizenry did not have religious experience, did not receive good spiritual counsel, or simply did not believe in the will of God. A pluralism of convictions, many of them nonreligious, arose in place of the theological homogeneity once briefly known. What once was can never return, nor should it. Yet this much ought to be said: The early New Englanders laid hold of a Judaeo-Christian truth for politics in all times, namely, that God does have a will for the communities of men. Along with this conviction our forbears sounded an evangelical note which today needs new form and expression. The Puritans believed that God had called them to work in the body politic to show forth His glory; and that if they would confess and lean on Him, He would show them the way.