NOTES

THE RULE OF LAW IN COLONIAL MASSACHUSETTS

INTRODUCTION

The belief that law ought to rule over governor and governed alike in human society—a concept known to the modern world as "the rule of law"—may be traced to the political and legal philosophies of the Classical world that underlay medieval thought. In modern societies the rule of law has ordinarily taken the form of the supremacy of fundamental laws embodied either in a written constitution, in the gradual accretion of statutory and judge-made law, or in a combination thereof. As it is understood today, the rule of law requires, as a corollary to adherence to a law that is binding upon ruler and ruled alike, recognition and enforcement of basic rights inhering to the individual in his relations with the state. It denies arbitrary power to the government by requiring that no person be made to suffer in body or goods unless by regular legal process. It requires equality of treatment, in the sense that every man is subject to the ordinary law of the land and to the jurisdiction of the ordinary courts, and in the further sense that the government may not discriminate arbitrarily among individuals or classes in its official acts.

The popular image of the Puritan society of the Massachusetts Bay Colony as a narrowly intolerant theocracy in which Biblical law was applied with harsh and devastating literalism and individual liberties were sternly suppressed does not comport with modern notions of the rule of law. That image has been fostered by historians who have applied the value judgments of their own age to a society whose values were markedly different. Regarding such persons as Roger Williams and Anne Hutchinson as protagonists of freedom in a struggle with the forces of intolerance represented by men like John Winthrop and John Cotton, they have emphasized the severity and intolerant ends of Puritan law; there has been little effort to account for this system of justice in terms of the ideas and presuppositions of the time of which they were a product. However, careful examination of the colony's political and legal institutions and critical comparison


3 See, e.g., Adams, The Founding of New England (1921); Morison, Builders of the Bay Colony 244-68 (1930).
of them with contemporary English institutions have led other scholars to conclude that the rule of law in its modern sense, entailing the recognition of basic individual rights, was operative in the Puritan colony.\(^4\)

The so-called “higher law background” of American constitutional law has been developed with insight and clarity in studies by distinguished legal scholars.\(^5\) Their emphasis, however, has been principally upon the origins, in older notions of fundamental law, of the device of judicial review of governmental acts for attaining conformity to constitutional standards. Because this mechanism was unknown in the Massachusetts Bay Colony, studies of the influence of the tradition of fundamental law upon American constitutional history have paid little attention to the impact of the same tradition upon the colony’s political and legal institutions and upon the men who framed and administered them.

The purpose of this Note is to relate the concept of the rule of law to the foundation and early history of the Massachusetts Bay Colony. The origins of the idea of the rule of law in the Puritans’ intellectual heritage are examined, and its form and application analyzed, in terms of the laws and political arrangements of the colony struggling to establish a “due forme of Government” in the New England wilderness.\(^6\) The legal and political ideas of John Winthrop serve as the focus of discussion.\(^7\) As will be seen, his version of the rule of law was ultimately rejected in substantial measure during the rapid political evolution that characterized the colony’s first twenty years.\(^8\) Nevertheless, his influence in Massachusetts far exceeded that of any other man during his lifetime, and the principles he advocated remained a vital force in the colony’s law and politics long after his death.


\(^5\) See, e.g., Corwin, *op. cit. supra* note 1; Dickinson, *op. cit. supra* note 1.

\(^6\) Limitations of space have required that this examination and analysis be selective and illustrative rather than comprehensive. Consequently, this Note does not attempt a general treatment of the social and political history of the colony although passing references to that history are made where they have been thought necessary.

\(^7\) For a general treatment of Winthrop’s political philosophy see Gray, *The Political Thought of John Winthrop*, 3 N. Eng. Q. 681 (1930). Morgan, *The Puritan Dilemma: The Story of John Winthrop* (1958), is a recent biography, and Morrison, *op. cit. supra* note 3, at 51-104, contains a good brief account of Winthrop’s life and influence. Winthrop was born in 1588 at Groton, Suffolk. His grandfather, a prosperous master clothier, had purchased the manor of Groton, formerly held by the Abbey of Bury St. Edmunds, after its seizure by the Crown during the reign of Henry VIII. Winthrop’s father had practiced law in London for a time, and Winthrop himself was trained in the common law at the Inns of Court after attending Cambridge University. Upon the death of his father he inherited the Manor of Groton, with the right to hold courts baron and courts leet. Commissioned a justice of the peace for the County of Suffolk at the age of eighteen, he served as Attorney in the Court of Wards and Liveries. *Id.* at 51-53, 66. Winthrop was thus exposed not only to the common law applied in the King’s courts, but also to the special, customary rules and procedures followed in the local courts and to the broad and varied administrative and criminal jurisdiction exercised by the English “country justice” sitting in the petty and quarter sessions of the peace.

\(^8\) See text accompanying notes 185-90 infra.
in 1649. More importantly, an examination of his conception of the proper interrelationship of law, authority and obligation serves to illuminate the content of the rule of law that evolved from the vigorous conflict between his ideas and those of his opponents within the colony.9

Fundamental Law in England

Law and Custom

There was general agreement among Englishmen of the seventeenth century that all political power is limited by principles which the holder of the power is incapable of changing.10 Belief in an eternal and immutable law to which the acts of human rulers should conform had become a part of the common Christian tradition of Europe through the Church's adoption of substantial portions of Classical thought and methodology.11 And the medieval revival of Roman law had led to wide acceptance of the notion of a *jus gentium*, embodying rules of universal application in human societies.12 English notions of fundamental law, however, owed more to Germanic ideas of custom and law than to the traditions of the Roman Church and jurisprudence. Through the influence of the Teutonic tribal society, law in the medieval world was ordinarily conceived of as immemorial custom. Medieval law must be "old" law and it must be "good" law. Hence it was not something to be made or created; legislation was not an assertion of will, but a promulgation of what was recognized as already binding upon men in society.13 Greek and Roman ideas of fundamental law became known in England during the Middle Ages through the influence of the Roman law and the Scholastic writers,14 but those concepts were not adopted in themselves so much as they were applied, as a sort of grammar, in the philosophical analysis and justification of the customary, "common" law of the land.

---

9 See text accompanying notes 129-43, 185-90 infra.
10 See generally DICKINSON, op. cit. supra note 1, at 76-95; GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 1-65 (1955); McILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 69-125 (1940).
11 See generally D'ENTRÊVES, THE MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT 1-43 (1939).
12 McILWAIN, op. cit. supra note 1, at 43-68.
13 DICKINSON, op. cit. supra note 1, at 85-86; for an extended treatment of the so-called Germanic conception of the law, see KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 149-80 (1939).
14 E.g., The Polycraticus of John of Salisbury, written in 1159 by an English churchman who was later exiled by Henry II for his support of Thomas à Becket, has been described as "the outstanding treatise on political theory before the work of Aquinas ..." 1 LEWIS, MEDIEVAL POLITICAL IDEAS 169 (1954). Citing the Digest, Demosthenes and holy scripture, he rejected the contention that "the prince is ... loosed from the bonds of the law ..." and asked, "but who speaks of the will of the prince in public affairs, since in these affairs it is not licit for him to will anything except what law or equity persuades or the consideration of the common utility requires?" THE POLYCRATICUS OF JOHN OF SALISBURY bk. 4, ch. 2 (Webb ed. 1909), quoted in 1 LEWIS, op. cit. supra at 172.
Christopher Saint Germain's *Doctor and Student*,\(^\text{15}\) published in 1523, illustrates the pragmatic English approach to natural law. "It is not used among them that be learned in the laws of England," he said, "to reason what thing is commanded or prohibited by the law of nature, and what not, but all the reasoning is under this manner. As when anything is grounded upon the law of nature, they say, that reason will that such a thing be done; and if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done."\(^\text{16}\) For the English lawyer of the time of James I, no less than for his predecessors a century before, the common law was equated with custom which had proved its reasonableness by long persistence. In 1610, Sir John Davies, Attorney General for Ireland, stated in the dedication of his Irish Reports that "the Common Law of England is nothing else but the Common Custome of the Realm"\(^\text{17}\) and described the process by which custom acquired the force of law as follows:

"When a reasonable act once done is found to be good and beneficial to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a Custome; and being continued without interruption time out of mind, it obtaineth the force of a Law."\(^\text{17}\)

A similar conception of the relation between common law and custom on the basis of conformity to reason had led Saint Germain to state that "it is many times very hard and of great difficulty to know what cases of the law of England be grounded upon the law of reason, and what upon custom of the realm. . . ."\(^\text{18}\)

**Law and Consent**

From earliest times, notions of the nature of law had been closely bound up with the idea of popular consent. The belief that the acts of the ruler derive their legitimacy from the consent of those whom he rules is traceable in part to Germanic tribal traditions and in part to Roman constitutional principles mirrored in the revived Roman law.\(^\text{19}\) The Anglo-Saxon codes and the laws of Canute recognized the principle of consent, and the years following the Norman conquest witnessed the gradual merger of that

---

\(^{15}\) *Saint Germain, The Doctor and Student or Dialogues Between a Doctor of Divinity and a Student in the Laws of England* (Muchall ed. 1874).

\(^{16}\) *Id.* at 12 (Dialogue I, ch. v).


\(^{19}\) *Clarke, Medieval Representation and Consent* 247-50 (1936).
 doctrine with Roman-feudal notions of counsel and consent. Thus Bracton stated in the opening paragraph of his treatise on the laws and customs of England that:

"Whereas in almost all countries they use laws and unwritten right, England alone uses within her boundaries unwritten right and custom. In England, indeed, right is derived from what is unwritten, which usage has approved. But it will not be absurd to call the English laws, although they are unwritten, by the name of Laws, for everything has the force of Law, whatever has been rightfully defined and approved by the counsel and consent of the magnates, with the common warrant of the body politic, the authority of the king or the prince preceding.”

The doctrine of consent and the notion that law was found, not made, were frequently coupled in English legal and political thought. Sir John Fortescue, writing a few years before the accession of the Tudor Henry VII to the throne, restated the medieval ideal at a time when its values and assumptions were about to come under attack by new social and political theories and by the encroachments of a succession of vigorous monarchs. Fortescue distinguished between the dominium regale of the French monarchy, by which the King “may rule his People by such Lawys as he makyth hymself; and therefor he may set upon them Talys, and other Impositions, such as he wyl hymself, without their Assent,” and the dominium politicale et regale which characterized the English system wherein the King “may not rule hys People, by other Lawys than such as they assenten unto.”

Sovereignty

The Tudor monarchs established justification and popular support for the constitutional changes of the sixteenth century by enhancing the participation of Parliament in the government; however, they skillfully guided parliamentary action so as to insure conformity to the royal policies. “We be informed by our judges,” said Henry VIII in a speech to the Commons, “that at no time do we stand so highly in our estate royal as in the time of parliament, wherein we as head and you as members are conjoined and knit together in one body politic.” The Tudors’ shrewd use of the conception of government by “the King-in-Parliament” afforded a means by which their “practical despotism” could be implemented con-

20 Id. at 249.
21 1 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 3 (Twiss ed. 1878).
22 FORTESCUE, THE DIFFERENCE BETWEEN AN ABSOLUTE AND LIMITED MONARCHY 2-3 (Fortescue-Aland ed. 1714).
24 Quoted in HASKINS, op. cit. supra note 23, at 124.
sistantly with English ideas of fundamental law as a limiting agency. Despite the increase in parliamentary legislative activity during the Tudor period—so striking to modern historians—neither the Parliament nor the people affected by its statutes thought of that activity in clear terms of “making” law. There was an evident growth of awareness that Parliament might in fact create “new law,” but the medieval idea of law as a promulgation of what was recognized as already binding retained considerable vitality throughout the sixteenth century and well into the seventeenth. A perceptive mid-sixteenth century observer, who said of the members of Parliament that “they render the absolute and royal power legitimate,” recognized both the developing fact of royal sovereignty and the popular participation therein which helped to insure the remarkable success of the administrative and legislative innovations of the Tudors. Their astute enlistment of the aid of Parliament in accomplishing their purposes preserved much of the vigor of the idea of the dominium politicale et regale during a period in which a progressive concentration of power in the Crown was setting the stage for Stuart pretensions of absolutism. Thus, although the English monarchs from Henry VII through Elizabeth brought about important changes in the English constitutional fabric, these alterations were effected without doing readily apparent violence to inherited legal and political ideas.

It is clear enough to the modern observer that the statutes of the Tudor period were enacted by a power that was virtually unlimited. But the fact that they issued from “the King-in-Parliament” bolstered the arguments of later theorists of parliamentary sovereignty. This theory was not clearly articulated before the time of Hobbes and did not gain full recognition until well into the eighteenth century. For the most part the contemporaries of Coke were not intellectually equipped to conceive of sovereignty as vested in the parliamentary assembly. As Maitland has pointed out, Parliament depended on the King’s will “for its constitution, for its very

25 See the discussion in Gough, op. cit. supra note 10, at 14-29. Mr. Gough observes that “in Brooke’s Abridgement, which was compiled in 1573, we find the distinction between statutes which affirm the common law and statutes which create new law, whereas in Fitzherbert’s Abridgement, which dates from before the Reformation Parliament, this distinction does not appear.” Id. at 27.

26 See, e.g., the assertion by the royalist Judge Jenkins from his cell in the Tower of London in 1647: “The Law of this Land hath three grounds: First Custome, Secondly, Judiciall Records, Thirdly, Acts of Parliament. The two latter are but declarations of the Common-Law and Custome of the Realme, touching Royall Government. And this Law of Royall Government is a Law Fundamentall.” The Works of Judge Jenkins 5 (1648), quoted in McLewain, op. cit. supra note 1, at 85-86. The “Royall Government” to which Jenkins alludes is the royal prerogative which the Stuart kings vigorously asserted and their Parliaments as vigorously resisted; his use of the “declaratory” theory of legislation to uphold the argument that the Crown’s prerogative power was a “Law Fundamentall” demonstrates how both parties in the constitutional struggles of the seventeenth century could enlist the aid of familiar English fundamental law concepts.

27 Quoted in Haskins, op. cit. supra note 23, at 124. The observer was the Venetian ambassador, Barbaro.

28 Maitland, op. cit. supra note 23, at 267-75, 297-301.
existence . . . ” 29 Parliament convened upon his call and disbanded upon his order. He could create lords temporal and spiritual and charter new boroughs with representation in Commons. In a very real sense the Parliament of the Tudor and early Stuart periods was itself an emanation of the royal power; thus there was considerable basis for the claims of the supporters of James I and Charles I that royal consultation of Parliament amounted to little more than a moral obligation. 30

Holdsworth has observed that no Englishman of the Tudor period

"could have given an answer to the question as to the whereabouts of the sovereign power in the English state. The doctrine of sovereignty was a new doctrine in the sixteenth century; nor is it readily grasped until the existence of a conflict between several competitors for political power makes it necessary to decide which of these various competitors can in the last resort enforce its will.” 31

The conflict to which Holdsworth alludes materialized in the bitter constitutional struggle commencing with the accession of James I to the English throne. The participants in this contest for sovereignty were eventually narrowed to the royal and parliamentary powers; at the beginning of the seventeenth century, however, the rivalry was three-sided. 32 The claims of Parliament were asserted almost without recognition of their ultimate tendency, and the articulate opposition to the claims of the Crown was asserted in large part in terms of the supremacy of the law. Sir Edward Coke, the leading exponent of the latter view, intimated that a judge might even hold a statute void—either because it was against the law of nature expressed through the common law or because it encroached upon the undoubted power of the King. 33 It is doubtful whether many of the party who opposed the Stuart assertions of divine right thought in terms of a judicial supremacy exercised through the assessment of legislative action against a natural and customary common law which was immutable and independent of the legislative will. It has been suggested that even Coke did not believe in the supremacy of such a law, but rather in the supremacy of a law that Parliament could change. 34 Whatever may have motivated Coke and his fellows in their arguments, it is evident that they were led by their assumed equation of the law of reason with the common law to a belief that basic questions of right and obligation should be settled by an appeal, not to the philosophical abstractions of natural law, but to a concrete body of customary rights, remedies and procedures.

29 Id. at 298.
30 Ibid.
32 Maitland, op. cit. supra note 23, at 298.
34 Gough, op. cit. supra note 10, at 34-43.
In contrast to the English turmoil, the doctrine of sovereignty gained wide currency and respectability on the continent during the sixteenth century—a period in which the dominant condition of political life was the emergence of powerful national monarchies from the ruins of the feudal system. Jean Bodin, who published his *De Republica* in France in 1576, defined the state in terms of sovereignty and subjection that discarded traditional ideas of consent and limitation. The subject owed unquestioning obedience to the state, which Bodin defined as an association of families and their common affairs, governed by a highest power, or sovereignty. Sovereignty was the highest power over citizens and subjects, unrestrained by laws, and the essence of sovereignty was the power to give law to all subjects, generally and singly. The sovereign was not bound by past laws, nor was it necessary that he obtain the consent of his subjects to his actions. The only law to which he must conform related to the constitutional basis of his sovereignty: he was subject to the law of princely succession and he could not alienate the territory of the state. Bodin conceded that the sovereign owed a moral duty to his subjects to conform to the law of God and nature, but his work omits the problem inherent in the choice between obedience to a command of the sovereign violative of divine or natural law, and obedience to those admittedly higher laws. His evasiveness reflects the basic dilemma of political thought of the time: men were prone to insist on older beliefs that a ruler is subject to immutable customary laws, while at the same time recognizing that there were no

---

35 See 4 HOLDSWORTH, op. cit. supra note 31, at 193-96 for an excellent brief summary of Bodin's theory of sovereignty.

36 “Un droit gouvernement de plusieurs mesnages, et de ce qui leur est commun, avec puissance souveraine.” 1 BODIN, DE LA REPUBLIQUE ch. i, at 1 (1593), quoted in 4 HOLDSWORTH, op. cit. supra note 31, at 194 n.6.

37 “La souveraineté n'est limitee, ny en puissance, ny en charge, 'ny à certain tempes.” Id. ch. viii, at 90, quoted in 4 HOLDSWORTH, op. cit. supra note 31, at 195 n.1.

38 “Soubs cest même puissance de donner et casser la loy, sont compris tous les autres droits et marques de souveraineté.” Id. ch. x, at 163, quoted in 4 HOLDSWORTH, op. cit. supra note 31, at 195 n.4.

39 “Si donc le Prince souverain, est exempt des loix de ses predecesseurs, beaucoup moins seroit il tenu aux loix et ordonnances qu'il fait...” Id. ch. viii, at 96-97, quoted in 4 HOLDSWORTH, op. cit. supra note 31, at 195 n.2.

40 ALLEN, A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY 413-14 (1928).

41 See the discussion, id. at 417-18 of Bodin's conception of the Salic Law of succession and the law prohibiting alienation of domain as *leges imperii*, undefeasible and binding upon the monarch.

42 “Quant aux loix divines et naturelles, tous les Princes de terre y sont subets, et n'est pas en leur puissance d'y contre venir, s'ils ne veulent estre coupable de leze majesté divine, faisant guerre à Dieu.” 1 BODIN, DE LA REPUBLIQUE ch. viii, at 97 (1593), quoted in 4 HOLDSWORTH, op. cit. supra note 31, at 195 n.7.

43 The inference may be drawn that the subject was bound at least not to engage in active disobedience of a command of the sovereign which violated the "loix divines et naturelles." The only sanction recognized by Bodin against the ruler for such a violation of natural law was the divine punishment which a just God would surely impose upon a Prince who should "make war" against Him. See 4 HOLDSWORTH, op. cit. supra note 31, at 195.
institutions capable of enforcing the sovereign's conformity to those laws.

It is not surprising that Bodin was unable to account for the limited English monarchy in terms of his conceptions of sovereignty and subjection. However, Richard Hooker, an English contemporary of Bodin, did explain and justify the monarchy of Elizabeth on the basis of a political theory which likewise recognized the legislative capacity of the ruler and the subject's duty of obedience. But Hooker dealt with authority and obligation in terms of the familiar medieval conceptions of consent, the supremacy of law, and the so-called "mixed constitution," roughly equivalent to the dominium politicale et regale of Fortescue.

Hooker's theory of law and politics derived directly from the Scholastic tradition. A hierarchical order of the world—reflected in a ranking of divine, natural and human law—was a basic part of Hooker's vision; at the same time his acceptance of the traditional Christian notion of the law of nature and reason was marked by a strong pragmatic and historical sense. On the question of the evidence from which the law of nature may be inferred, he followed the common lawyers in entertaining a strong presumption in favor of that which has been traditionally practiced and accepted. However, he argued that all human laws derive from reason in the sense that they are means addressed to an end; consequently the reason may be justifiably employed to alter the law as circumstances change, the better to

44 "Les autres Roys n'ont pas plus de puissance que la Roy d' Angleterre; par ce qu'il n'est en la puissance de Prince du monde, de lever imposts à son plaisir sur le peuple, nonplus que prendre le bien d'autrui." 1 Bodin, op. cit. supra note 42, ch. viii, at 102, quoted in 4 HolDSwoRTH, op. cit. supra note 31, at 195 n.5. This is scarcely consistent with his statement, made elsewhere, that "la souveraineté donnee à un Prince soubs charges et conditions, n'est pas proprement souveraineté, ny puis- sance absolue." Id. at 93, quoted in 4 HolDSwoRTH, op. cit. supra note 31, at 195 n.1.

45 Although Hooker's book treats Of the Laws of Ecclesiastical Polity, the title of the work conceals its broad scope. Written at a time when the study of politics was still subsumed in large measure under the disciplines of theology and ethics, it propounded questions of authority and obligation that are common to all "polities," whether civil or ecclesiastical, and answered them in a lucid, if somewhat anachronous, restatement of the medieval doctrine of moral restraint of political power. As HolDSwoRTH has said, "Hooker's book is dominated by the medieval idea of the supremacy of the law." 4 HOLDSwoRTH, op. cit. supra note 31, at 212. See generally D'ENTrèVES, op. cit. supra note 11, at 80-142.

46 See text accompanying note 22 supra.

47 Hooker, Of the Lawes of Ecclesiastical Politie bk. 1, at 47 (1617): "Thus farre therefore we have endeavoured in part to open, of what nature and force Lawes are, according vnto their several kindes; the Law which God with him selfe hath eternally set downe to follow in his owne works; the Law which he hath made for his creatures to keepe, the Law of naturall and necessary Agents; the Law which Angels in heauen obey; the Law whereunto by the light of Reason men finde themselves bound in that they are men; the Law which they make by composition for multitudes and politique Societies of men to be guided by; the Law which belongeth vnto each Nation; the Law that concerneth the fellowship of all, and lastly, the Law which God himselfe hath supernaturally reveale." 4 Hooker, op. cit. supra note 47, bk. 4, at 135: "For in all right & equity, that which the Church hath receiued and held so long for good, that which publike Approbation hath ratified, must carrie the benefit of presumption with it to be accounted meet & convenient."
attain the end desired. In this Hooker differed from the still persistent medieval view of law as immutable custom to which the common lawyers subscribed. Hooker's belief that the dictates of reason and nature should be responsive to the changing needs of society without contradicting the evidence afforded by historical development, reveals a "typically English distrust of rational constructions and deep feeling for tradition . . . ."

Like Saint Germain, Hooker recognized that the law of nature and reason is not necessarily abstract, but may be arrived at inductively from historical data.

Hooker followed medieval tradition in assuming that the law of reason, engraved on the hearts of mankind from creation, must be supplemented by "human" or "positive" law authoritatively pronounced by a ruler in a political society. Reflecting the Augustinian theory that political institutions are enjoined by God as a consequence of and punishment for man's fall from grace, Hooker evidently believed that human government derived its immediate power from the community and its ultimate sanction from God Himself:

"To take away all such mutuall grievances, injurys and wrongs, there was no way but onely by growing vnto composition and agreement amongst themselves, by ordaining some kind of Government publike and by yeelding themselues subject thereunto; that vnto whom they granted authoritie to rule and gournerne, by them the peace, tranquillitie, and happy estate of the rest might bee procured." 

In England the "Gouernment publike" was the King-in-Parliament, and its legislative capacity extended to all things which the law of God and of nature "leaueth arbitrarie and at libertie." Such matters were "all subject to the positius Lawes of men; which Lawes for the common benefit abridge particular mens libertie in such things, as farre as the rules of equitie will suffer. This we must either maintayne, or else ouer-turne the world, and make euer man his owne Commander." Although he recognized that "the publike power of all societies is aboue euer soule contayned in the same societies," and vigorously asserted the subject's duty of obedience to that power, Hooker also maintained that the form of that "publike power"

49 Hooker, op. cit. supra note 47, bk. 1, at 44-47.
50 See text accompanying notes 15-18 supra.
51 D'ENTRAvES, op. cit. supra note 11, at 120-21.
52 Each society was free to adopt the "positive" laws and institutions that suited its condition, so long as they were not contrary to the laws of God and nature. Hooker, op. cit. supra note 47, bk. 3, at 2-3.
53 "Laws Politike, ordained for externall Order and Regiment amongst men, are neuer framed as they should be, vnlesse presuming the will of man to be inwardly obstinate, rebellious, and averse from all obedience vnto the Sacred Lawes of his nature; in a word, vnlesse presuming man to be in regard of his depraued, little better then a wild beast, they doe accordingly provide, notwithstanding so to frame his outward actions . . . ." Hooker, op. cit. supra note 47, bk. 1, at 23.
54 Id. at 26.
55 Hooker, op. cit. supra note 47, bk. 5, at 382.
was a subject of the free choice of the particular group or "independent multitude" which instituted it. His statement of the role of consent as an institutional device in the English political structure suggests Fortescue's distinction of a century earlier between the *dominium regale* and the *dominium politicale et regale*:

"Where the king has power of dominium . . . there no foreign state, or potentate, no state or potentate domestic, whether it consists of one or many, can possibly have . . . authority higher than the king. . . . On the other side; the king alone has no right to do without consent of the lords and commons assembled in parliament: the king of himself cannot change the nature of pleas, nor courts, no not so much as restore [corrupted] blood; because the law is a bar unto him."

Richard Hooker's organic Christian state bore limited resemblance to the political actualities of late Elizabethan England. It presupposed what was untrue in reality: the substantial agreement of the whole body politic, motivated by the dictates of natural reason, as to the political and religious ends which the commonwealth should pursue. Thus clinging to the ideal of rational uniformity in a day when self-seeking diversity was rampant, it was not the first nor the last political philosophy to attempt to accommodate the facts of one age to the assumptions of the era preceding it.

The claims of James I to unbridled legislative capacity and the vigorous opposition that immediately developed to them dramatically underlined the breakdown of the ideals expressed by Hooker in the face of rapid political and economic flux. The early Stuart pretensions were soon supported by argumentative literature supporting the "divine right of kings"; no small part was contributed by James himself. Briefly stated, the position of the supporters of James and Charles in the ensuing constitutional struggle was that monarchy is a divinely ordained institution; the hereditary right of succession thereto is indefeasible; the King, in whom sovereignty is entirely and indivisibly vested, is answerable to God alone; God requires obedience to the commands of the king that comport with God's law, and nonresistance to the laws of the king that transgress it.

It is scarcely possible to overstate the assertions of the Stuart kings. James I maintained that "kings were the authors and makers of the Lawes, and not the Lawes of the kings." In words that recall Bodin's statement that the French monarch is bound by the Salic law of succession, James recognized no fundamental laws save "only those Lawes whereby con-

---

67 Figgis, *The Divine Right of Kings* 5-6 (1914).
68 The Political Works of James I 62 (McIlwain ed. 1918).
69 See note 41 supra.
fusion is avoydéd, and their King's descent mainteined, and the heritage of
the succession and Monarchie . . . .” 61 Implicitly rejecting any notion
that sovereignty was vested in the King-in-Parliament, he claimed, for
instance, a right to deal with his subjects' lands “without advice or
authoritie of either Parliament, or any other subalterin judicall seate.” 62
His obligations were not to the people or to their representatives, but to God
alone. Nevertheless, as McIlwain has stated, “in fairness to James himself,
it must be said that in theory if not always in practice, he emphasized these
duties only less than his powers.” 63

James' emphasis upon his obligations as well as his powers reflects the
age in which he lived. It is significant that the developing theories of
sovereignty assumed almost unanimously that a state in which the sovereign
exercised his power unjustly was not truly well ordered. Bodin implied
that good order required more than the mere absence of disturbance.
Though the ruler was legibus solutus for practical purposes, he was morally
obliged to abstain from exercising his authority outside the bounds of
natural law. 64 However, even systems of mixed or limited monarchy such
as England were notably deficient in institutional sanctions effective to
restrain a ruler's illegal exercise of power. The force of the Biblical
injunction of obedience to temporal rulers and the Augustinian notion of
government as a punishment for original sin, as well as patriotic devotion
to the person of the monarch, hampered the development of means by which
recognized theoretical limitations upon rulers might be enforced in practice.
Theorists who propounded systems of limited government typically assumed
a studied vagueness as to sanctions, or expressly admitted that the limita-
tions which they proposed were little more than guideposts for the ruler's
conscience. 65 The few exceptions, who advocated resistance to illegal acts
of the ruler or—more dramatically—tyrannicide as the ultimate sanction,
were universally condemned in England where awareness of the threat
of foreign subversion was never absent from the collective consciousness
in the sixteenth and early seventeenth centuries. 66

As a consequence, distinctions between theories of sovereignty and of
limitation were perhaps more apparent than real. In England under the
first James and Charles, Parliament's increasing resistance to Stuart ab-
solutism and signs of a developing theory of constitutional review in the
courts of the common law gave some promise of eventual attainment of
effective institutional checks upon royal power. 67 Coke's rather ambiguous

61 JAMES I, op. cit. supra note 59, at 300. See, however, his views on the con-
tractual effect of the coronation oath. Id. at 309.
62 Id. at 195.
63 Id. at xliv (editor's introduction).
64 See text accompanying note 42 supra.
65 See generally ALLEN, op. cit. supra note 40, at 247-70.
66 See McIlwain's discussion of the controversial literature in JAMES I, op. cit.
supra note 59, at ixi-lxxx (editor's introduction).
67 See generally McILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPRE-
MACY 371-74 (1910).
intimations of the supremacy of the law—enforced through judicial review of legislation—proved to be abortive in England, though this concept was to be revived in American constitutional law. Nor did the struggle between King and Parliament result in a balanced constitution, based on consent and mutual obligation as projected by Fortescue and Hooker. Rather, its ultimate result was a drastic displacement of sovereignty from the King to Parliament during the Civil War and the Interregnum; to paraphrase Father Figgis, the divine right of the Stuart kings gave way to the divine right of Parliament.68

Fundamental Law and Puritanism

The Law of God

The bitter pamphlet controversy between Anglican and Puritan publicists, which gives a distinctive flavor to the intellectual history of the reigns of Elizabeth and the first two Stuarts, has obscured the substantial agreement of the opposing camps with respect to wide areas of politics and religion. Like their opponents, the apologists for the English establishment such as Hooker and Whitgift, the lay and clerical Puritan leaders were heirs to the rich and varied intellectual tradition of the Renaissance and Reformation. Apart from the concrete problems that it attacked and the particular program that it advocated, English Puritanism "was part and parcel of the times, and its culture was simply the culture of England at that moment."69 For example, the English university training received by a number of the leaders of the emigration to Massachusetts was the same as that of other English gentlemen, and the curriculum prescribed for Harvard College closely followed that of Cambridge University in England.70 At the same time, however, the Puritans were eclectic and tendentious after the prevailing fashion;71 as a consequence their application of traditional doctrines exhibited a number of features and emphases that were peculiar to Puritanism.

Pertinent examples of this tendency are apparent in Puritan notions of the nature of law, of the relationships among divine, natural and human law, and of the scope and content of each. Like their learned opponent Richard Hooker, Puritan writers were accustomed to using the philosophical concepts of the Schoolmen, and they assumed the validity of the hierarchical arrangement of laws—human, natural, and divine. The place in this scheme of the word of God revealed in Holy Scripture had never been clearly established by theologians. Since natural law as conceived by the Classical world was a set of abstractions—unwritten rules with implicit possibilities for disagreement in interpretation—it had been attacked by the

68 Figgis, op. cit. supra note 58, at 11.
69 Miller & Johnson, The Puritans 7 (1938).
70 Id. at 19-21.
cynic and the sceptic as a wholly subjective system affording no basis for moral guidance. Adopting the notion of natural law, the Church could answer these arguments by adverting to the Bible as an authoritative text embodying the principles of the natural law. Accordingly, a tendency to equate the law of nature with Biblical revelation is discernible in the writings of a number of pre-Reformation scholars; more typically, however, medieval conceptions of natural law were couched in terms of general principles drawn from human reason and experience rather than scriptural specifics. In the wake of the quickened interest in the Bible that accompanied the Reformation, protestant theologians, in contrast with their Scholastic forebears, often referred to the law of nature as if it were embodied in and exemplified by the injunctions of the Ten Commandments and the teachings of Christ.

No protestant sect was more emphatic as to the literal identity of revelation and natural law than the Puritans who emigrated to Massachusetts. Their ministers and magistrates subscribed to a belief not merely that the moral principles of the Decalogue and the New Testament embodied the law of nature, but that a large proportion of the specific rules of Mosaic law was also exemplary of the natural law. This was so by virtue of their evident or demonstrable conformity to right reason. The standard applied to specific portions of the Mosaic law to determine their inclusion in the natural law, and hence their applicability in Massachusetts, was at once logical and pragmatic. The intricate "ceremonial law" of the books of Moses, dealing with dietary rules and the manner of worship, was clearly intended for the "particular condition" of the people of Israel; hence it lacked the universal applicability that was a hallmark of natural law. On the other hand, much of the "judicial" law of Moses, "which is about judgments or any politic matters thereto belonging," was held to be equally entitled to a place in the law of nature with the "moral" laws of the Ten Commandments and the teachings of Christ. The criterion, despite its expression in terms of Schoolmen's logic, was essentially utilitarian. If a law were to qualify as moral, it was necessary that the "special intrinsical and proper reason of the law," as well as its general reason, be moral. The latter test may be said to have involved an appraisal of the end that was contemplated by the law, whereas the former entailed an assessment of the means in terms of the "special intrinsical and proper" condition of

---

72 E.g., Gratian, who first identified natural law with the Holy Scriptures; Rufinus and the canonists later developed the notion of the Mosaic and Evangelic law as an external substitute for the interior light of reason, clouded by original sin, and the important distinction between the "moral" and "ceremonial" aspects of Biblical law. See 1 Lewis, Mediaeval Political Ideas 9 (1954).

73 J. Lewis, op. cit. supra note 72, at 7-17.


76 Id. at 191.
the society in which its application was contemplated. The prefatory epistle to the Massachusetts Code of 1648 remarked that "so soon as God had set up Politicall Government among his people Israel hee gave them a body of lawes for judgement both in civil and criminal causes. These were breif and fundamental principles, yet withall so full and comprehensive as out of them clear deductions were to be drawne to all particular cases in future times." 77 The passage refers to the divine promulgation of the "judicial" laws of Moses and exemplifies the conception of a division of divine law into "natural" and "positive" aspects. 78 The judicial laws of Moses were an emanation of God's positive law, conceived to be "mutable and various according to God's good pleasure," 79 so that the reference to "clear deductions" applicable to future particular cases does not imply that the judicial laws and the deductions therefrom were necessarily applicable in Massachusetts. Rather the author of the epistle appears to have meant only that God's "people Israel" might properly deduce rules for particular cases from the "breif and fundamental principles" revealed to them. Whether the colonists of Massachusetts should adopt any particular part of the divine positive law given to Moses' Israel was a question which called for rational analysis, not blind obedience; the answer properly took account of matters of policy and expediency subsumed under the rubric of the "special intrinsical and proper reason of the law." 80

Puritan legal theory was marked by simplicity of form, but its application to specific social and political situations demanded a considerable degree of sophistication. This is equally true with respect to Puritan views as to legislative capacity. Belief in the identity of natural law with scripturally revealed law led Puritan writers to lay particular stress upon the idea that God was the sole lawmaker; at best, human enactments could only reflect or restate the divine principles revealed in the Bible. Decidedly, such enactments did not derive their dignity as "law" from the will of the human authority from which they proximately emanated. William Aspinwall remarked in his preface to John Cotton's draft code that:

"Though the Author attribute the word [Law] unto some of them; yet that it was not his meaning that they should be enacted as Lawes (if you take the word Law in a proper sense) appears by his conclusion taken out of Isa. 33.22. Hee knew full well that it would be an intrenchment upon the Royall power of Jesus Christ, for them or any other of the sonnes of Adam to ordain Lawes. . . . For alas, what energie or vertue can such an act of poore sinfull creatures adde unto the most perfect and wholsome lawes of God?" 81

77 The Book of the General Lawues and Libertyes Concerning the Inhabitants of the Massachusetts (1648) (introductory epistle).
79 Id. at 187.
81 1 Hutchinson Papers 182 (Prince Soc'y ed. 1865).
Cotton himself asserted that "the more any Law smells of man the more unprofitable"; nevertheless Puritan logic was equal to the task of accommodating such laws to the theory that God is the only law-giver. The conclusion of the epistle to the 1648 Massachusetts Code warns against the danger of rash discrimination between the laws of God and the laws of men, for

"when the Authoritie is of God and that in way of an Ordinance Rom. 13.1. and when the administration of it is according to deduc-
tions, and rules gathered from the word of God, and the clear light of nature in civil nations, surely there is no humane law that tendeth to common good (according to those principles) but the same is medi-
ately a law of God, and that in way of an Ordinance which all are to submit unto and that for conscience sake. Rom. 13.5."  

The Puritan test of the "morality" of scriptural law in terms of its suitability to the particular needs of the community suggests both the English lawyers' justification of the common law as custom which has proved its conformity to reason and Richard Hooker's argument for the mutability of laws. All three views posited unchangeable principles which underlay their particular, positive manifestations: for the Puritan theorist such a principle might be found in the judicial law of Moses which served as the model for a positive human enactment; for the lawyer it would ordinarily be found in a common-law rule which was judicially applied to a particular controversy; and for Hooker the principle was discoverable by the application of right reason to a problem confronting the "publike power." Although Hooker stresses the mutability of positive laws more specifically than does either the Puritan or the common lawyer, a central purpose to reconcile the abstract law of nature and the concrete needs of human society is apparent in the other two theories. The Puritan's task involved an attempt "to harmonize the determination of God with the ex-
ertion of men, the edicts of revelation with the counsels of reason and experience." The interrelation of these two factors in Puritan legal thought is readily apparent in the prefatory epistle to the Massachusetts Code of 1648. The operation of the English common law was similar: grounded upon the myth of law in rules whose reasonableness was proved by immemorial usage, it was implemented in practice by sophisticated judicial choices that were largely independent of natural reason.

Thus when James I sought to justify an asserted right to judge legal causes on the basis of his ability to apply correctly a

82 Ford, Cotton's "Moses his Judiciales", 16 PROCEEDINGS OF MASS. HIST. SOC'y 274, 284 (2d ser. 1893).
83 GENERAL LAUNES AND LIBERTIES, op. cit. supra note 77 (introductory epistle).
84 See text accompanying note 49 supra.
85 MILLER & JOHNSON, op. cit. supra note 69, at 191.
86 See text accompanying note 83 supra.
law purportedly grounded upon universal principles of reason, he received a famous rebuke from Sir Edward Coke, his Lord Chief Justice. Coke instructed James "with all reverence" that, though the King was a reasonable man, he was not "learned in the laws of this your realm of England," and that legal causes were "not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it." 87 Coke's position as to the common law was not unlike the orthodox Puritan view that definition of the law of God and its application to human society must be entrusted to learned and godly ministers and magistrates; both assumed that unassisted "natural" reason was incapable of arriving at a proper legal formulation of principles which in theory were discoverable by rational processes. The logical inconsistency that appears to be inherent in this view may be explained by the common lawyer's conception of the law as a craft or "mystery." The apparent inconsistency of the Puritan concept merely reflected the theological dogma that the natural reason of man instilled by God at the Creation had been clouded, though not entirely effaced, by the derangement of human faculties that followed man's fall from grace.

The literal Biblicism of the Massachusetts Puritans was strikingly expressed in a number of positive laws of the colony which resulted in substantial departures from contemporary English law. 88 And even in the absence of an appropriate provision of enacted law, the scripturally revealed natural law contemplated by Puritan theory was nevertheless applicable. 89 So long as the colony's positive legislation was relatively sparse, the magistrates—as the guardians and interpreters of the underlying unwritten law—exercised discretionary powers that far exceeded those of an English common-law judge. It is not surprising that those powers excited suspicion among many colonists whose memories of arbitrary government in England were still fresh. The codification movement—the popular response to the threat believed posed by magisterial discretion 90—was illustrative of still another aspect of the Puritan mentality, not unrelated to its Biblical literalism. The Puritans' reliance upon the Bible as a source of law was only the most vivid manifestation of a general yearning for the certainty that was thought to inhere in the written word. Puritan hostility to the English courts of law, for instance, appears to have been based in considerable part upon distrust of the unwritten law there enforced. The discretionary powers of Equity and the prerogative courts of Star Chamber and High Commission—unlimited even by the vague precedents of the unwritten common law—were objects of particular attack by Puritan writers.

88 See generally Haskins, op. cit. supra note 80, at 145-57.
89 I Records of the Governor and Company of the Massachusetts Bay in New England 175 (Shurtleff ed. 1853).
90 On the movement for codification, see generally Haskins, op. cit. supra note 80, at 119-40.
A recurring theme in their controversial literature was the necessity of reducing the chaotic corpus of English law to a collection of written rules conformable to the dictates of God as revealed in Holy Scripture.91

Moreover, through their experiences in the manors and boroughs of England, many of the colonists had become used to the notion of precise limitation of authority by written custumals and bylaws authoritatively expressing the rights and responsibilities of all members of the community.92 On a more exalted level, Parliament's exaction of written guarantees of its rights from Charles I was a matter of recent history,93 and a belief in the special position of the Magna Charta as a species of statutory fundamental law had gained wide currency during the struggle against the prerogative powers of the Crown.94 So long as they remained in England, the delicate position of the Puritans with respect to the Church and the Crown virtually forced them to take the position that all powers of government are limited; these attitudes were not readily discarded when the colonists found themselves aggrieved by what they regarded as arbitrary conduct by the leaders of a Puritan commonwealth. These general cultural and political influences, coupled with the peculiar Puritan stress upon the value of precise written rules, underlay the vigorous popular pressure for detailed legal codification in Massachusetts.95

The Covenant

Religious and Social

Puritan notions of the nature and sources of law were supplemented and reinforced by the peculiar form of the colonists' belief in the consensual origin of human government and by their adherence to the idea of the organic nature of society and the state. These aspects of Puritan social and political theory received their principal expressions in the "social covenant," which accompanied and derived from the "covenant of grace," and in the "church covenant." Like the theory of the divine right of kings, the notion of the covenant as developed and applied by the Massachusetts colonists was the product of "an age in which not only religion but theology and politics were inextricably mingled—when even for utilitarian sentiments a religious basis must be found if they were to obtain acceptance."96 As was true of other fundamental concepts of Puritanism, the virtue of the covenant lay precisely in the fact that it was well adapted to both doctrinal and practical purposes.97

91 Id. at 191-92.
93 McIlwain, op. cit. supra note 67, at 82.
95 See note 90 supra and accompanying text.
96 Figgis, op. cit. supra note 58, at 11.
97 An eminent historian of Puritan thought has observed that the social covenant "may be engineered by God, but it is also an eminently reasonable way of bringing a state into being." MILLER & JOHNSON, op. cit. supra note 69, at 191.
According to the "federal" version of Puritanism to which the Massachusetts colonists subscribed, God had always dealt with man by means of covenant. The original covenant, offered to Adam, was the so-called "covenant of works," in which the consideration for a divine promise of eternal life was man's strict obedience to God's positive law. The opportunity to earn salvation through "works" or moral obedience was lost to Adam and his posterity because of his sin of disobedience—"In Adam's Fall/We sinned all," commences a seventeenth century catechism for Massachusetts children. Repudiation of the covenant of works was followed eventually by a totally new covenant which God mercifully offered to Abraham; under this "covenant of grace" the prerequisite of human salvation was not works but faith. It originated in an offer, freely made by God and open to acceptance by any individual, in which God engaged to "convey all that concerns our happiness, upon our receiving of them, by believing on him." There was no other road to salvation: "God conveys his salvation by way of covenant, and he doth it to those onely that are in covenant with him. . . . This covenant must every soule enter into, every particular soul must enter into a particular covenant with God; out of this way there is no life." The covenant of grace afforded a means by which, even in man's fallen state, the impotence of the human will and the omnipotence of the divine could deal on terms of equality. Because God initiated the transaction of His own merciful volition, His offer of the covenant to man did not detract from His omnipotence. Man, on the other hand, could bind Him to His offer by acceptance; by "believing on him," man's puny will could confine the exercise of the illimitable divine power to the express terms of the covenant.

This conception, however, suggested a question, the answer to which was crucially important not merely to religion but to human society in its broader aspects: if faith alone was sufficient for salvation, what need was there for moral obedience to the standards of behavior imposed by the Bible and enforced in one degree or another by every Christian society? In reply, the covenant theologians propounded that the covenant of grace incorporated the covenant of works. To be sure, conformance to the covenant of works was not regarded as a condition of the covenant of grace; fallen man, contaminated and morally disabled by original sin, was incapable of fulfilling his obligations under the older covenant. But Christ had fulfilled the covenant of works and satisfied God's vengeance; his rightousness was imputed to the saints among mankind for their salvation. This imputation of His virtue to man's credit—evocable by man through faith—was known as "justification." The categorical law of the original

---

98 Quoted in id. at 696.
99 Miller, op. cit. supra note 71, at 374 (quoting an unidentified seventeenth century writer).
100 See generally id. at 373-78.
101 Id. at 383-85.
covenant, full compliance with which was admittedly impossible to man in his fallen state, nevertheless remained “as the unchangeable rule of life and manners, according to which persons in Covenant ought to walke before and with the Lorde, and in this sense it belongs to the Covenant of Grace.” This was so because “for the Morall Law, the Law of the ten Commandements, we are dead . . . to the covenant of that law, though not to the command of it.”

If a man attained grace through covenant with God, he owed a duty to make use of it to follow God’s commandments; it was assumed that a reborn man, in the moment of his justification through faith, was imbued with heightened ability to follow the path of righteousness indicated by God’s laws. His righteous conduct after justification was known as “sanctification”—entirely a function of his own will and faculties as regenerated through grace. Supine faith alone was theoretically sufficient to satisfy the terms of the covenant of grace, but an active striving toward righteous behavior was expected of the regenerate man and was regarded as the best evidence of spiritual revival. Though “workes are not set as the causes of our salvation,” nevertheless they were “evidences and signs of those that do believe unto life.”

The Puritans were thoroughly familiar with the Augustinian view that human government was ordained by God as a consequence of man's fall from grace. Uncorrupted by original sin, men might safely omit laws and governments, inasmuch as each man’s free compliance with the moral dictates of the natural law engraved upon the human heart at Creation would insure order and justice among men. But fallen man’s unrestrained natural liberty “is a liberty to evil as well as to good,” in John Winthrop’s words, and the “exercise and maintaining of this liberty makes men grow more evil, and in time to be worse than brute beasts. . . .” In order that men might live in some semblance of peace with one another, God ordained that they should be subject to organized society. Reinforcing the notion that the necessity for human government arose from original sin was the belief that man is inclined by his nature toward political association. Human government was thus a fact of nature, but it was also divinely ordained; a Massachusetts election sermon asserted that “power of Civil Rule, by men orderly chosen, is God’s Ordinance” though “it is from

102 Id. at 191 (quoting John Cotton).
103 Id. at 392 (quoting an unidentified seventeenth century writer).
104 In the words of an election sermon of the seventeenth century, “had man kept his first state, the Moral Image Concreated in him, consisting in Knowledge, Righteousness, and True Holiness, would have maintained him in a perfect understanding of, and Spontaneous Obedience to the whole duty incumbent on him, without the need of civil Laws to direct him, or a civil Sword to lay compulsion on him.” Willard, The Character of a Good Ruler, in MILLER & JOHNSON, op. cit. supra note 69, at 251.
105 Winthrop, Speech to the General Court, July 3, 1645, in MILLER & JOHNSON, op. cit. supra note 69, at 206.
the Light and Law of Nature,' because 'the Law of Nature is God's Law.'

A regenerate man was expected to abide by God's laws and to fulfill God's revealed will in church and society as well as in his private life. Each of the congregations of the Massachusetts Bay Colony had its inception in a formal mutual engagement defining the obligations of the members; this was the church covenant, to which persons admitted to membership were required to subscribe. Just as regenerate men gathered themselves into churches by means of mutual covenant, so were they also impelled to form and submit themselves to civil government. The seventeenth century mind could not conceive of the one without the other; there must be a "due forme of Government both ciuill and ecclesiastical." In Massachusetts a "social covenant" between ruler and ruled, in the form of the free annual election of the magistrates and deputies by the regenerate, on the one side, and the solemn oaths of the persons elected promising justice, on the other, was the immediate basis of the power of the government. John Winthrop flatly stated that "no common weale can be founded but by free consent"; Thomas Hooker, the Massachusetts clergyman who founded the colony of Connecticut, argued that in the formation of a society among men "there must of necessity be a mutuall ingagement, each of the other, by their free consent, before by any rule of God they have any right or power, or can exercise either, each towards the other."

Although the selection of rulers was committed to the persons ruled, Puritan theory placed the ultimate source of governmental power not in the electors but in God, Who had ordained that men should be subject to human laws and government and Who was deemed to be a party to the social covenant itself. The election was in the nature of a secondary cause; the will of God was manifested through the collective agency of His regenerate people: "in regular actings of the creature, God is the first Agent; there are not two several and distinct actings, one of God, another of the People: but in one and the same action, God, by the Peoples suffrages, makes such an one Governour, or Magistrate, and not another."

---

107 Davenport, A Sermon Preach'd at the Election . . . May 19th 1669, quoted in Miller & Johnson, op. cit. supra note 69, at 191.

108 "The holy society was erected upon the belief that the right sort of men could of their own free will and choice carry through the creation and administration of the right sort of community. . . . The saints were expected to act positively because they had in them a spirit of God that made them capable of every exertion." Miller & Johnson, op. cit. supra note 69, at 188.

109 Haskins, op. cit. supra note 80, at 85-87.

110 Winthrop, A Modell of Christian Society, in Miller & Johnson, op. cit. supra note 69, at 197.

111 Winthrop, A Defence of an Order Made in the Year 1637, in Miller & Johnson, op. cit. supra note 69, at 200.

112 Hooker, A Survey of the Summe of Church-Discipline, quoted in Miller & Johnson, op. cit. supra note 69, at 188.

113 Davenport, supra note 107, quoted in Miller & Johnson, op. cit. supra note 69, at 190.
Having attained grace through a covenant with God, the individual was expected to bend his every effort toward fulfillment of "the Morall law"; similarly, regenerate men gathered with God's approbation into both churches and civil society owed a duty to see that God's law was followed by sanctified and reprobate alike. Although unable to subscribe to the social covenant through the annual election because of their exclusion from a franchise restricted to church members, the latter sealed it implicitly by living in the commonwealth and enjoying benefits in it, and explicitly by the oath of obedience required of them.\footnote{114 For the forms of the oaths required of freemen and inhabitants, see General Laws and Liberties, op. cit. supra note 77, at 56.}

The Covenant and Legislation

Apart from their belief that the origin and justification of church and state lay in the covenant, the Massachusetts Puritans also applied the notion of consent through covenant to their thinking about law and legislation. Although the Puritans believed that the acts of "poore sinfull creatures" could add no "energie or vertue ... unto the most perfect and wholsome lawes of God,"\footnote{115 See note 81 supra and accompanying text.} the instinctive feeling for the practical that was coupled with their absorption in the doctrinal led them to recognize that even the laws of God required the knowledge and consent of the subject if they were to be the occasions of drastic sanctions in civil society. The thinking and policy of the colonists in this regard was markedly legalistic. Nothing could have been a clearer contravention of the law of God than the act of adultery. Yet uncertainty regarding the procedural sufficiency of the enactment and publication of a colonial adultery statute saved three persons from the penalty of death prescribed therein. The convicted adulterers were held in prison for several months while the Massachusetts clergy were polled as to the propriety of putting them to death. The answer of the elders concluded that if the colonial law "had been sufficiently published, they ought to be put to death." Winthrop noted in his journal, however, that:

"the court, considering that there had been some defect in that point, and especially for that it had been oft questioned among the deputies and others, whether that law were of force or not, being made by the court of assistants by allowance of the general court; therefore it was thought safest, that these three persons should be whipped and banished; and the law was confirmed and published."\footnote{116 J. Winthrop, The History of New England from 1630 to 1649, at 257 (Savage ed. 1825).}
obedience to any Lawe, which they may not (by common Intendment) take notice off.”

William Aspinwall suggested that the laws of God, embodied in a code of legislative specifics such as was favored by heavy popular pressure in the colony during the 1630's and 1640's, became binding upon men in civil society through a species of covenant resulting from the submission of the laws to the people for their approbation and emendation. Such an encovenanting process was followed by the General Court in the drafting and eventual adoption of both the Body of Liberties of 1641 and the Massachusetts Code of 1648. The extraordinary method employed in the drafting and enactment of those two bodies of law may be explained by their fundamental nature, as contrasted to ordinary, piecemeal legislation passed by the General Court. The binding effect of the codes derived from a covenant similar in some respects to the general social covenant annually renewed in the colony's general elections, but distinguishable from the consent to routine legislation implied by the participation of the freemen, through the deputies, in the routine enactments of the General Court.

The Social Organism

Despite its voluntaristic origins, the commonwealth envisaged by Puritan political thought was no mere congeries of its component groups and individuals. On the contrary, it was ordinarily conceived of in organic terms. John Winthrop instinctively illustrated the ideal toward which the emigrants should strive in their public affairs by analogy to a living organism:

"... wee must be knitt together in this worke as one man, wee must entertaine each other in brotherly Affection, wee must be willing to abridge our selues of our superfluities, for the supply of others necessities, wee must uphold a familiar Commerce together in all meekenes, gentlenes, patience and liberality, wee must delight in eache other, make others condicions our owne reioyce together, mourne together, labour, and suffer together, allwayes haueing before our eyes our Commission and Community in the worke, our Community as members of the same body. ..."

The forces within the colony pressing for limitation of governmental power through the certainty of written laws and the definition of individual rights also subscribed to the organic ideal. The prefatory epistle to the 1648 Massachusetts Code, a code enacted largely in response to popular demands

118 1 Hutchinson Papers, op. cit. supra note 81, at 182.
119 See generally Haskins, op. cit. supra note 80, at 124-36.
120 Winthrop, supra note 110, at 198.
for certainty in the law, echoed Winthrop's view of the organic nature of colonial society:

"If any of you meet with some law that seems not to tend to your particular benefit, you must consider that lawes are made with respect to the whole people, and not to each particular person: and obedience to them must be yielded with respect to the common welfare, not to thy private advantage, and as thou yieldest obedience to the law for the common good, but to thy disadvantage: so another must observe some other law for thy good, though to his own damage; thus must we be content to bear one anothers burden and so fulfill the Law of Christ." 121

The medieval ideal of the commonwealth as an organic body—timeless, self-sufficient, and subject by the consent of its members to a government divinely empowered to pronounce laws for the common good—was never more lucidly stated than in the foregoing passage. If the substantive legal provisions which followed that passage encouraged individualistic tendencies which would ultimately supplant the organic ideal, the inconsistency was typical of an age when men sought to express new ideas in traditional terms. More particularly it reflects the essentially contradictory deductions that could be made from the basic assumptions of Puritanism.

THE INFLUENCE OF WINTHROP

Law and "Historical" Custom

The public acts and policies of John Winthrop, and the statements he was repeatedly impelled to make in defense of them, demonstrate the resourcefulness with which an astute political leader could use basic Puritan ideas to define the goals of a struggling new society and to devise means proper for their attainment. A brief reference in Winthrop's journal illustrates his skill in applying a familiar legal idea to the unique problems presented by the attempt to erect a godly commonwealth within the terms of a restrictive royal charter. Weighing the advisability of enacting a comprehensive body of laws for the colony, Winthrop recited the "reasons . . . which caused most of the magistrates and some of the elders not to be very forward in this matter." The first was "want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive, that such laws would be fittest for us, which should arise pro re nata upon occasions, &c." "[A]nd so," he continued in a statement suggesting the common lawyer's relation of custom to law, "the laws of England and other states grew, and therefore the fundamental laws of England are called customs, consuetudines." 122 However, Winthrop's position differed in

121 GENERAL LAUUES AND LIBERTYES, op. cit. supra note 77 (introductory epistle).
122 1 WINTHROP, op. cit. supra note 116, at 323.
important respects from the accepted English view of common-law custom as immemorial and thus anterior to history itself. The "custom" to which Winthrop referred, in an isolated community founded less than ten years before, was necessarily historical. More pointedly, Winthrop suggested that "custom" might be deliberately instituted by authority. Recognizing that positive enactment of many Puritan tenets, such as the civil marriage, "would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England . . .," he nevertheless asserted that:

"to raise up laws by practice and custom had been no transgression; as in our church discipline, and in matters of marriage, to make a law that marriages should not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it is no law made repugnant, &c." 124

Winthrop's argument that "to raise up laws by practice and custom had been no transgression" of the charter's terms may be viewed as a specific application of the broad common-law assumption—implemented by the myth of immemorial custom—of the conformity of customary rules and practices to the law of reason. Winthrop, precluded from speaking of colonial legal development in terms of custom that was timeless, simply ignored that difficulty in his bold suggestion of a deliberate, authoritative institution of "custom" which might serve as the basis of divergent colonial law. The equation of law and reason was available, moreover, as a justification of departures of positive colonial enactments from the standard prescribed by the charter. Thus, when the so-called "Child Petitioners" asserted that a number of colonial laws were violative of the charter terms, the General Court, with Winthrop presiding as Governor, replied that the colony made no laws "repugnant" to the laws of England, inasmuch as such laws would necessarily be "contrary to the law of God and of right reason, which the learned in those laws [i.e., the laws of England] have anciently and still do hold forth as the fundamental basis of their laws. . . ." 126 Moreover, noted the Court, "the learned in those laws" took the position "that if any thing hath been otherwise established, it was an error, and not a law, being against the intent of the law-makers, however it may bear the form of a law (in regard of the stamp of authority set upon it) until it be revoked." 127 This latter assertion of the Court appears to refer to an accepted English doctrine of statutory construction, which

---

123 See notes 16-18 supra and accompanying text.
124 I WINTHROP, op. cit. supra note 116, at 323. (Emphasis added.)
125 On the "Child Petitioners," see generally Kittredge, Dr. Robert Child the Remonstrant, in 21 PUBLICATIONS OF COLONIAL SOC'Y OF MASS. 1 (1919); MORISON, BUILDERS OF THE BAY COLONY 244-68 (1930).
126 2 WINTHROP, op. cit. supra note 116, at 289.
127 Ibid.
assumed the legislators act in conformity with right reason and cannot intend legislation that runs contrary thereto.\textsuperscript{128}

\textit{Magisterial Discretion}

Among the earliest legislative acts of the General Court of Massachusetts was a declaration that the law of God should govern in any case not covered by an express order of the Court\textsuperscript{129}—a principle that was reiterated in the Body of Liberties of 1641\textsuperscript{130} and in the Code of 1648.\textsuperscript{131} However, despite general agreement that the Bible afforded all the rules and principles necessary for the ordering of the church and civil society, differences of opinion developed with regard to the proper means for their implementation. In 1644, the deputies of the General Court propounded a number of questions to the elders of the churches concerning scriptural justification of the discretion of the magistrates in matters of criminal punishment. The \textit{Reply of the Elders} to the questions put to them by the deputies adopted the view that the legislators could “warrantably prescribe penalties to offences which may probably admit of variable degrees of guilt.”\textsuperscript{132} The terms of the statute itself, in the elders’ view, should take account of the circumstances which might call for a greater or lesser penalty for generically similar offenses,\textsuperscript{133} and the statute might also properly provide for a range of penalties according to the circumstances of the offender, “as whether it were his first offence, or customary, whether he was inticed thereto or the inticer, whether he was principall or accessory, whether unadvised or wittingly and willingly, &c.”\textsuperscript{134} Moreover, a judge ought not to exceed the prescribed penalty, “because he hath noe power committed to him by law to goe higher”; but if the prescribed penalty appeared to the judge to exceed the merit of the offense, he should suspend the sentence “till by conference with the lawgivers he hath liberty, either to inflict the sentence or to mitigate it.”\textsuperscript{135}

\textit{Stewardship}

John Winthrop’s \textit{Discourse on Arbitrary Government}, written in 1644, was occasioned by the same general debate concerning magisterial discretion that gave rise to the \textit{Reply of the Elders} but reaches conclusions fundamentally different from the stand taken by the deputies, whose advocacy of criminal penalties rigidly prescribed by statute was subst-

\begin{itemize}
  \item \textsuperscript{128} \textsc{A Discourse upon the Exposition \& Understanding of Statutes 80-83} (Thorne ed. 1942) (editor’s introduction).
  \item \textsuperscript{129} \textsc{1 Records of the Governor, op. cit. supra} note 89, at 175.
  \item \textsuperscript{130} \textsc{The Colonial Laws of Massachusetts 33} (Whitmore ed. 1889).
  \item \textsuperscript{131} \textsc{General Laws and Liberties, op. cit. supra} note 77 (introductory epistle).
  \item \textsuperscript{132} \textsc{1 Hutchinson Papers} 209 (Prince Soc’y ed. 1865).
  \item \textsuperscript{133} \textit{Id.} at 210.
  \item \textsuperscript{134} \textit{Ibid.}
  \item \textsuperscript{135} \textit{Id.} at 211.
\end{itemize}
Winthrop agreed that a just penalty must be “by a certaine Rule,” but he equated that “Rule” with “an ordinance sett vp of God for that purpose,” which in his view was not necessarily, or even usually, in the form of rigidly prescribed penalties. Rather it was “a sure promise of divine assistance” to the judges in punishing each wrongdoer according to the merit of his offense. God had prescribed no penalties in the Bible “except Capitall, [or] . . . in suche Cases as are betweene party and party, and that is rather in a waye of satisfaction to the partye wronged, then to Justice and intention.” Winthrop was confident that God would “teach his ministers the Judges, what sentence to pronounce, if they will aliso observe his worde, and trust in him.” God had promised that He would guide the magistrates in their judgments; Winthrop noted somewhat contemptuously that “no suche promise was ever made to a paper Sentence of humane Aut[horit]ye or Invention.” The magistrate’s function, then, was “to give a Just Sentence”; the principal guide to that end was the Bible, “with all the Additions, explanations and deductions, which have followed” since the days when the laws of the Pentateuch served as the civil law of Israel. More important, however, was God’s promise of immediate assistance to his judges in their disposition of cases pro re nata: “to be present in his owne Ordinance, to improue suche gifts as he should please to conferre vpon suche as he should call to place of Gouernment.” This aspect of Winthrop’s conception of the function and powers of the magistrate, envisioning the godly judge and ruler in terms of a stewardship of divinely instilled “gifts,” runs like a thread through his acts and utterances.

“Justice and Mercy”

Even though his writings are studded with Biblical citations, scriptural literalism influenced Winthrop less than other leaders of the colony. The Christian tradition which stressed the spirit of the New Testament rather than the letter of the Old appears to have taken strong root in Winthrop. In simplest form this doctrine held that Christ’s new dispensation freed men from bondage to the law of Moses; its roots were in Paul’s warning to the Galatians that “if righteousness come by the Law, then Christ died in vain.” Winthrop, who once said that “the matter

138 WINTHROP, supra note 117, at 475.
137 Ibid.
138 Id. at 477.
139 Id. at 475.
140 Ibid.
141 Id. at 477.
142 Id. at 473.
143 Ibid.
144 PURITANISM AND LIBERTY 65 (Woodhouse ed. 1951) (editor’s introduction).
of scripture . . . be always a Rule to us, yet not the phrase,"  

appears to have looked to the teachings of the New Testament as a liberating force. His application of them, together with his conception of the stewardship of the magistrate, left a distinctive mark on the colony's political and legal development.

"There are two rules whereby we are to walk one towards another: Justice and Mercy," Winthrop told the Puritan emigrants aboard the Arbella; "there is likewise a double Lawe by which wee are regulated in our conversacion one towards another: . . . the lawe of nature and the lawe of grace, or the morrall lawe or the lawe of the gospel. . . ."  

John Milton and Martin Luther read the Pauline text as a total abrogation of Mosaic law;  

Winthrop, faithfully echoing a theology that postulated the incorporation of the covenant of works into the covenant of grace, did not go so far, but concluded that the justice which characterized the natural or moral law propounded by Moses and the mercy which infused the law of grace propounded in the Gospel supplemented one another as a "double Lawe" by which godly men should be regulated.

In his essay, Arbitrary Government, Winthrop carried the notion of a double law over from theology to jurisprudence even more emphatically, insisting upon the magistrate's duty to exercise "the wisdome and mercye of God (which are his Attributes), as well as his Justice,"  

and demonstrating by an abundance of Scriptural examples that even the penalties prescribed by God might be modified by force of overriding circumstances.  

The law of grace and mercy propounded in the New Testament did not abrogate the moral law of the Old, but the new dispensation mitigated and modified the old in the sense that it enjoined the magistrate to look beyond the letter of the law to its end or reason.

The Equity of the Statute

Aside from religious justification there was basis in common-law rules of statutory construction for Winthrop's position that the magistrate should look to the "matter of Scripture" in preference to "the phrase." By the sixteenth century the conception known in the law French of the Year Books as l'equity de l'estatut had been supplemented in statutory interpretation by a broader conception, which Plowden called an "equity which is not part of the law, but a moral virtue which reforms the law."  

Because, from the standpoint of these early equitable concepts, "the reason of the lawe is the soule & pythe of the lawe, yea, the verie lawe itselfe,"

---

146 Winthrop, supra note 110, at 196.
147 Puritanism and Liberty, op. cit. supra note 144, at 65.
148 Winthrop, supra note 117, at 476.
149 Id. at 476-77.
150 Quoted in A Discourse, op. cit. supra note 128, at 79 (editor's introduction).
the ratio of the statute—in Winthrop's terms, the "matter of Scripture"—was the crucial factor to which the judge should look.151

The doctrine of the equity of the statute appears to have been familiar to the colonists of the Massachusetts Bay Colony; "Liberty 1" of the Body of Liberties, for instance, recites that no man shall be in "any wayes indamaged under colour of Law or countenance of Authoritie, unles it be by the vertue or equity of some expresse law of the Country warranting the same. . . ."152 Arguments based on this rule of "equitable" construction were advanced in advocacy of the hanging of a boy convicted of the rape of "a child of 7 or 8 years old." The offender was sentenced to be severely whipped; there being no express law of God or of the colony prescribing death as the punishment for his crime. "Yet," Winthrop noted, "it may seem by the equity of the law against sodomy, that it should be death, for a man to have carnal copulation with a girl so young, as there can be no possibility of generation, for it is against nature as well as sodomy and buggery."153

Institutional Fundamental Law

The Discourse on Arbitrary Government was not limited to advocacy of magisterial discretion. It also offered a definition of arbitrary government as one "where a people have men sett ouer them without their choyce, or allowance: who haue power, to Gouerne them, and Judge their Causes without a Rule."154 The government of Massachusetts was not arbitrary, in the first place, because of "the Constant Libertye of the Freemen, to choose yearly at the Court of Election, out of the Freemen, all the generall Officers of this Jurisdiction."155 The Massachusetts government met the second part of Winthrop's test inasmuch as its officers were bound to govern the people and judge their cases in accordance with a fundamental rule: "... the Officers of this Bodye Politick have a Rule to walk by, in all their administrations, which Rule is the Worde of God, and such conclusions and deductions, as are, or shalbe regularly drawne from thence."156

Winthrop's justification of the Massachusetts government also involved an examination of the proper relations of its constituent parts to one another. At the head were the Governor, Deputy Governor and Assistants, in whom was vested "the power of Auth[horit]ye"; under them were the Freemen, who exercised "the power of Liberty," entailing active responsibilities in the colony's government, "and that vnder 2

151 Id. at 147.
152 BODY of LIBERTIES of 1641 (liberty one), reprinted in THE COLONIAL LAWS of MASSACHUSETTS 33 (Whitmore ed. 1899).
154 WINTHROP, supra note 117, at 468.
155 Id. at 471.
156 Id. at 472.
generall heads, Election and Counsell.” The former power extended to the choice of all “generall officers, viz.: such as should have influence (either Juditiall or ministeriall) into all parts of the Jurisdiction.” The liberty of counsel extended to all “lawes, decrees, or orders of any publ[ic] nature or concernment,” and to “taxes, impositions, impresses, or other burdens of what kinde soeuer”; no such governmental act could be imposed upon the freemen without their “counsell and consent.”  

In addition to the “Rule” by which the officers of the government were to be guided, Winthrop appears to have recognized in these relationships a second, “institutional” kind of fundamental law. He suggested in his Defense of the Negative Vote that those aspects of government are fundamental which make a “specificall difference betweene one forme of Government and another.” He contended that the so-called “negative vote,” by which a simple majority of the Magistrates sitting in the General Court had a power of veto over the acts of the entire Court, was “fundamental” in the institutional sense because in the event of its discard, “our Government would be a meere Democratie, where now it is mixt. . . .” The Puritan leaders were constantly concerned that the system of “mixed aristocracy” which they had established should not degenerate into a “meere Democratie.” Thus, John Cotton was shocked by the suggestion of an English correspondent that the popular choice of church and civil officers practiced in Massachusetts would “lay such a foundation, as nothing but a mere democracy can be built upon it.” In refutation, he cited “Bodine” for the proposition that though it be status popularis where a people “choose their owne governors; yet the government is not a democracy, if it be administered, not by the people, but by the governors, whether one (for then it is a monarchy, though elective) or by many, for then (as you know), it is aristocracy.”

Winthrop’s descriptive, institutional conception of fundamental law has a remarkably modern ring to it. His views differ little, for instance, from Austin’s definition of constitutional law as that which “determines the persons or the classes of persons who shall bear the sovereign powers; and . . . determines moreover the mode wherein such persons shall share those powers,” or from Holland’s statement that “the primary function of constitutional law is to ascertain the political centre of gravity of any given state. . . . In other words it defines the form of govern-

157 Id. at 468-69.
159 On the political dispute within the colony concerning the “Negative Vote,” see generally *Haskins, Law and Authority in Early Massachusetts* 38-39 (1960).
160 *Winthrop, supra* note 158, at 382-83.
Winthrop's definition of fundamental law in terms of institutional arrangements, alteration of which would fundamentally subvert the political structure, demonstrates awareness of the political realities, as well as the theoretical niceties, of the function of fundamental law in society.

Limitation of Authority

Conflict between the purposes of government and law has been a persistent theme in Anglo-American legal tradition. Such opposition is implicit in the very idea of a body of fundamental law against which the acts of authority may be assessed. The efforts of an important faction of the Massachusetts colonists to limit the discretionary powers of the magistrates by reference to "a body of grounds of laws, in resemblance to a Magna Charta" reflected the popular belief that the ends of law and of government might in fact be widely divergent, so as to necessitate the active limitation of the latter by the former. The Puritans were in the forefront of the struggle to limit the prerogative powers of the English Crown; it is not surprising, therefore, that a Puritan group attempted to achieve substantially similar goals at the expense of the government of the Massachusetts Bay Colony.

Paradoxically, the government which the "popular" party of Massachusetts sought to limit was itself bottomed on the strictest Puritan orthodoxy. The intracolonial political maneuvering of the first two decades illustrates the widely differing emphases to which the Puritan tradition of fundamental law was susceptible. The position taken by Winthrop in the matter of the magistrates' discretionary powers shows that a belief in an immutable body of law applicable to the acts of human government might be held consistently with a belief in the substantial identity of the purposes of government and law. The persons who held political power in Massachusetts during the earliest years were strongly influenced by traditional Christian conceptions of human society as an organism, of which the immediate end was temporal peace and well-being and the ultimate end the advancement of the true religion through the church. Convinced that rulers chosen with God's approbation by a covenant among godly men must necessarily pursue ends conformable with the fundamental law revealed by Scripture and reason, and that God had promised assistance to His earthly ministers so chosen, Winthrop and his followers regarded the fundamental law not in terms of a brake upon authority, but as an enhancement and justification of it.

163 Holland, Jurisprudence 359 (10th ed. 1906), quoted in Maitland, op. cit. supra note 162, at 532.
165 Winthrop, op. cit. supra note 116, at 151.
166 That position could be supported by reference to Roman conceptions of jús naturale as an ideal toward which actual law tended, rather than a standard from which actual law constantly strayed. Unlike the later idea that the natural law should limit human authority exteriorly, the Roman conception of natural law was that it bene-
The problem of providing means of enforcing legal limitation of
government had baffled many of the political theorists who preceded the
Massachusetts Puritans. The ruler’s adherence to the standards of a funda-
mental moral law was universally assumed to be the essence of a well-
ordered society, but historically, the political arrangements under which
men lived had provided few, if any, institutional guaranties of such ad-
herence. The elective “mixed aristocracy” of Massachusetts, however,
afforded an apparatus by which traditionally broad powers were assigned
to the office of the ruler, while an effective check upon their exercise was
exerted by the periodical popular choice of the persons to whom the
ruling power was given. John Winthrop recognized the function of the
popular election as a means of preserving both the integrity of the magis-
terial office and the people’s right to be free from what James I had
called “the faults of the person.”

"The covenant between you and us," he told the people, “is . . . that we shall govern you and judge your
causes by the rules of God’s laws and our own, according to our best
skill.” The people, in choosing a magistrate, “must run the hazard of
his skill and ability.” But if the ruler fails, not in skill and ability, but
in the faithfulness to the laws to which he is bound by his oath, then
“it must be required of him.”

One way in which it might “be re-
quired of” a magistrate for acts exceeding his lawful authority was by
judicial proceedings in the General Court; more significant, however,
was the power of the freemen to discharge a magistrate “without shewing
cause” at any annual Court of Elections.

Consent and the Organic State

Winthrop’s statements respecting the constitutional relationship among
the magistrates, the deputies and the people, manifest the widely held
belief—expressed in Puritan conceptions of the social covenant—that the
people had owned political power originally and wholly, and had subse-
fitted mankind by enlightening authority. Cf. Corwin, The “Higher Law” Back-
ground of American Constitutional Law 22-23 (1955); Gough, Fundamental
Law in English Constitutional History 53-54 (1955). The older tradition had
its roots in Aristotle’s recognition that the rule of law would ordinarily be exerted
through the influence upon rulers of “principles of rational generality,” which he
elsewhere defined as “reason free from desire,” for “he is a better ruler who is free
from passion than he who is governed by his impulses.” See Dickinson, Administra-
tive Justice and the Supremacy of Law in the United States 1 (1927). Aris-
totle’s view was familiar to the Massachusetts colonists; Thomas Hooker, who favored
legal and institutional checks upon governmental power, referred John Winthrop
somewhat inappositely to “what the Heathen man sayd by the candell light of com-
mon sense: The law is not subject to passion, nor to be taken with self seeking ends,
and therefore ought to have cheif rule over rulers them selves.” Thomas Hooker to

167 The Political Works of James I 315 (McIlvain ed. 1918).

168 Winthrop, Speech to the General Court, July 3, 1645, in Miller & Johnson,
op. cit. supra note 161, at 206.

169 Id. at 205.

170 Winthrop, Discourse on Arbitrary Government, in 4 Winthrop Papers 471
quently, by means of a compact, subjected themselves to government. That belief is susceptible of varying applications. The theory of popular sovereignty argues from the premise of consensual origin that the ruler is the mere agent of the people, who retain all political power in themselves. On the other hand, the notion of limited sovereignty implies that the people, by the terms of their agreement, continue to possess rights whose existence limits the ruler in the exercise of the powers entrusted to him. As a third alternative, the whole and undivided political power of the people devolves upon the ruler by virtue of the social compact; the people are left with little more than the right to assert a claim to the ruler's fulfillment of his contractual obligation to rule them justly. John Winthrop probably agreed with the third deduction. A thoroughgoing authoritarian by training and inclination, he had scant confidence in popular participation in the business of ruling Massachusetts.

D'Entrèves has pointed out that the contract assumed two distinct forms in the history of political thought. The first, the *pactum unionis* or *societatis*, is an agreement by individuals to unite; the second, the *pactum subiectionis*, is an agreement with a ruler to obey. The importance of the former in intellectual history derives from its usefulness as a vehicle for the principle of the natural rights of the individual. The latter posits that political power derives from the collective, not the individual personality; its tendency is emphatically organic. Winthrop was reluctant to accept the conflict of the individual and the state which is implicit in the *pactum societatis*. However, from the time of the admission of the deputies from the towns to the General Court, and even more clearly after the enactment of the Body of Liberties in 1641, belief in the value of individual rights was increasingly important in shaping the colony's laws and institutions; the organic ideal which Winthrop favored was correspondingly eroded. Pre-eminently a realist, Winthrop accommodated his political and constitutional arguments to the increasingly apparent importance of the voice of the freemen in the colony's government.

He was not generous, however, in his estimation of the proper role of the deputies in the government. Confronted with the argument that "the greatest power is in the people: therefore it should be in their Dep[u]tyes," he answered in a vein that is instructive as to his notion of the effect of the consensual origin of the state. Conceding that "originally and virtuall" the political power is in the people, he nevertheless main-

---

171 See generally 1 GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY 50-61 (1934).
172 WINTHROP, John Winthrop's Summary of His Letter to Thomas Hooker, in 4 WINTHROP PAPERS 53-54 (Mass. Historical Soc'y 1944) : "I expressd about the unwarrantableness and unsafeness of referring matter of counsel or judicature to the body of the people, quia the best part is always the least, and of that best part the wiser part is always the lesser."
tained that when the people have chosen their magistrates, their political power "is actually in those to whom they have committed it. . . ." 175 Inferentially, then, the deputies represent the people, not as they were "originally and virtually," in full possession of political power, but as they are "actually," having invested the magistrates with the "power of Aut[horit]ye." 176 By this analysis the deputies represent the people only as to the "power of liberty," which, Winthrop appears to concede, is inalienable. Although he recognized that the "power of liberty" which the people exercised through the deputies included important political rights, Winthrop insisted that the only legitimate "liberty" of the people of Massachusetts was "a liberty to that only which is good, just, and honest." He further asserted that this liberty was properly "maintained and exercised in a way of subjection to authority" and was preserved, not by murmuring and opposition, but by "upholding the honor and power of authority. . . ." 177

Familiar only with political arrangements whose origins were lost in the dimness of centuries past, political theorists of the postmedieval period used the consensual origin of the state as little more than an hypothesis to explain and justify existing governmental institutions. For the Massachusetts colonists, on the other hand, the notion that the state derives its existence and its powers from the consent of the persons governed was not a mere scholarly convention. Accustomed by religious teaching to think in terms of covenant, the colonists readily perceived an actual social compact in the annual election of governmental officers by the freemen—periodically renewed by ruler, by subject, and by God Himself through His use of them as secondary natural causes. 178 They were encouraged in this notion by the sermons preached on election day. The ministers regularly warned the electors against the consequences of frivolous change. 179 To speak of an officeholder's tenure under an elective system in terms of a "freehold" may appear to be anomalous, but the relative infrequency with which magistrates were in fact "turned into the condition of a private man" during the first twenty years of the colony's history 180 suggests that election sermons such as Cotton's had considerable effect.

The free annual election of governmental officers had the approval of Puritan covenant doctrine, but its immediate legal basis was the royal charter of the Massachusetts Bay Company. Indeed, the political history

175 Winthrop, supra note 158, at 390.
176 See note 157 supra and accompanying text.
177 Winthrop, supra note 168, at 206-07.
178 See notes 108-13 supra and accompanying text.
179 1 Winthrop, The History of New England from 1630 to 1649, at 257 (Savage ed. 1825).
180 See Haskins, op. cit. supra note 159, at 53.
of the colony during its first twenty years might be characterized as an accommodation of strongly felt popular beliefs in the limitation of authority to the organizational structure of a seventeenth century trading company controlled by men of strong authoritarian tendencies. The structure of the Massachusetts Bay Company was broadly similar to that of other English trading companies of the time. The "general court" of the Massachusetts charter, as well as the "freemen" and the annually elected "governor," "deputy governor," and "assistants" who comprised it, had close counterparts in the royal charters of such companies as the Merchants Trading to France and the African Company. Superficially democratic in its internal government and procedures, the trading company was strongly marked by the organic and authoritarian bent that was a feature of the medieval merchants' gild from which it derived. At any rate, the small group in control during the earliest years, which sought to adapt "the machinery of a simple business organism to the requirements of a body politic," found it possible at the outset to use that machinery to exercise a rigid supervision over the public and private lives of the colonists. But as the number of freemen increased and their political awareness and activity grew more evident, the more liberal possibilities of the corporate trading company structure took on large practical importance in Massachusetts.

**Individual Liberties and Codification**

Partly because of the continuing influence of the clergy upon the electorate, John Winthrop's belief that government was principally limited by the ruler's conscience and self-restraint, and his insistence upon the virtue of the people's obedience to their betters continued to be a vital force in the administration of the colony's affairs during the first two decades. However, it was gradually supplemented by an increasing emphasis upon specific individual rights. The most important manifestation of this trend was the General Court's enactment in 1641 of the Body of Liberties, a collection of fundamental laws embodying numerous specific guaranties of the rights of the individual as against the government.

Nathaniel Ward, who is reputed to have drafted the Body of Liberties, was trained, like Winthrop, in the common law. But he appears to have been influenced far more than Winthrop by ideas, then gaining currency in

---

181 Select Charters of Trading Companies, A.D. 1530-1707, at 68 (Carr ed. 1918).
183 Id. at 100-01.
184 Id. at 25.
186 See the biographical essay on Ward in Morison, Builders of the Bay Colony 217-43 (1930). Ward "studied and practised law . . . for about ten years" before entering the ministry. Id. at 220.
England, that governmental authority should be limited by specific, inviolable rights and privileges guaranteed to the subject. Winthrop and John Cotton,\textsuperscript{187} with varying emphases, set up the Word of God as the standard by which the limits of the magistrate's power must be determined; Ward agreed that "Morall Laws, Royall Prerogatives, Popular Liberties, are not of Mans making or giving, but Gods: Man is but to measure them out by Gods Rule: which," he added significantly, "if mans wisdome cannot reach, Mans experience must mend."\textsuperscript{188} Ward was firm, however, that "these Essentialls, must not be Ephorized or Tribuned by one or a few Mens discretion, but lineally sanctioned by Supreame Councels," and that the safeguards inherent in representation be reinforced by fundamental instruments specifying and guaranteeing the respective rights and powers of ruler and subject:

"Yet it were good if States would let People know so much before hand, by some safe woven \textit{manifesto}, that grosse Delinquents may tell no tales of Anchors and Buoyes, nor paliate their presumptions with pretence of ignorance. . . . And in all, the best Standard to measure Prerogatives, is the Plough-staffe; to measure Liberties, the Scepter: if the tearmes were a little altered into Loyall Prerogatives and Royall Liberties, then we should be sure to have Royall Kings and Loyall Subjects."\textsuperscript{189}

Ward, no less than Winthrop, assumes the organic nature of society and government. His recognition of the importance of personal rights does not imply an opposition between the ends of the individual and those of the state. On the contrary, an harmonious accommodation of the collective rights of society exerted through the ruler, on the one hand, and the rights of the individual, on the other, is implicit in his striking figure of the ploughstaff and the sceptre. That attitude is entirely consistent with opinions repeatedly expressed by Winthrop. The Massachusetts Code of 1648, wherein the principle of limitation of government by specific legal rules and guaranties found its most complete expression, was prefaced by an epistle which expressed the organic conception of the commonwealth in words that might have been written by Winthrop himself.\textsuperscript{190}

\textit{R. H. C.}


\textsuperscript{188} Ward, \textit{The Simple Cobler of Aggawam in America}, in Miller & Johnson, op. cit. supra note 161, at 226, 236.

\textsuperscript{189} Ibid.

\textsuperscript{190} Cf. Haskins, op. cit. supra note 159, at 140.