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Keepers of the New Covenant: The Puritan Legacy in American Constitutional Law

Daniel F. Piar

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I. INTRODUCTION

There is an emerging tendency in legal scholarship to study law as a cultural artifact. Rather than arguing about what the law says, how it should be reformed, or how it can best effect policy, scholars are beginning to study how cultures use law, how cultural factors influence the development of law, and how changes in culture yield changes in law quite apart from questions of law reform or doctrinal description. While this cultural perspective can illuminate our legal past, it can also yield surprising conclusions about the current directions of law and culture.

This Article offers one such perspective by linking the current culture of civil rights law to the American Puritan culture of the seventeenth century. At first glance these two cultures would seem to have virtually nothing in common: the Puritans are commonly viewed as dour theocrats presiding over a repressive, witch-burning regime, while the modern age of civil rights is seen as one of expanding personal liberties free from the complications of state-sponsored religion. But beneath the stereotypes lie important cultural similarities, among them the view of the proper role of law. As I will...
explain, both the Puritan culture and our own share a belief that one of law’s functions is to define and enforce the proper conditions for the development of the individual soul.

In our own time, this link is reflected in a series of landmark Supreme Court cases in which constitutional rights have been construed with an eye toward protecting what the Court has called “the realm of intellect and spirit,” or “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” or the “transcendent dimensions” of personal freedom – in short, the soul. As early as 1943, the Court identified a “right of self-determination in matters that touch individual opinion and personal attitude,” and forbade government to trespass on “the sphere of intellect and spirit.” A decade later the Court struck down school segregation on the grounds that it “generates a feeling of inferiority” detrimental to minority schoolchildren. More recently, the Court has developed a test for Establishment Clause cases that bars government action that makes people feel like “outsiders, not full members of the political community.” It has struck down school prayer that causes nonbelieving students to feel “offense,” “isolation” and “affront.” It has disallowed state action that it sees as interfering with “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” And it has emphasized that legally protected liberty must be understood not only in the “spatial” dimensions of

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bodily freedom, but also in the “more transcendent dimensions” of spiritual autonomy.\(^9\) Thus, constitutional law has taken as a primary subject what legal historian James Willard Hurst called “the personal environment,” or what we might now call the self, the psyche or the soul.

This yoking of law to the spiritual finds cultural precedent in the Puritan regime of the seventeenth century. In Puritan America, church and state were bent to the service of a well-defined process of individual salvation, guarded by secular power and enforceable by civil punishments. The Puritans held a view of society, the individual and the role of law that had, roughly, the following four components: (1) the central question of life is whether the individual soul has achieved salvation; (2) the individual is too weak and corrupt to develop spiritually on his own; (3) the achievement of salvation requires the mediation of the Word of God through the organized church; and (4) civil government exists to support the church and to maintain the proper conditions for individual souls to flourish. Human authority, therefore, was indispensable to the process of salvation. The soul was the supreme object of the divine scheme, but the soul needed a particular kind of help, and that help was enforceable by law. As one recent commentator has noted, “Among the fundamentals of Puritan jurisprudence were the integrated and determined use of legal and ecclesiastical institutions to foster a godly community.”\(^{10}\) Law for them, as for us, was directed toward the flourishing of the soul.

The recognition of the cultural links between the Puritans and ourselves has several implications. First, it undermines the claim of modern constitutional law to be

wholly secular. While the Court has been seen (and has seen itself) as a bulwark against the mingling of government and religion, this view ignores the extent to which the law itself functions as a religion. For what is religion if not a program of concern with the soul? By viewing the spiritual as part of law’s empire, the Court (with the apparent blessing of the culture) has placed itself in a position of transcendent authority, just as the Puritan fathers did, and, indeed, as virtually any religious leader does. We have, in short, a constitutional religion to replace the old theistic one.

This realization also adds another dimension to the growing body of scholarship on the religious aspects of constitutional law. To date, scholars drawing connections between constitutional law and religion have largely focused on hermeneutics (such as drawing links between methods of Biblical and constitutional interpretation), symbolism as practiced in church and state, and identifying the remaining strains of theistic “civil religion” in constitutional law.¹¹ This Article takes the discussion in a slightly different direction by treating law as religion, as opposed to showing the parallels between law and religion. While this subject has been broached by other scholars,¹² it has not to my knowledge been treated as a matter of cultural inheritance, as I propose to do here.

Finally, the religious function of law raises important questions about the current state of our constitutional culture. Specifically, if it functions as a religion, is it a religion of liberation, or a religion of oppression? For the Puritans, the role of law was to enforce

the earthly conditions for eternal salvation, but in the process they were at times
dogmatic, intolerant, and repressive. The individual, seen as inherently weak and sinful,
needed the ministrations of church and state to achieve transcendent ends, and when
rebels such as Anne Hutchinson tried to go it alone, they were censured and banished.
Likewise, modern constitutionalism seeks individual freedom in its tendency to enforce
claims of individual right. But we may wonder whether this likewise proceeds from
assumptions about the weakness of human nature, and the consequent need for a central
authority to set the proper course. There is a real danger that modern Constitutional law,
like the American Puritan regime, exalts the individual while subjecting him to profound
legal control. Whether for good or ill (and I think it is some of both), we have given law
a central place in our innermost lives. At the least, we should make this choice
consciously and not as the unwitting children of our cultural milieu.

I will begin this Article by showing the extent to which the modern Supreme
Court has used rights law to claim a role as the overseer of the spiritual realm, then
connect this trend to its cultural predecessor, the American Puritan regime. I will
conclude with some thoughts as to the implications of this cultural kinship for our
freedoms and our selves.

II. THE AMERICAN CONSTITUTIONAL RELIGION

The internal or spiritual use of constitutional law is in most respects a twentieth-
century innovation. Indeed, such an approach would have been foreign to the law in the
first century or so of American constitutionalism. Through much of the nineteenth
century, the courts were distinctly unwilling to engage in the business of soothing spirits
or guiding souls. In fact, they tended to dismiss claims of spiritual freedom as merely personal problems rather than legal ones. In the state courts, individual claims based on liberty of conscience, such as the right to exemptions from Sunday laws, the right not to be forced to pray in public schools, and the right to be free from prosecutions for blasphemy, were typically rejected on the theory that the outward duties imposed by law did not interfere with the individual’s inward power to believe as he wished.  

It is true that conscience was kept free from state interference, typically by express constitutional provisions. At the same time, however, the courts would not allow claims of conscience to trump state action. Meanwhile, in landmark cases such as *Dred Scott v. Sandford*,  

*The Civil Rights Cases*,  

*Plessey v. Ferguson*, and *Reynolds v. United States*, the U.S. Supreme Court showed itself to be uninterested in legal claims founded on personal dignity, spiritual freedom or other such internal claims.

This approach to law was in large part an outgrowth of a liberal Protestant culture (not to be confused with Puritan Calvinism), which heavily influenced nineteenth-century law, and which believed in individual moral autonomy rather than state moral intervention. But with the late-century decline of Protestantism as a means of public discourse, the stage was set for law to move toward regulation of the internal realm, colonizing territory that had previously been occupied by a religion. This progression

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14 *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
15 109 U.S. 3 (1883).
16 163 U.S. 537 (1896).
17 98 U.S. 145 (1879).
19 *Id.*
was noted by legal historian James Willard Hurst in his seminal *Law and the Conditions of Freedom in the Nineteenth-Century United States*. Hurst described three environments that the nineteenth century progressively subjected to legal regulation. The “natural environment” was the first, responding to the needs of westward movement and the expropriation of natural resources. The “social environment” was the second, law serving here to govern group interactions and structure expanding communities. “Subtlest and last to be envisaged as presenting a challenge was the individual’s internal environment, formed by the pattern of deepset emotional drives and the values resting thereon.”

Thus, following the civil war, “we began to use law with growing consciousness of a need to meet the challenge of the personal environment, set by individual’s emotional response to circumstance.” The end result was “more self-conscious resort to law as the expression of values.”

Hurst, of course, was writing about the nineteenth century, and so did not apply these insights to the twentieth-century law of civil rights. Nonetheless, that is precisely where this shift led. Empowered by the Fourteenth Amendment, and buoyed by the culture’s growing interest in the internal states of individuals, the Supreme Court began to turn inward, evaluating civil-rights claims with reference to the emotional, spiritual or psychic impact of state action on those affected. The Court that began the twentieth century talking about the right of the individual to sell his labor ended the century talking about “the right to define one’s own

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21 *Id* at 84-85.
concept of existence, of meaning, of the universe, and of the mystery of human life.”

By the dawn of the twenty-first century, the personal environment had become a primary touchstone of civil-rights law.

One harbinger of this shift was Warren and Brandeis’s article “The Right to Privacy,” in which the authors celebrated the law’s discovery of “man’s spiritual nature, of his feelings, and intellect,” and argued for legal protection for “thoughts, emotions and sensations.”

It would be several decades before this kind of thinking reached the case law, and it did so initially in dissent. In a 1928 decision, *Olmstead v. United States*, Justice Brandeis used a minority opinion in a case about criminal wiretap evidence to urge judicial protection for internal states of being:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against

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23 The labor case, of course, was *Lochner v. New York*, 198 U.S. 45 (1905); the second case is *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

24 4 Harv. L. Rev. 193 (1890).

25 *Id.* at 193, 194.

26 277 U.S. 438 (1928).
the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.\footnote{id}{Id. at 478 (Brandeis, J., dissenting).}

By 1943, this kind of thinking captured a majority for the first time in \textit{West Virginia State Board of Education v. Barnette}\.\footnote{319 U.S. 624 (1943).} The \textit{Barnette} case was a challenge to a school’s requirement that children pledge allegiance to the American flag – a pledge said by the parents to violate the children’s Jehovah’s Witness faith. While the issue was thus phrased in terms of religious freedom, the Court opted for a more expansive approach, treating the claim as one of spiritual and psychic autonomy: “The sole conflict is between authority and the rights of the individual. . . . [The plaintiffs] stand on a right of self-determination in matters that touch individual opinion and personal attitude.”\footnote{id}{Id. at 630-31.} The State’s sin lay not so much requiring religious observation as in requiring a more general “affirmation of a belief and an attitude of mind.”\footnote{id}{Id. at 633.} On this view, forced political conformity was as bad as forced religious observance, for “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein.”\footnote{id}{Id. at 642.} Accordingly, the Court wrote, the law “invades the sphere of intellect and spirit”\footnote{id}{Id. at 642.} and must be struck down.

\textit{Barnette} may have been the first Supreme Court case to focus on the internal consequences of state action, but it was far from the last, and later cases would build

\begin{footnotes}
\item[27] \textit{Id.} at 478 (Brandeis, J., dissenting).
\item[28] 319 U.S. 624 (1943).
\item[29] \textit{Id.} at 630-31.
\item[30] \textit{Id.} at 633.
\item[31] \textit{Id.} at 642.
\item[32] \textit{Id.} at 642.
\end{footnotes}
upon Barnette’s commitment to law as a tool for internal regulation. In one of the twentieth century’s judicial landmarks, *Brown v. Board of Education*,33 the Court rejected the concept of “separate but equal” in public education because of the emotional harm posed by segregation. In the central passage of the case, the Court explained that “to separate [schoolchildren] from others . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”34 While ostensibly *Brown* was an equal protection case, and could have been decided on various technical legal grounds,35 it was this psychological insight that held the key to the decision.

As the twentieth century progressed, the Court’s attention to the internal implications of rights law was further manifested in a number of important cases in diverse areas of law. Much of this development occurred in cases involving the right to privacy argued for by Warren and Brandeis at the end of the previous century. In abortion law, for example, beginning with *Roe v. Wade*,36 the Court grappled with the question of rights in terms of the mental and spiritual well-being of women. The *Roe* opinion zeroed in on the emotional impact of unwanted pregnancies in upholding a woman’s right to obtain an abortion:

This right of privacy … is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State

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34 *Id.* at 494.
would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.\textsuperscript{37}

The internal, emotional impact of pregnancy justified the intervention of constitutional law in a previously unconstitutionalized area.

In a later abortion case, \textit{Planned Parenthood v. Casey},\textsuperscript{38} the Court reiterated its view of rights law as a means of spiritual caretaking. The \textit{Casey} Court was faced with several discrete restrictions on abortion, and had it wished to do so, it could have resolved those questions within the framework of existing abortion law. \textit{Roe v. Wade} had been on the books for nearly twenty years, and numerous precedents had been established that provided some framework, even if not an indisputable one, for evaluating subsequent restrictions of the abortion right. In other words, to resolve the case, it was not necessary that the Court do anything more than determine where the challenged regulations fit within a fairly well-developed body of law. And this is where the Court began, invoking

\textsuperscript{37} \textit{Id.} at 153.

\textsuperscript{38} 505 U.S. 833 (1992).
specific, analogous due process guarantees: “Our law affords Constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” But the Court went on to endorse a much more sweeping form of Constitutional oversight:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state. These considerations begin our analysis of the woman’s interest in terminating her pregnancy. . . .

Rather than applying facts to precedent, the Court took as its starting point a vision of law as a tool of spiritual growth, a vision encapsulated in its assertion later in the opinion that “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives.” The abortion right, like the rights of schoolchildren, became less a matter of legalism than a matter of spiritualism.

And in *Casey*, as in *Barnette*, the Court showed the extent of its concern with the soul by conflating controls on behavior with controls on belief. The laws at issue in *Casey* were attempts by a state to control actions; to limit and to structure the circumstances in which a woman could obtain an abortion. But the Court’s response to

39 *Id.* at 851.
40 *Id.* at 851.
41 *Id.* at 852.
this was to treat it as an invasion of the soul rather than an invasion of the body, scolding that “Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the state.”

Read carefully, this is a non sequitur. A woman who cannot obtain an abortion under her preferred conditions is not likely to change her beliefs about abortion on that basis alone, and there was no suggestion in the Casey opinion or in the statutes under review that Pennsylvania was trying to change anyone’s mind as opposed to regulating their activities. It is not an inevitable response to a regulation of behavior to say that one’s ability to philosophize is in peril. But Casey seems to proceed from a different logic altogether. The concern of the Court is not merely liberty of the body; instead, it is the state of the soul, and government action that might trouble the soul is forbidden.

Nor is this vision of law reserved to the “liberals” on the Court. In the Court’s most recent abortion case, Gonzales v. Carhart, a conservative majority used a spiritual rationale to uphold Congress’s ban of partial-birth abortions. The Court relied in part on the emotional impact of the banned procedures, imagining a woman who procured an abortion only to learn later of the distasteful method used by her doctor to terminate the pregnancy. Congress, the Court said, had a legitimate interest in protecting women from the psychic damage that such knowledge might bring:

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a

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42 Id. at 851.
mother who comes to regret her choice to abort must struggle with grief more
anguished and sorrow more profound when she learns, only after the event, what
she once did not know: that she allowed a doctor to pierce the skull and vacuum
the fast-developing brain of her unborn child, a child assuming the human form.\textsuperscript{44}

The content of rights law – in this case, expanding state power rather than limiting
it – was again determined by internal, emotional considerations.

The same internal vision of law animated another recent privacy case, \textit{Lawrence}
v. Texas,\textsuperscript{45} in which the Court struck down a state law criminalizing same-sex sodomy.
The Court took the occasion again to affirm its sweeping vision of the proper zone of
Constitutional authority: “Liberty presumes an autonomy of self that includes freedom of
thought, belief, expression and certain intimate conduct. The instant case involves liberty
of the person both in its spatial and more transcendent dimensions.”\textsuperscript{46} In \textit{Lawrence}, this
liberty again took the form of the correct psychic environment. The Texas law was
wrong not because it infringed on private sexual conduct (which the Court had previously
held protected in other contexts, such as marriage and procreation), but because
regulation of such conduct meant that the state had impermissibly sought to “demean [the
plaintiffs’] existence or control their destiny.”\textsuperscript{47}

The Court’s attention to internal, spiritual states has not been limited to privacy
cases. \textit{Plyler v. Doe},\textsuperscript{48} like \textit{Brown}, was an equal protection case, in which the children of

\begin{itemize}
\item[\textsuperscript{44}] Id., 127 S.Ct. at 1624.
\item[\textsuperscript{45}] 539 U.S. 558 (2003).
\item[\textsuperscript{46}] Id. at 562.
\item[\textsuperscript{47}] Id. at 578.
\item[\textsuperscript{48}] 457 U.S. 202 (1982).
\end{itemize}
illegal immigrants challenged a Texas law that would have denied them public education. Striking down the law, the Court expressed its disapproval of “governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. [B]y depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”

The Court’s focus on the “esteem” in which one is held suggests that the psychological effects of the law were important, a suggestion that the Court made explicit later in the opinion: “The inestimable toll of this deprivation [of education] on the social, economic, intellectual and psychological well-being of the individual, and the obstacle it imposes to individual achievement . . . [violate] equal protection.” The message is clear: laws that impair peoples’ “intellectual and psychological well-being” risk running afoul of the Constitution. Law protects the internal realm as well as the realm of behavior.

First Amendment jurisprudence has also seen the use of law to regulate internal states. *Roberts v U.S. Jaycees* involved a Minnesota law that required a private, all-male civic group to admit women as members. Although the Court upheld the law, thereby limiting the associational rights of the group’s members, it continued to make clear that the law would be attentive to the internal needs of its subjects: “[I]ndividuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”

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49 *Id.* at 222.
50 *Id.*
52 *Id.* at 619.
role of law is to police the “emotional enrichment” of citizens, thereby keeping the path clear for the development of one’s “identity.”

Other First Amendment cases have likewise attended to the internal realm. In the mid-1980’s the Court began to develop the so-called “endorsement test” in Establishment Clause cases. This test, which first appeared in Justice O’Connor’s concurrence in *Lynch v. Donnelly*, 53 465 U.S. 689 (1984), measures alleged establishments of religion to see whether they send a message of endorsement or disapproval of religion. Any such message should be prohibited because of its effects on the psyches of the auditors:

“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” 54 The more conventional approach to the Establishment Clause had prevented government from favoring one religion over another, or conditioning the exercise of civil rights on religious belief. The endorsement test, however, follows the more modern trend

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54 *Id.* at 688 (O’Connor, J., concurring). This test has twice commanded a majority of the Court, and it has become a persistent presence in establishment-clause cases, earning frequent citation and the support of a number of Justices. For majority citations see Santa Fe Independent School District v. Doe, 530 U.S. 290, 309-10 (2000); School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 389-90 (1985) (finding that program providing education to parochial students at public expense in public schools could send a “message” of government approval of religion, and could confer a “significant symbolic benefit to religion in the minds of some”). For other citations see Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 773 (1995) (O’Connor, concurring, joined by Souter and Breyer, JJ.); Lee v. Weisman, 505 U.S. 577, 606 n.9 (1991) (Blackmun, J., concurring, joined by Stevens and O’Connor, JJ); County of Allegheny v. American Civil Liberties Union, 492 U.S. 624, 626 and 627 (1989) (O’Connor, J., concurring, joined by Brennan and Stevens, JJ.) and Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 n.1 (1989) (Opinion of the Court per Brennan, J., joined by Marshall and Stevens, JJ.)
in conditioning the validity of state action on the feelings it engenders in those affected by it.

This emphasis on feelings was also seen in the First Amendment case of Lee v. Weisman, in which the Court relied on emotional impact to rule against the use of prayer at a middle-school graduation ceremony. The fatal flaw in the prayer, according to the Court, was that it “forced” non-believing students either to stand in apparent assent or to remain seated in obvious dissent. Peer pressure might compel the student to stand, contrary to her principles, while remaining seated might draw unwanted attention. This “dilemma,” in turn, could cause “embarrassment and . . . intrusion” for the student, thereby increasing her sense of “offense,” “isolation” and “affront.” The Court’s “psycho-journey,” as Justice Scalia called it in dissent, emphasized yet more strongly that rights law would be used to tend to the inner states of individuals.

All of these cases show that for the modern Supreme Court, law has come to be seen as a means to safeguard the emotional, psychic and spiritual advancement of its citizens. Constitutional decisions are meant not merely to resolve disputes, protect property, or check state power, but also to ensure the proper conditions for the flourishing of individual souls. The internal realm of which Hurst wrote has become an increasingly important part of law’s empire. The controlling principles of modern rights law are something more than mere rules of law or expressions of political philosophy. They are spiritual principles, which place the Court as much in the line of Puritans John Winthrop

56 Id. at 593-94.
57 Id. at 594.
58 Id. at 643 (Scalia, J., dissenting).
and Cotton Mather as of Thomas Jefferson and James Madison. It remains, then, to connect this state of affairs to its closest precedent in American culture: the Puritan culture of seventeenth century New England.

II. PURITANISM: THE STATE AND THE SOUL

A. Puritanism and the Individual Soul

To understand the Puritan view of law, one must first understand a few aspects of Puritan theology. The Puritans believed in a precise and sometimes elaborate model of the soul’s progress. Several important assumptions underlay this model; these included the natural depravity of fallen man, the existence of a covenant by which God would redeem the predestined elect, the need for each person to work out his own salvation personally and internally, and the need for strong church and civil government to assist this process by mediating the correct relationship between the individual and God. These premises shaped the Puritan (and later the American) concept of the proper relationship between the individual and human authority, or law.

Much Puritan theology stemmed from the concept of covenant: a special agreement by which God offers eternal life to men, his unworthy creations. Covenant was considered the exclusive path to salvation, for “God conveys his salvation by way of covenant, and he doth it to those onely that are in covenant with him.” The original

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59 Puritan theology is also called “federal theology,” from the Latin foedus, or “covenant.” For a survey of New England covenantal doctrine, see John Witte, Jr., The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism, 277 ff. (2007).

60 Peter Bulkeley, The Gospel-Covenant; or The Covenant of Grace Opened 47 (1651). The original reads, “those onely without may fear of disappointing look for his salvation”; I have corrected this apparent transposition. Most of the primary Puritan
covenant was called the covenant of works, and was extended by God to Adam before the fall of man. This covenant promised eternal life on condition of obedience to divine law: “The [Covenant of works] saith, Doe this and live. . . the way of life which the Law propounds is, Doe these things comprehended in the Law, and doe them constantly, and then thou shalt live.” Salvation, therefore, was a matter of human effort: “Adam had the stock in his own hand, and might of himself by Grace received, have wrought out his own Salvation.” But Adam failed to obey, and by eating the forbidden fruit, he demonstrated man’s inability to obey God’s will. With the initial covenant broken, man’s own efforts could no longer suffice for salvation, “not because the covenant is changed, but because we are changed, and cannot fulfill the condition, to which the promise is made; the covenant stands fast, but we have not stood fast in the covenant.” It was not the covenant that was flawed, but Adam, and, by extension, all mankind.

In purely contractual terms, God could have let matters rest there, and cast aside His creatures who had proved unworthy. Yet in His infinite mercy, He sent Christ to die in atonement for Adam’s breach. God then offered another route to salvation, a second covenant known as the covenant of grace. Unlike the covenant of works, the covenant of

sources cited in this Article were consulted on microfilm or as facsimile reprints of the original texts. In quoting from these sources, I have preserved the original capitalization, spelling, italics and punctuation, with the exception of the long “s”.

61 Id. at 57.
64 A Confession of Faith, Chapter VIII (“Of Christ the Mediator”), 2 Mather, supra note 63, at 188-89.
grace did not depend on the actions of man (who had proved himself incapable of right behavior in Adam’s fall), but instead required only a belief in the saving power of Christ:

“The first difference is in the condition of the Covenants, the one requires doing, the other believing; the one workes, the other faith; The one saith, Doe this and live, the other saith, Believe and thou shalt be saved.” 65 The covenant of grace did not nullify the ethical duties of God’s law, but those duties were transformed into acts of thankfulness for redemption rather than the means by which redemption could be obtained:

Though the doctrine of grace command the same duties as the covenant of workes doth, as of love, feare, and of keeping the Commandments, and it ratifies the duties of the Law; yet here is the difference, that they are commanded in another manner, and for another end then in the covenant of workes; not as the matter of our justification, but as testimonies of our thankfulnesse for the great mercy of God in our free justification by grace. Let us therefore keep these differences unconfounded; for these two covenants are as different in their nature, as heaven and earth. 66

Once entered, the covenant guaranteed life to man, because God Himself was bound by its terms: “[T]his grace we may stand and wonder at, that the high God, who is free from all, and bound to none, no, not to the Angels in Heaven, is yet pleased for our good and benefit, to enter into bonds, and bind himselfe unto us in the bond of a covenant, to blesse

65 Bulkeley, supra note 60, at 57.
66 Id. at 164 (actually p. 111, misnumbered 164 in the original edition).
us, and to do us good.” The promise of free grace was a lifeline for sinful man, offering an escape from eternal damnation, despite the unworthiness of Adam and his descendants.

If the Puritans had left matters there, they might have been among the sunniest of sects, enjoying the promise of free grace and the assurance of covenantal salvation. But they were Calvinists who had a keen appreciation both of God’s goodness and of His wrath; in addition, they were astute psychologists who understood Man’s capacity for evil and self-deception. The mixture of these elements in their theology meant that, while grace was offered freely by God in the sense that it was the product of His free and merciful will, it was emphatically not “free” in the sense that it was there for anyone to take.

One of the more important aspects of Puritan theology was the way in which it personalized the question of salvation. It was a central tenet of Puritanism that each person must join the covenant individually: “God conveys his blessings onely by covenant, and 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.” To be saved, then, required more than membership in a church, or affiliation with a system of belief; it meant a personal relationship with God and an individual entrance into His covenant. This injected a measure of urgency into the doctrine, for it placed the onus of looking to one’s salvation squarely on one’s own shoulders; it also meant that one’s own weaknesses or failings could interfere with one’s membership in the covenant.

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67 Id. at 46.
68 Id. at 47, 48.
The Puritans added to personal responsibility the concept of predestination. This doctrine, which was central to Calvinism, held that God “hath ordained all men to a certain and everlasting estate, that is, either to salvation or condemnation, for his own glory.”\(^\text{69}\) In other words, God has already identified the elect, also known as the “saints,” who are “predestined unto everlasting life.”\(^\text{70}\) These were the only persons who could join in the covenant, for “[t]he objects of the covenant of grace are the elect alone.”\(^\text{71}\) On the other side of the ledger were the damned, or the “reprobate,” who were “fore-ordained unto everlasting death.”\(^\text{72}\) All of this made membership in the covenant more than a point of theological nicety; instead, it was quite literally a matter of survival.

This naturally raised an important question: How could one know whether one was saved or not? The answer lay within each believer. The exact workings of grace were thought to be internal and mysterious, “secret and Spiritual,”\(^\text{73}\) but their effects on the soul could be discerned. To know one’s status, therefore, one had to look inward: “Would we then know whether we be of the number of those that are saved by the bloud of the Covenant? Wee need not for this ascend up into heaven, to search the book of Gods election . . . but goe down into our own hearts.”\(^\text{74}\) The Puritan literature is full of admonitions to search, to test and to doubt oneself, all for the sake of determining whether one be in the covenant or no. Bulkeley put it in inquisitorial terms, urging that


\(^{70}\) A Confession of Faith, Chapter III.III, supra note 63, at 185.


\(^{72}\) A Confession of Faith, Chapter III.III, supra note 63, at 185.

\(^{73}\) Hooker, The Application of Redemption, supra note 62, at 137.

\(^{74}\) Bulkeley, supra note 60, at 264.
“it were good for every one of us, that we would begin to suspect ourselves, and to
question our interest in this Covenant.”

Hooker likewise urged an investigative
approach: “Examine your selves, prove your selves whether you be in the Faith or no . . .
[T]his is that ought to try to & find out, & you too or els you are to blame.”

Even Roger Williams, writing to his wife in a more informal vein, sounded a note of warning:
“[A] deep and frequent examination of our spiritual condition, is an excellent means of
Christian health and temper. . . . This duty is hard, and therefore we must often cry to
God with David, ‘Search me, O God, and try my heart, and see if there be any wicked
way in me, and lead me in the way everlasting.’”

Puritan spiritual life was in large part
a constant process of self-examination and wondering, searching for evidence that one
was saved instead of damned.

To guide this process, the Puritans developed a sometimes elaborate taxonomy of
salvation. There were some variations in the details, but distilled to its most important
elements, the stages were (1) vocation (2) preparation (3) justification (4) sanctification,
and (5) glorification. Vocation, or “effectual calling,” was the offering of grace by God
to the soul of the elect. “All those whom God hath predestined unto life, and those only,
he is pleased . . . effectually to call by his word and spirit, out of the state of sin and death
. . . to grace and salvation by Jesus Christ.”

To respond to this call, the sinner had to
prepare himself to receive it. This required recognizing one’s own corruption, and

75 Id. at 109.
77 Roger Williams, Experiments of Spiritual Life and Health 90 (c. 1650) (Winthrop S.
78 A Confession of Faith, Chapter X.I, supra note 63, at 190.
developing a fear of damnation and hatred of sin that would allow grace to enter. Thomas Hooker captured this with typically Puritan eloquence:

[I]n this Second Covenant of the Gospel . . . it comes to pass when the Lord will lay hold upon the proud heart of a Sinner and draw him to himself, he Sinks his Spirit with the sense of his own wretchedness, so that he sees and confesseth freely that he is undone without Mercy, and yet conceives it not possible that ever such a worthless worm should partake thereof, acknowledgeth it’s just with God to deny to give, nay to offer Grace to him, that hath slighted, rejected, opposed Grace from day to day. . . . In a word, then is a man truly worthy[,] that is[,] fit to hear of, and to receive mercy, when he is rightly, really become appreciative of his own unworthiness. 79

Cotton Mather offered a more pastoral but no less chastening image when he preached that “The earth is not more broken by the plow tearing of it, than the heart of a repenting one is broken with the sorrow of repentance.” 80 This was not, nor was it meant to be, a pleasant experience for the believer, as it required him to confront his own failings and to acknowledge his fitness for Hell. Yet the alternatives were far worse, for God reserved special punishment for those who turned away from His grace: “But know this to thy everlasting terror, That if thou do continue thus in the hardness and opposition of thy

80 Cotton Mather, Agricola (c. 1725), reprinted in Alan Heimert & Andrew Delbanco, eds., The Puritans in America: A Narrative Anthology 331 (1985).
heart against Christ and his Grace, that this Power of the Lord that would convert thee, will put forth itself to confound thee to thine eternal ruine.”

If the soul were properly prepared, it was then ready for the next step, which was justification. In this stage, the sinner actually received the inflowing grace of God, his sins were forgiven, and he was made fit for eternal life: “Justification is the gracious judgment of God by which he absolves the believer from sin and death, and reckons him righteous and worthy of life for the sake of Christ apprehended in faith.” Justification was, in effect, a renewed judgment of God upon man; not, as in Eden, a judgment of condemnation, but a new judgment of salvation in which “we are pronounced just and awarded the judgment of life.” Justification was sometimes called “justification by faith,” because belief in Christ was viewed as the sole means by which justification could occur: “Faith thus receiving and resting on Christ and his righteousness, is the alone instrument of justification.” Faith was also a condition of entering the covenant, for “If Christ Purchased all for Believers as such, then they must be such before they can challenge and take this Purchase as their own, it is the Condition that Christ requires upon which he communicates all that saving and spiritual good.”

Those who were justified then experienced sanctification, “the real change, wherein justification is manifested and its consequences, so to speak, brought into being.” The influx of grace caused the saint to be “purged from the corruption of his

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81 Hooker, Application of Redemption, supra note 62, at 138.
82 Ames, The Marrow of Theology, supra note 69, at 161.
83 Id. at 172.
84 A Confession of Faith, Chapter XI.II, supra note 63, at 191.
86 Ames, The Marrow of Theology, supra note 69, at 167.
own nature” and to be “indued with inward righteousness.” The changes wrought by grace began in the soul, but soon spread to the will and then the body:

Although the whole man partakes of this grace, it is first and most appropriately in the soul and later progresses to the body, inasmuch as the body of the man is capable of the same obedience to the will of God as the soul. In the soul this grace is found first and most appropriately in the will whence it passes to other faculties according to the order of nature.

Sanctification was therefore an internal change of state that had behavioral consequences, leading the sanctified to act in ways that were visible signs of redemption. As Bulkeley explained, “True sanctification cleaves to the whole law, and to all the Commandments of it, seeking to doe and fulfill all; such an heart the Lord requires . . . and such he works, where he works Grace in truth.” Notably, this meant that sanctification could be seen as outward evidence of justification, and thus of a person’s election by God: “[W]e should search and see whether we have been made partakers of this salvation promised. But how shall we know that? Even by our sanctification, if the Lord hath renewed and sanctified our natures and made us new creatures in Christ.” And while the sanctified soul might stray from the ways of God (being yet human), it would continually be drawn back to righteousness: “True sanctification will never suffer the soule to find rest and

87 Perkins, The Foundation of Christian Religion, supra note 63, at 159-60.
88 Ames, The Marrow of Theology, supra note 69, at 169.
89 Bulkeley, supra note 60, at 266.
90 Id. at 260.
peace, but only in the way which is called holy: A sanctified soul may step aside into the way which is not good, but it can find no rest there.”  

The final stage in this process was glorification, in which God finally delivered the eternal life promised in His election of the soul:

Glorification is the real change in man from misery, or the punishment of sin, to eternal happiness. . . . [It] is nothing but the carrying out of the sentence of justification. For in justification we are pronounced just and awarded the judgment of life. In glorification the life that results from the pronouncement and award is given to us: We have it in actual possession. 

Glorification thus was the opposite of damnation; a passing of a sentence of eternal life instead of eternal torment.

It should be remembered that the goal of this process was not to achieve salvation, since that was a decision that had already been made by a predestining God. Rather, the goal was to obtain knowledge of one’s election, what the Puritans called “assurance,” “comfort” or “consolation.” If the believer could find in his own soul evidence of justification, or detect in his behavior true sanctification, then he could take solace in the fact that he was not destined for Hell: “It is a use of marvelous comfort, to those that do

91 Id. at 266.
92 Ames, The Marrow of Theology, supra note 69, at 171-72.
93 See, e.g., John Cotton, Christ the Fountaine of Life 92 (Arno Press 1972) (1651) (describing the signs of the Christian life as “the life of righteousnesse in our Justification, and of Sanctification, of comfort and consolation, and of eternall glory.”
Endeavour to walk uprightly and faithfully in covenant with God. . . here is comfort for such, that the blessing of life and salvation is as sure to such souls, as the covenant of a faithful God can make it." Hooker seized on this assurance as a central goal of spiritual life, urging his readers, “Do not rest until you have made sure your Evidence for Heaven and Happiness, that you may be able to say I am sure Christ and all Saving good is mine.” And, in a beautiful set of metaphors, he described the effect of such assurance on the elect:

[I]t is a ground of strong consolation (as the Apostle saith) to beare up the hearts of Gods people in the day of death, that they may lift up their heads with comfort, and looke grizzled death in the face with courage and boldnesse; for the death of Christ hath taken away the evill of thy death: therefore be thou not troubled with it, nor dismaid by it; there is no bitternesse in that pill, nor no venom in that cup to thee. . . for the sharpest death of a Saint of God, is like a humble Bee that hath no sting in it, which a childe may play withal, and not be hurt.96

Of course, human frailty could come between the sinner and God at any time, and “a person who truly believes and is by faith justified before God may for a time think that he neither believes nor is reconciled to God.”97 Worse, one could delude oneself into thinking that he was saved when he was not, for “Men may vainly deceive themselves

94 Bulkeley, supra note 60, at 52.
95 Hooker, The Application of Redemption, supra note 62, at 108.
96 Hooker, The Soules Exaltation 207-08 (1638).
97 Ames, The Marrow of Theology, supra note 69, at 163.
with false hopes, and carnal presumptions of being in the favor of God, and state of
salvation.” 98 Even the saints, it seems, were bound to a life of self-examination and at
least occasional doubt.

The devout Puritan thus occupied a tenuous position. He was in real danger of
eternal damnation, which he could escape only by being among the elect. He could learn
of his election only by debasing himself before God, and believing himself fit for Hell,
then examining his soul for the minutest signs of inward grace, which might or might not
come, and which, once found, might or might not be real. At the same time, while his
own deeds could not merit his salvation, there were nonetheless requirements of behavior
and attitude that had to be met in order to seek and to keep the covenant. While God
could if He chose provide the elect with sure and easy knowledge of their salvation, He
instead demanded a process that was anything but certain, and which demanded self-
abasement, fear and trepidation. Roger Williams distilled this problem to what he called
a “Christian riddle”: “[W]hy is it, since God worketh freely in us to do and to will of his
own good pleasure, that yet he is pleased to command us to work out our own salvation
with fear and trembling? Let us all humbly beg the finger (the spirit) of the Lord to untie
these knots for us.” 99 It is small wonder, then, that one modern commentator could
describe Puritan spirituality as “a tortured solipsism.” 100 The internalization of salvation,
the burden of individual responsibility in seeking God, and the prospect of eternal
damnation for failure brought relentless pressure to bear on each believer.

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98 A Confession of Faith, Chapter XVIII.I, supra note 63, at 195-96.
99 Roger Williams, Experiments of Spiritual Life and Health (c. 1650), reprinted in Alan
Heimert & Andrew Delbanco, supra note 80, at 209.
100 Heimert & Delbanco, id. at 15.
This anxiety could (and often did) pervade everyday life. Samuel Sewall, a prominent merchant and magistrate who officiated in the Salem witchcraft trials, recorded in his diary “[b]eing distressed with melancholy and troubled concerning my State.” The following year he wrote, “I have been exceedingly tormented in my mind. . . [s]ometimes with my own unfitness and want of Grace.” Years later the diarist records the anguish of his daughter Betty, who after dinner one night “burst out into an amazing cry,” because “she was afraid she should goe to Hell, her Sins were not pardon’d.” The entry concludes with the father’s poignant prayer: “The Lord bring Light and Comfort out of this dark and dreadful Cloud, and Grant that Christ’s being formed in my dear child, may be the issue of these painfull pangs.” John Winthrop recorded a more tragic episode in which a young woman, tormented by doubt over the state of her soul, threw her baby down a well so that she would at least know for sure that she was damned – knowledge of Hell apparently being preferable to a state of perpetual doubt. While the Puritans may not always have been as dour as Hawthorne and others have painted them, clearly there was much in the doctrine to make spiritual life difficult.

In the search for salvation it could be particularly hard to determine exactly where human effort ended and free grace took over, and this ambiguity was an important one. A rigorous belief in predestination would suggest that individual action should not matter at all in the scheme of salvation. Of course, such a belief would not be greatly conducive to civil society (which was a special concern of the Puritans, as we shall see), for it would

102 Id. at 39 (entry for March 21, 1676/7).
103 Id. at 346 (entry for January 13, 1695/6).
offer nothing to encourage useful and sociable behavior. Nor would it be consistent with the concept of covenant, which implies not unilateral promise, but reciprocal obligation. As a party to a covenant, there must have been something that man had to do in exchange for grace. As Bulkeley put it, “this is not properly a Covenant, where there is not a mutuall obligation and binding of the parties one to another by condition.”105 And the Puritans did believe in free will, which at least implied the possibility that the elect could fall away from grace completely (though this seemed to be balanced by a belief that they would always come around to God in the end).106 Thus, the Puritan scheme of salvation required affirmative acts of faith, self-abasement, self-examination, and right behavior, if not as conditions of God’s favor, then as conditions of the quest for assurance. John Cotton urged his readers to “labor for justification,”107 as if human effort really did count for something, and “to work out one’s salvation” was a common verb in the Puritan dialect. Puritan doctrine thus harbored a delicate balance between works and grace; a subtlety, a paradox or a flat contradiction, depending on one’s point of view.108 It is not clear that the Puritans ever resolved these questions fully, and they were to become a breeding ground for controversy, most notably the Antinomian Crisis, of which more below.

105 Bulkeley, supra note 60, at 314.
106 The tenets of the 1680 Confession of Faith capture this tension. Chapter IX (“On Free Will”) states that grace imbues the sinner with a will to do good, while his corrupt nature continues to cause him to will what is evil. See supra note 63, at 190. But Chapter XIII, (“On Sanctification”) insists that in the elect, the “continual supply of strength from the sanctifying spirit of Christ” will eventually counteract the effects of this lingering corruption. Id. at 192.
108 For a detailed treatment of the problem, see Perry Miller, The Marrow of Puritan Divinity, in Errand into the Wilderness 48 (1956).
But whether or not the Puritans made sense on their own terms, their ideas established cultural patterns that continue to echo in our own time. One of the most important of these for our purposes is the constant focus on the individual. The central question of salvation was addressed to each person individually; there was no chosen people of which one might be a part; there were only chosen persons, which one might or might not be. The search for assurance furthered the theme of individualism, for it meant that a major goal of Puritan life was the achievement of a particular psychological state. The Puritan focus on the individual would find its later counterpart in the American obsession with individual development and individual rights.

But the individual was not to be left on his own, either then or now. The Puritans believed that the process of seeking assurance, and the accompanying mechanism of justification, sanctification and glorification, were the exclusive channels of spiritual development. Hence, individual salvation took on a structure, a well-defined system within which salvation could be known, and without which it could not. As the next section will show, this led to a particular conception of the role of social authority – both the Church and the civil government – in overseeing the individual’s progress. These themes of internal development and institutional oversight would become hallmarks of American law long after the passing of the Puritan regime.

B. The Church, the State and the Individual

The Puritan model of salvation may have centered on the individual experience of grace, but the individual was not to be left to his own devices in seeking assurance. Instead, the soul’s development required the right relationship between human authority and the individual believer. The Puritans saw their American venture as a program for
the saving of souls to the glory of God, and they believed that they had been specially selected by God for the task. This epochal sense of mission, sharpened by the challenge of settling a wilderness, led to the creation of well-defined structures of church and state. These human institutions had a particular role to play in the saving of souls, and they were quick to defend themselves against any suggestions that their role was secondary or superfluous. The resulting mode of spiritual oversight struck a note in American public life that would echo in the American law of the twentieth and twenty-first centuries.

1. The Ends of America

The Puritans’ emphasis on human authority was colored by their concept of their mission in the New World. The Puritan settlers believed that they were sent not only to colonize a formerly unsettled land, but to build a new and exemplary outpost of Christ. Edward Johnson captured this mood in a contemporary history of Puritan New England, writing in the voice of an English Puritan about to embark for Massachusetts Bay: “I am now prest for the service of our Lord Christ, to re-build the most glorious Edifice of Mount Sion in a Wildernesse, and as John Baptist, I must cry prepare yee the way of the Lord, make his paths strait, for behold hee is coming againe, hee is coming to destroy Antichrist, and give the whore double to drinke the very dregs of his wrath.”109 Those who were part of the first settlements echoed this sense of mission. Preaching on board the ship Arabella, John Winthrop, the nearly perpetual governor of Massachusetts Bay, declared that the settlers had been given a “special Commission”110 from God, and that the world would be watching them: “[W]e must consider that we shall be as a City upon

110 John Winthrop, A Model of Christian Charity (1630), reprinted in Heimert & Delbanco, supra note 80, at 90.
a Hill. The eyes of all people are upon us.”

Winthrop also linked the establishment of the colony to the cause of individual salvation: “The end is to improve our lives to do more service to the Lord . . . and work out our salvation under the power and purity of his holy Ordinances.”

This attitude descended to later generations, as well. Peter Bulkeley, for example, reiterated both Winthrop’s vision of a sacred charge and his connection between the New England polity and personal salvation:

And thou New-England, which art exalted in the privileges of the Gospel above many other people . . . consider the great things the Lord hath done for thee. . . . Thou has many bright stares shining in they firmament, to give thee the knowledge of salvation from on high, to guide thy feet in the way of peace. . . . Thou shouldt be a speciall people, an onely people, none like thee in all the earth.

In a still later generation Cotton Mather described the colonies as “A New-English Israel,” and claimed that the pre-Puritan settlements had failed because they were “aimed no higher than advancement of some worldly interests, until there was a plantation erected upon the nobler basis of Christianity.”

Yet with this great opportunity came great responsibility. Although the world was watching, God was watching even more closely. Winthrop cautioned that “When

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111 Winthrop, id. at 91.
112 Id. at 89.
113 Bulkeley, supra note 60, at 16.
114 1 Mather, supra note 63, at 44.
115 Id. at 66.
God gives a special commission he looks to have it strictly observed in every article.”¹¹⁶
Should the colonists fail, by “embrac[ing] this present world and prosecut[ing] our carnal
intentions,” God “will surely break out in wrath against us [and] be revenged of such a
perjured people, and make us know the price of the breach of such a covenant.”¹¹⁷
Bulkeley, too, warned New England that the price of failure would be high: “The more
thou hast committed unto thee, the more thou must account for. No peoples account will
be heavier than thine, if thou doe not walke worthy of the meanes of thy salvation. . . .
The Lord looks for more from thee, than from other people.”¹¹⁸ The work of God was
righteous, but there was little room for error.¹¹⁹

2. The Church and the Ministry

If the Puritans were to fulfill their destiny in the New World, they would need
human institutions through which to act for the glory of God and the salvation of souls.
Chief among these was the organized church. Broadly speaking, the New England
Puritans were Congregationalists, reformed Protestants who believed that each
congregation should be self-governing. (This was in contrast to the Presbyterian model,
which advocated the oversight of multiple congregations by centralized bodies of church
elders.) Periodically, the New England congregations would meet in synods to discuss
matters affecting them collectively; while such efforts led to periodic charges of
Presbyterianism, they were typically defended as permissible examples of cooperation.

¹¹⁶ Winthrop, supra note 110, at 90.
¹¹⁷ Id. at 90-91.
¹¹⁸ Bulkeley, supra note 60, at 16.
¹¹⁹ As a product of this sense of mission and responsibility, the Puritans developed the
literature of the jeremiad, consisting of writings and sermons warning the people of their
backsiding and predicting the wrath of God as a consequence. A well-known study is
not centralized church government. Within each congregation, leadership usually consisted of one or more ministers, sometimes aided by a group of lay elders. Membership in a church was reserved for the “visible saints,” those who could give believable testimony that they had attained knowledge of their election.\(^{120}\)

While there were various controversies about the fine details of church government, there were two fundamental principles on which nearly all Puritans agreed: (1) the foundation of each church was a covenant between its members, and (2) the ministry had a central role to play in helping believers to work out their salvation. These tenets would undergird efforts by the church to cement its role as an authoritative participant in the salvation of each individual.

a. The Church Covenant

The Puritans considered church membership to be essential to spiritual life. As John Cotton wrote, “It is the part of all Christians, who look for salvation by Christ Jesus, to joyn themselves (if God give them opportunity) to some one or other such a particular visible Church of Christ. . . . that so he may not deprive himselfe of the benefit and comfort of any of Gods holy Ordinances.”\(^{121}\) The concept of covenant, in turn, was central to the Puritan concept of the church. Just as each believer had to enter a covenant with God to be saved, so each member of a church had to enter into a covenant with the other members in order to participate in the life of the church (and hence, in the life offered through Christ). The church covenant was separate from the covenant of grace,

\(^{120}\) For a brief overview of Puritan church government, see Francis J. Bremer, The Puritan Experiment 97-105 (1976).

but linked to it as the means to an end. As John Norton explained, “The covenant of grace contains salvation itself; the church covenant is the ordinary means of being linked with this salvation: it marks the external application of the covenant of grace and the institution of worship within it.”

A church covenant was defined as “a mutual engagement of faithful people, explicitly or implicitly expressed, to walk with God and with each other in the polity of the Gospel.” The covenant could be express or implied, but the Puritans were fond of the written word, and some of the early church covenants have survived. Edward Johnson records one example:

We . . . . do here in the name of Christ Jesus, as in the presence of the Lord, from the bottom of our hearts agree together through his grace to give up our selves, first unto the Lord Jesus as our only King, Priest and Prophet, wholly to be subject unto him in all thing[s], and therewith one unto another, as in a Church-Body to walk together in all the Ordinances of the Gospel, and in all such mutual love and offices thereof, as toward one another in the Lord.

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122 Norton, The Answer to Appolonius, supra note 71, at 55.
123 Id. at 55. And see Ames, The Marrow of Theology, supra note 69, at 180 (“This bond is a covenant . . . by which believers bind themselves individually to perform all those duties toward God and one another which relate to the purpose [ratio] of the church and its edification”).
125 Johnson, supra note 109, at 179.
This excerpt illustrates two key aspects of a covenant: the consent of the members to be bound (“we. . . do. . . agree together. . . to give up our selves”) and the mutual obligation of the covenant members that results (“we. . . . give up our selves. . . one unto another”). Thus, an erstwhile member of a church must “willingly binde and ingage himself to each member of that society to promote the good of the whole, or else a member actually he is not.”

In part, subscribing to a church covenant meant engaging in the churchly duties of attendance, financial support and righteous conduct. But the covenant also carried with it the duty of monitoring and helping fellow church-members as they sought assurance of salvation. Bulkeley admonished his readers to “aske others” whether one was in the covenant of grace or not, and it was within the church covenant that this could most readily occur. Indeed, spiritual surveillance of others was a positive duty of church membership, as illustrated by one early account of a church founding: “[T]hey joined together in a holy covenant with the Lord, and one with another promising the Lords Assistance to walke together in Exhorting, Admonishing and Rebuking one another, and to cleave to the Lord with a full purpose of heart, according to the blessed Rules of his Word made known unto them.” To aid in this project, the churches developed internal modes of discipline, including reproof, censure, and, in extreme cases, excommunication. The members of the church had “church-power over one another

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127 Bulkeley, supra note 60, at 109.
128 Johnson, supra note 109, at 21.
129 See, e.g., The Massachusetts Body of Liberties, Art. 95(4) (1641), reprinted in Puritan Political Ideas. 1558-1794, at 200 (Edmund S. Morgan ed., Bobbs-Merrill 1965)
mutually,”¹³⁰ watching, admonishing, and monitoring one another’s souls to ensure the success of the project of salvation.

There was more at stake than the merely personal, however. Success in individual spirituality would also ensure the success of the colonies in their mission to establish the New-English Israel. Church discipline therefore could serve both individual and collective goals; conversely, its failure could have dire consequences. Controls were needed both to guide the fallen in their search for assurance and to guide the colonies in fulfilling God’s charge. The church covenant thus was a gateway to the covenant of grace, but on terms that show the Puritan reluctance to leave the soul unsupervised.

b. The Ministry and the Word

Within the structure of the church, it was the written Word of God – the Bible – that was the key to bringing souls to Christ. And it was human authority, in the form of the ministry, that was most effective in bringing sinners to the Word and therefore to God.

The Word was essential to Puritan belief, for although the operations of grace were internal, the Word was the external means by which a person could attain faith, and, through faith, justification. John Cotton, like most other Puritan divines, could discern a “marvelous power” in the scriptures “to supply faith, and the defects of it in every Beleeever.”¹³¹ While the “light of nature” and the “works of creation and providence” could manifest God’s greatness, they alone were not sufficient to provide “that

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¹³⁰ A Platform of Church Discipline, Chapter IV.3, 2 Mather, supra note 63, at 215.
¹³¹ Cotton, Christ the Fountaine of Life, supra note 93, at 198; see also Perkins, The Foundation of Christian Religion, supra note 63, at 148 (“Faith cometh only by the preaching of the Word and increaseth daily by it”).
knowledge of God and of his will, which is necessary unto salvation . . . which maketh the Holy Scripture to be most necessary."\textsuperscript{132} It was therefore basic Puritan doctrine that “The promise of Christ and salvation by him, is revealed only in and by the word of God. . . . the gospel [is] the only outward means of revealing Christ and saving grace.”\textsuperscript{133}

The Word alone, however was not enough. In order for fallen Man to realize its benefits, a mediator was needed, someone to explain its meaning and to ensure its impact on the soul of every believer. This task required God’s “faithful Ministers,” to whom God “hath delegated the dispensation of his Word (in a way of Explication and Application of it).”\textsuperscript{134} Without the ministry, man could not hope to approach the salvation offered by God, for although “God himselfe . . . is the Principal Cause” of salvation, the “Ministry of the Word” was “the Instrumental Cause of the Application of all saving good.”\textsuperscript{135}

The minister’s “application,” or explication, of the Word was carried out mainly through preaching, for “We receive the Spirit of sanctification, not by the workes of the Law, but by hearing of faith preached.”\textsuperscript{136} While the Puritan faithful were expected to read the Bible on their own, the ministry, as special agents of God, could better bring its meaning home: “Faith cometh by hearing of the Word of God: it is not meant that faith comes by hearing of the word read, for that kind of preaching is here meant for which a

\textsuperscript{132} A Confession of Faith, Chapter I.I, \textit{supra} note 63, at 182.
\textsuperscript{133} A Confession of Faith, Chapter XX.IV, \textit{supra} note 63, at 198.
\textsuperscript{134} Hooker, The Application of Redemption, \textit{supra} note 62, at 134.
\textsuperscript{135} \textit{id.} at 135.
\textsuperscript{136} Bulkeley, \textit{supra} note 60, at 253. \textit{See also} Ames, The Marrow of Theology, \textit{supra} note 69, at 191 (“Here the preaching of the word is of the utmost importance, and so it has always been of continuous use in the church”).

\hspace{1cm} 40
man is sent . . . but for bare reading no man had need to be sent.”137 In other words, a special kind of human aid was required to set the soul on the correct path to God.

Part of what made preaching so important was the minister’s ability (at least in theory) to tailor the message of the Word to each hearer. The listeners were to be “pricked to the quick so that they feel individually . . . that the word of the Lord is a two-edged sword, piercing to the inward thoughts and affections and going through to the joining of bones and marrow.”138 Hooker wrote of the personal effect of the minister’s mediation:

[W]hen the Word is rightly opened, and rightly applied, it works then more powerfully, because dispensed . . . according to the weakness of them to whom it is delivered, as the chewing of meat fits it for the stomach, and therefore nourisheth it more, the pounding of Pouder makes it smel more: so it is with the Word when opened and applied according to the minde of God.139

In chewing this spiritual meat for his congregation, it was the duty of the minister to take account of each member’s needs, “giv[ing] to every one their portion, terour to whom terour belongs, and comfort to whom comfort belongs.”140 Yet the congregant could not listen passively, for the role of the ministry ultimately was to aid in the process of ferreting out one’s own weakness, sin and hardness of heart:

138 Ames, The Marrow of Theology, supra note 69, at 193-94.
139 Hooker, The Application of Redemption, supra note 62, at 133-34.
140 Thomas Hooker, The Soules Preparation for Christ 73 (1638).
Therefore when you come into the congregation, and see the Minister giving and parting to every one his doale; reproof here, and instruction there; looke up to heaven, and labour to get something to thy owne particular, and say . . . *something for mee*, Lord, *something for mee*, instruct me, reprove mee, make knowne my sinnes, and discover my abominations.\(^{141}\)

Attendance upon preaching required the active participation of the individual in searching for light, and a serious Puritan would take the occasion to “[find] out thy sinne by the help of the minister.”\(^{142}\) Perkins captured the urgency of the process by exhorting the faithful to come to a sermon “with hunger-bitten hearts, having an appetite to the word.”\(^{143}\) If right preaching was accompanied by right hearing, then the Word could not fail to reach its mark, for “[t]here was never any convicting Ministry, nor any man that did in plainenesse apply the word home, but their people would be reformed by it.”\(^{144}\)

The Puritan concept of the Word placed a layer of human authority between the believer and God in the quest for salvation. There was a written text to guide the soul, and a body of hierophants to mediate the truths of the text to the individual. This was widely seen (and probably widely functioned) as a benevolent state of affairs, offering a way of facilitating salvation rather than constraining the quest. But the potential for

\(^{141}\) *Id.* at 73-74.
\(^{142}\) *Id.* at 240.
\(^{144}\) Hooker, The Soules Preparition for Christ, *supra* note 140, at 64.
authoritarianism was clear, and offered another indication that Puritanism did not entirely trust mankind.

3. Civil Government and Church Discipline

The same concept of covenant that underlay church polity also appeared in the Puritan view of civil government. John Cotton expressed a mainstream Puritan belief when he extended the covenantal view of church government to civil relationships: “[I]t is evident by the light of nature, that all civill relations are founded in Covenant. . . . There is no other way given whereby a people (sui juris) free from naturall and compulsory engagements, can be united or combined together into one visible body, but onely by mutuall Covenant.”\textsuperscript{145} Like the church covenant, the hallmarks of the civil covenant were consent of the members to be bound, and their mutual obligation thereafter. These elements are illustrated by perhaps the most famous example of a Puritan civil covenant, the Mayflower Compact:

\begin{quote}
We, whose names are underwritten . . . doe . . . covenant and combine ourselves together into a civill body politick, for our better ordering and preservation . . . and by virtue hereof to enacte, constitute and frame such just and equall laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meeet and convenient for the generall good of the Colonie unto which we promise all due submission and obedience.\textsuperscript{146}
\end{quote}

\textsuperscript{146} The Mayflower Compact (1620), \textit{reprinted in} American Historical Documents, 1000-1904, at 59 (P.F. Collier 1938).
The notion of consent to be bound appears in the colonists’ pledge to “combine ourselves,” instead of being forced to combine by others. The mutual obligation that flows from this consent is seen in the promise of “all due submission and obedience” to the “generall good” of the new colony. These principles were repeated elsewhere in the Puritan literature. John Winthrop preached on board the ship *Arabella*, bearing the first wave of colonists to Massachusetts Bay, that the “work we have in hand. . . . is by a mutual consent,” just as he declared several years later that “No commonwealth can be founded but by free consent.” The *Arabella* sermon also expressed the resulting obligations of the commonwealth-members:

For this end, we must be knit together in this work as one man. We must entertain each other in brotherly affection, we must be willing to abridge ourselves of our superfluities, for the supply of others’ necessities. We must uphold a familiar commerce together in all meekness, gentleness, patience and liberality. We must delight in each other, make others’ conditions our own, rejoice together, mourn together, labor and suffer together, always having before our eyes our commission and community in the work, our community as members of the same body. So shall we keep the unity of the spirit in the bond of peace.  

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147 John Winthrop, A Model of Christian Charity (1630), supra note 110, at 89.
148 John Winthrop, A Defense of an Order of Court (1637), reprinted in Heimert & Delbanco, supra note 80, at 165.
149 Winthrop, A Model of Christian Charity, supra note 110, at 91.
Like the Puritan church, the Puritan state was founded on federal principles.

The Puritans did preserve some distinctions between church and state. For example, clergymen, however influential, were ineligible for civil office.\(^{150}\) Still, the New England way was not so much a separation of church and state as a symbiosis of the two, which were “inextricably linked in nature and in function.”\(^{151}\) In its milder form, this consisted of the idea that church and state were harmonious means to the same end: the building of the American Israel, the city on a hill that would shine forth Christianity to the world. There was a strong sense among the Puritans that godliness must permeate the colonies, and that ensuring such godliness was the task of civil government. The 1649 Platform of Church Discipline posed as an article of church doctrine that “The end of the magistrate’s office is not only the quiet and peaceable life of the subject in matters of righteousness and honesty, but also in matters of godliness; yea, of all godliness.”\(^{152}\)

Edward Johnson, in his 1654 history of New England, argued that the Puritans had removed from England to America “not for the Land, but for the government, that our Lord Christ might raigne over us, both in Churches and in Common-wealth.”\(^{153}\) And John Cotton told a European audience that in America, “church government . . . can most beautifully accord with civil government. Like Hippocrates’ twins the two laugh and cry together.”\(^{154}\)

All of this suggested that church government and civil government were independent yet complementary structures for maintaining a holy commonwealth. But

\(^{150}\) Bremer, supra note 120, at 62, 94. See also Witte, supra note 59, at 309-10.
\(^{151}\) Witte, supra note 59, at 310.
\(^{152}\) A Platform of Church Discipline, Chapter XVII.6, 2 Mather, supra note 63, at 236.
\(^{153}\) Johnson, Wonder-Working Providence, supra note 109, at 112.
\(^{154}\) John Cotton, Foreward to The Answer to Appolonius, supra note 71, at 11.
many Puritans seem to have gone a step farther, viewing civil government as less a sibling than a servant of the church. Hooker, for instance, classified civil government as the “Inferiour helping cause” of the visible church, God being the principal such cause.\(^{155}\) In many cases, the civil government lent its strength to the churches, not only by giving them the freedom to operate, but also by enforcing adherence to many of their tenets. For example, the Massachusetts Body of Liberties, a 1641 codification of the colony’s civil law, guaranteed a number of liberties to the churches, including the election of officers, the admission, discipline and excommunication of members, and the right to hold private meetings.\(^{156}\) Such a list could be seen as merely a guarantee of religious freedoms, not a blending of church and state. But the code also asserted an affirmative role for civil government in policing religious behavior, imposing the death penalty for the worship of false gods and blasphemy,\(^{157}\) and granting the civil authorities the power to “see the peace, ordinances and Rules of Christ observed in every church according to his word, so it be done in a Civill and not in an Ecclesiastical way.”\(^{158}\) This sort of interrelationship could make one wonder exactly where civil power ended and church power began.

The line between the two was especially blurry in the Puritans’ ongoing struggle with the question of religious tolerance. The Puritans’ pre-migration experiences in England had shown the dangers of official orthodoxy. Ongoing civil and religious strife had led to a number of prosecutions, and more than one of the leaders of the American

\(^{155}\) Hooker, A Survey of the Summe of Church-Discipline, supra note 126, at 12.
\(^{156}\) Massachusetts Body of Liberties, Art. 95, supra note 129, at 199-202.
\(^{157}\) Id., Arts. 94(1) and 94(3), supra note 129, at 197.
\(^{158}\) Id., Art. 58, supra note 129, at 190.
Puritans had fled England to escape official disfavor and possibly worse.\textsuperscript{159} Thus, there were some for whom the establishment of the American Israel on correct principles required at least some leeway for those who entertained divergent religious views (at least so long as they professed some form of Christianity).\textsuperscript{160}

But there were many who believed that a stricter religious orthodoxy was required, both to keep public order and to ensure the success of the American mission. Johnson’s exhortation was typical: “[O]ur Magistrates, being conscious of ruling for Christ, dare not admit of any bastardly brood to be nurst up upon their tender knees.”\textsuperscript{161} Hooker sidestepped the matter in his \textit{Survey of the Summe of Church-Discipline}, but could not resist the trenchant observation that he was “not yet perswaded that the chief Magistrate should stand a Neuter, and tolerate all religions.”\textsuperscript{162} The forces of intolerance frequently had their way. The Massachusetts Puritans banished Roger Williams in 1635, and Anne Hutchison in 1638.\textsuperscript{163} They jailed and whipped Baptists in 1651.\textsuperscript{164} In the late 1650’s a number of Quakers were variously whipped, banished, mutilated, and hanged.\textsuperscript{165} Such acts were explained (if not justified) by the need to preserve social order,\textsuperscript{166} but the line appeared to be drawn very finely between matters of religious orthodoxy and matters

\textsuperscript{159} Thomas Shepard and John Cotton were notable examples. See Heimert & Delbanco, \textit{supra} note 80, at 6, 27. On the English persecution of Puritans generally, see Bremer, \textit{supra} note 120, at 15-17.
\textsuperscript{160} See, \textit{e.g.}, Henry Vane, A Brief Answer (1637), \textit{reprinted in} Heimert & Delbanco, \textit{supra} note 80, at 169-70; see also 2 Mather, \textit{supra} note 63, at 525-27.
\textsuperscript{161} Johnson, \textit{Wonder Working Providence}, \textit{supra} note 109, at 112.
\textsuperscript{162} Hooker, \textit{Survey of the Summe of Church-Discipline}, \textit{supra} note 126, at 13.
\textsuperscript{163} Hutchinson’s case will be discussed more thoroughly in Part Three below. For an overview of the Williams controversy, see Bremer, \textit{supra} note 120, at 65-67.
\textsuperscript{164} Bremer, \textit{supra} note 120, at 122.
\textsuperscript{165} \textit{Id.} at 138-40.
\textsuperscript{166} See, \textit{e.g.}, Winthrop, A Defense of an Order of Court (1637), \textit{reprinted in} Heimert & Delbanco, \textit{supra} note 80, at 164-67; 2 Mather, \textit{supra} note 63, at 525-26.
of public safety. The state, as well as the church, took an official interest in the soul, either to keep it on the correct path or to counteract its pernicious influence on the American Israel.

Through the church, the ministry and the magistrate, Puritan New England combined an intense focus on the internal state of the individual with well-defined, hierarchical structures to ensure the proper conditions for the development of the soul. As historian Stephen Foster summarized it, the “central Puritan vision” was one of a society in which “the magistracy guaranteed the social conditions under which the laity, part volunteers and part conscripts, pursued their individual destinies in a collective context interpreted and mediated by the clergy.”

The role of law in this calculus was vividly illustrated by the case of Anne Hutchinson, which set a tone that persists to this day in American constitutionalism.

III. A CASE STUDY: THE ANTINOMIAN CONTROVERSY AND THE ROLE OF LAW

The Puritan balance among individual, church and state was severely tested in the Antinomian Controversy of 1636-38. The crisis and its resolution was a seminal moment in the history of New England; one that would both expose and define a vision of the role of law that continues to permeate American life.

The controversy in brief can best be understood as revolving around two figures: John Cotton, the most prominent New England minister of his day, and Anne Hutchinson, the wife of a Boston merchant. Cotton had been Hutchinson’s favorite

minister in England before the migration, and when he left for Massachusetts in 1631, she and her family followed in 1633.\footnote{Hall, The Antinomian Controversy, 1636-1638: A Documentary History, supra note 104, at 5. I have relied mainly on primary sources in this section of the Article. For a recent account of Hutchinson’s life and trial, see Michael P. Winship, The Times and Trials of Anne Hutchinson: Puritans Divided (2005).} Once settled in Boston, Hutchinson began to hold meetings in her house with other laypersons, in which they would discuss the sermons that they had heard that week in church. This was a common practice, but it soon came out that Hutchinson was questioning the spiritual authority of the New England ministry. She was said to believe that nearly all of them except Cotton were preaching a covenant of works by allowing sanctification to serve as evidence of justification. In other words, by allowing right behavior to serve as an indication of the indwelling of God’s grace, the ministers were teaching that man could in some sense earn salvation instead of receiving it by God’s free and unfettered dispensation.\footnote{Id. at. 5-6.}

This was a direct affront to most of the ministry, which at the same time became embroiled in a debate with Cotton about exactly what it was that he was preaching. In October 1636 a number of Massachusetts ministers held a private meeting with Cotton, minister John Wheelwright (Hutchinson’s brother-in-law) and Hutchinson herself, after which, Winthrop reported, Cotton “gave satisfaction to them, so as he agreed with them in all in the point of sanctification, and so did Mr. Wheelwright; so as they all did hold that sanctification did help to evidence justification.”\footnote{John Winthrop, The Journal of John Winthrop, 1630-1649, at 106 (Richard S. Dunn and Laetitia Yeandle, eds., Belknap Press 1996).} This consensus proved short-lived, however, for in December 1636 the “rest of the ministers” of New England,
“taking offence at some doctrines delivered by Mr. Cotton,”

171 drew up a list of sixteen questions for Cotton to answer, among which the thirteenth one struck at the heart of the growing controversy: “Whether evidencing Justification by Sanctification, be a building

my justification on my Sanctification: or a going on in a Covenant of Workes.”

172 Cotton answered the ministers’ queries (dryly referring to the questions as “Interrogatories”), but his lengthy response largely failed to satisfy his interlocutors on the critical thirteenth question. In their Reply to Cotton’s answers, the ministers reasserted their belief that sanctification could evidence justification, and they identified what they saw as the danger of Cotton’s views:

[A]ll [the recent controversies] have been taken up [by you] in this one conclusion, That we can see neither Sanctification nor faith no nor

Justification, before the witness of the Spirit, but all at once by it. And whereas it hath been wont to be argued thus, He that believeth shall be saved, He that is justified shall be saved, He that is sanctified shall be saved. Now it is thus, He that shall be saved is justified is sanctified hath faith. viz. He first seeth his good Estate in Gods thoughts of peace, (or in election) testified to him, and therein reads himself a believer, justified, sanctified; and this is the only way, all others going on in or aside to a

171 Winthrop, Journal, id. at 113.
172 Sixteene Questions of Serious and Necessary Consequence (1637), reprinted in Hall, supra note 104, at 52.
173 Id. at 46.
Covenant of Works. Which if they be the truths of God we would gladly be convinced thereof by sound proof.\textsuperscript{174}

Cotton, in the ministers’ view, had departed from the traditional Puritan model of salvation, in which the believer “worked out” his salvation by a process of preparation, faith, and self-examination. Instead, he had endorsed a vision of salvation as a direct, instantaneous process, bringing faith, justification, and sanctification together “all at once” in a flash of grace from God.\textsuperscript{175} This meant that Cotton (and by extension the Antinomians who preferred his ministry to others’) viewed the traditional tokens of human effort as hallmarks of the covenant of works, and thus rejected the conventional teachings of the day. This was also an implicit rejection of the ministry, whose job it was to lead believers through this process by mediating the Word of God to them.

While Cotton was continuing his debate with the ministers, factions were forming on either side of the dispute in the Boston church, as well as within the General Court,\textsuperscript{176} pitting a pro-Antinomian governor (Henry Vane) against the more orthodox members of that body. Vane tendered his resignation, then withdrew it at the request of some of the Boston church-members, and a public fast was called for January 19 to try to calm tempers. On that day, however, John Wheelwright fanned the flames by delivering a

\textsuperscript{174} The Elders Reply (1637), \textit{reprinted in} Hall, \textit{supra} note 104, at 75.
\textsuperscript{175} Winthrop disapprovingly noted that “the ground of all [spiritual knowledge, in the view of the Antinomians] was found to be assurance by immediate revelation.” Winthrop, Journal, \textit{supra} note 170, at 113. Hutchinson would confirm these views at her eventual trial before the General Court, where she claimed to know God’s will by direct revelation. \textit{See} The Examination of Mrs. Anne Hutchinson at the Court at Newtown, \textit{reprinted in} Hall, \textit{supra} note 104, at 337.
\textsuperscript{176} The General Court was the supreme civil authority in Massachusetts. \textit{See} Bremer, \textit{supra} note 120, at 61-62.
sermon in the Boston church trumpeting the Antinomian position.\textsuperscript{177} As a hostile Winthrop recounted, Wheelwright “inveighed against all that walked in a covenant of works, as he described it to be, viz. such as maintain sanctification as an evidence of justification, etc., and called them antichrists, and stirred up the people against them with much bitterness and vehemency.”\textsuperscript{178} In March 1637 the General Court convicted Wheelwright of sedition for the sermon.\textsuperscript{179} Two months later, on May 17, 1637, Governor Vane was voted out of office in a bitterly partisan election and replaced with Winthrop.\textsuperscript{180} Tensions continued to boil, and in November 1637 the General Court (now under Winthrop’s leadership) disenfranchised and banished a number of the more prominent Antinomians after they petitioned to the Court to reverse the judgment against Wheelwright.\textsuperscript{181} Lesser members of the faction were allowed to stay, but they were forbidden to bear arms – a rather stiff penalty considering the ongoing threat of Indian attacks.\textsuperscript{182}

The Court then turned its attention to Hutchinson herself, who was tried over two days in November 1637. The gravamen of the case was that Hutchinson “hath traduced the magistrates and ministers of this jurisdiction, that she hath said the ministers preached a covenant of works and Mr. Cotton a covenant of grace, and that they were not able

\textsuperscript{177} The sermon is reprinted in Hall, \textit{supra} note 104, at 153; see especially pp. 161-62.
\textsuperscript{178} Winthrop, Journal, \textit{supra} note 170, at 117.
\textsuperscript{179} Hall, \textit{supra} note 104, at 8.
\textsuperscript{180} \textit{Id.}, at 8-9.
\textsuperscript{182} Hall, \textit{id.} at 10; Winthrop, Journal, \textit{supra} note 170, at 133.
ministers of the gospel.”

Hutchinson denied this charge; the most she would admit was saying that certain ministers preached the covenant of grace more clearly than others:

Mrs. H. [Hutchinson] I pray Sir prove it that I said they preached nothing but a covenant of works.

Dep. [Dudley] [Thomas Dudley]. Nothing but a covenant of works, why a Jesuit may preach truth sometimes.

Mrs. H. Did I ever say they preached a covenant of works then?

Dep. Gov. If they do not preach a covenant of grace clearly, then they preach a covenant of works.

Mrs. H. No Sir, one may preach a covenant of grace more clearly than another, so I said.

* * * *

D. Gov. I will make it plain that you did say that the ministers did preach a covenant of works.

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183 The Examination of Anne Hutchinson, reprinted in Hall, supra note 104, at 330 (statement of Governor Winthrop).
Mrs. H. I deny that.\textsuperscript{184}

Cotton bolstered Hutchinson’s defense by testifying that during their October 1636 conference with the elders, Hutchinson had said that they “preach of the seal of the spirit upon a work and he [Cotton] upon free grace without a work or without respect to a work, he preaches the seal of the spirit upon free grace and you upon a work.”\textsuperscript{185} Cotton added, “I must say that I did not find her saying they were under a covenant of works, nor that she said they did preach a covenant of works.”\textsuperscript{186} To a sympathetic audience, these distinctions would have meant that Hutchinson was remarking on the connection drawn by ministers between man’s works and free grace (i.e., their willingness to take sanctification as evidence of justification), and contrasting it with Cotton’s preaching, which held that grace could be had free from any taint of works. Cotton, on this comparison, might be seen as preaching a less confusing version of the covenant of grace than the others. While this might be drawing the line very thin, it was a position that could have been taken without necessarily imputing to the other ministers a covenant of works. But for the most part the General Court was anything but sympathetic; meanwhile, six ministers came forth to testify against Hutchinson that she had accused them of preaching a covenant of works or had otherwise disparaged the clergy.\textsuperscript{187}

Hutchinson’s second line of defense was that whatever she did say was said in private, as a matter of conscience, and not in public to foment civil unrest. As she said to the Court:

\textsuperscript{184} Id. at 318.
\textsuperscript{185} Id. at 334.
\textsuperscript{186} Id. at 334.
\textsuperscript{187} Id. at 319-25.
If one shall come unto me in private, and desire me seriously to tell them what I thought of such an one. I must either speak false or true in my answer. * * * * It is one thing for me to come before a public magistracy and there to speak what they would have me to speak and another when a man comes to me in a way of friendship privately there is difference in that.\textsuperscript{188}

In the same vein, William Coddington, a member of the Court who made a belated effort to defend Hutchinson, urged that the elders had breached the Word of God by making public things that were “spoken but to a few and in private.”\textsuperscript{189} Winthrop’s retort to these arguments was curt: “[T]hough things were spoken in private yet now coming to us, we are to deal with them as public. * * * * What was spoken in the presence of many is not to be made secret.”\textsuperscript{190} The Court clearly was determined to treat the trial as a matter of public safety rather than one of private belief.\textsuperscript{191}

\textsuperscript{188} \textit{Id.} at 319.
\textsuperscript{189} \textit{Id.} at 346. This was probably a reference to Matthew 18:15, “Moreover, if thy brother shall trespass against thee, go and tell him his fault between thee and he alone.” \textit{See id.} at 349.
\textsuperscript{190} \textit{Id.} at 319.
\textsuperscript{191} This did not go unnoticed by contemporaries, many of whom (especially in England) viewed the handling of the crisis as an indication that the New Englanders were criminalizing matters of personal belief. When Winthrop’s account of the crisis was published in 1644, Thomas Weld, a New Englander then living in London, felt compelled to add a preface protesting that the Antinomians had been punished for encouraging civil strife, “not for their opinions, as themselves falsely reported, and as our Godly Magistrates have beeene much traduced here in England.” \textit{See} Hall, \textit{supra} note 104, at 213.
As the trial unfolded, however, Hutchinson’s position concerning the ministry proved to be only one facet of her more troubling views of the entire process of salvation. Midway through the second day’s proceedings, she began to defend herself by relating “the grounds of what I know to be true.”\textsuperscript{192} She explained that while she was suffering a spiritual crisis, God had led her to passages in scripture that enabled her to “see which was the clear ministry and which the wrong.”\textsuperscript{193} Since that experience, she declared, “I have been more choice and he [God] hath let me to distinguish between the voice of my beloved and the voice of Moses, the voice of John Baptist and the voice of antichrist. . . . Now if you do condemn me for speaking what in my conscience I know to be truth I must commit myself unto the Lord.”\textsuperscript{194} What happened next sealed Hutchinson’s fate:

\textit{Mr. Nowell.} How do you know that that was the spirit?

\textit{Mrs. H.} How did Abraham know that it was God that bid him offer his son, being a breach of the sixth commandment?

\textit{Dep. Gov.} By an immediate voice.

\textit{Mrs. H.} So to me by an immediate revelation.


\textsuperscript{192} Examination of Anne Hutchinson, Hall, \textit{id.} at 336.  
\textsuperscript{193} \textit{Id.} at. 336.  
\textsuperscript{194} \textit{Id.} at. 336-37.
Mrs. H. By the voice of his own spirit to my soul. . . . Ever since that
time I have been confident of what he hath revealed unto me. * * * * Now
having seen him which is invisible I fear not what man can do unto me.\textsuperscript{195}

This claim provided just the opening that Governor Winthrop felt he needed to
dispose of Hutchinson once and for all:

\textit{Gover.} The case is altered and will not stand with us now, but I see a
marvelous providence of God to bring things to this pass that they are.
We have been hearkening about the trial of this thing and now the mercy
of God by a providence hath answered our desires and made her to lay
open her self and the ground of all these disturbances to be by
revelations.\textsuperscript{196}

After a brief further discussion Hutchinson was deemed “unfit for our society” by
the nearly unanimous vote of the Court.\textsuperscript{197} Winthrop swiftly pronounced
sentence: “Mrs. Hutchinson, the sentence of the court you hear is that you are

\textsuperscript{195} \textit{Id.} at 338-39.
\textsuperscript{196} \textit{Id.} at 341. Hutchinson’s claims of revelation may not have been wholly unexpected.
As we have seen, the clergy that had been querying Cotton had already identified a belief
in direct revelation as a corollary of the idea that justification could not evidence
sanctification. \textit{See supra}, note 117 and accompanying text. Winthrop, too, had noted in
a journal entry the Antinomian position that “the ground of all was found to be assurance
\textsuperscript{197} The final vote was twenty-nine in favor, two dissenting and one abstaining. \textit{See} Hall,
\textit{supra} note 104, at 347-48; Emery Battis, Saints and Sectaries 345 (1962).
banished from out of our jurisdiction as being a woman not fit for our society, and
are to be imprisoned till the court shall send you away.”

While the religious disputes at the heart of this crisis may seem abstruse to
modern readers, the matter provides a vivid example of the Puritan concept of the role of
law. Part of the significance of the controversy was its treatment of individual
conscience as a matter of legal concern. There was, to be sure, a public aspect to what
Hutchinson and her followers had wrought: by the time of Hutchinson’s trial, she and
her supporters had polarized both the Boston church and the General Court, which had
led to a variety of major and minor disturbances in the life of the colony. But it is hard to
escape the feeling that Hutchinson would have been punished even without the public
unrest. An exchange from the opening of the hearing reveals that there was more to the
trial than keeping the peace:

_Mrs. H._ What have I said or done?

* * * *

_Gov._ Why for your doings, this you did harbour and countenance those
that are parties in this faction that you have heard of. (_Mrs. H._) That’s
matter of conscience, Sir.

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198 Hall, supra note 104, at 348. Hutchinson remained in Boston under house arrest for
the rest of the winter of 1637-38. In March 1638 she was tried again, this time by the
Boston church, which excommunicated her. She left Massachusetts for Rhode Island six
days later, then moved to New York, where she was killed in an Indian attack in 1643.
_See id._ at 10.
Gov. Your conscience you must keep or it must be kept for you.  \(^{199}\)

From the very outset of the trial, then, it was clear that the psychic state of the individual was seen as the appropriate domain of the law – the “conscience” to be kept by the civil powers.

But the trial involved more than correcting an errant member of the flock. Hutchinson’s beliefs also were the law’s concern because they threatened the carefully constructed Puritan scheme of individual salvation and human authority. In the opening statement of the trial Winthrop accused Hutchinson of having “spoken divers things as we have been informed very prejudicial to the honour of the churches and the ministers thereof.”  \(^{200}\) But worse, Winthrop declaimed, she threatened the very foundations of the Puritan Zion:

[T]he ground work of her revelations is the immediate revelation of the spirit and not by the ministry of the word, and that is the means by which she hath very much abused the country that they shall look for revelations and are not bound to the ministry of the word, but God will teach them by immediate revelations and this hath been the ground of all these tumults and troubles. . .  \(^{201}\)

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\(^{199}\) Id. at 312.

\(^{200}\) Id. at 312.

\(^{201}\) Id. at 341-42.
In a sense, Hutchinson’s views were a logical development of Puritan thought. If grace was experienced spiritually and internally, why should the believer not get it directly from God? But such a view would make unnecessary the painstaking process of “working out” one’s salvation in the prescribed manner. It would marginalize the ministry, for no one would feel “bound” to its guidance, and it would undermine the combined authorities of church and state. Hutchinson had truly “abused the country” by suggesting that the government did not need to exist as it did. But too much was at stake for this to be allowed. Winthrop and his cohort believed that the structures of church and state existed to foster individual salvation, and thereby to glorify God. Failure meant not only damnation for individuals, but God’s wrath on the entire colony. The New-English Israel, that great Puritan machine for the saving of souls, could not be jeopardized by an errant conscience. Law would and must intervene to preserve the approved system of salvation and the approved social and political structures for bringing it about.

III. THE PURITAN LEGACY IN AMERICAN CONSTITUTIONAL LAW

The Puritan experience shaped America in many ways, among them inculcating a fear of theocracy. From the distance of history, the Puritan regime with its banishments, burnings, and other punishments looks like a cautionary tale, a lesson that we tend to congratulate ourselves for having learned in our ostensible separation of church and state. Yet in important ways we now find ourselves repeating the pattern, making religious use of law and surrendering spiritual authority to government. Church and state may be formally separated, but in achieving that separation we tend to overlook the functional equivalence of the two.
For law now operates as a religion, addressing its commands to the spiritual environment, and taking as its task the creation of the correct conditions for spiritual growth. The Court made this explicit in the line of cases from *Barnette* forward, in which the Court blended its well-established powers of judicial review with an emerging attention to internal states of being. Like the Puritan fathers, the Supreme Court sees itself as a spiritual guardian, using law to mediate its view of the necessary conditions for spiritual flourishing. In *Planned Parenthood v. Casey* the Court was most overt about this role. Drawing on the very language of Puritanism, the Court declared, “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations.”202 The keeper of this covenant is the Supreme Court: “We accept our responsibility not to retreat from interpreting the full meaning of this covenant in light of all our precedents.”203 This “responsibility” includes not only the policing of the covenant against state incursion, but also defining the meaning of the covenant to the American people who wish to live under the rule of law, because “their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their Constitutional cases and speak before all others for their Constitutional ideals.”204 To its subjects who would be “tested by following,” the Court pledged “to remain steadfast” in its “promise of constancy” as the keeper of the Constitutional compact.205 Like the Puritan ministers mediating between man and God in the church-covenant, the Supreme Court mediates between its followers – the American people – and the covenant of the Constitution. And, like the Puritan authorities

202 505 U.S. at 901.
203 *Id.* at 901.
204 *Id.* at 868.
205 *Id.* at 868.
governing in the name of their model of salvation, the Court governs in the name of its vision of what is best for the human spirit.

That this has gone largely unremarked may be explainable by the seeming benignity of the process. After all, the Supreme Court does not hang or banish people as the Puritans did, and the internal approach to law has tended to yield an apparent expansion of individual rights (Gonzalez v. Carhart being the rare exception). But in its own way the Court is committed to a spiritual orthodoxy, and as distrustful of the soul as the Puritans ever were.

As we have seen, much of the Puritan church-state edifice was erected for the sake of saving souls, based on the premise that fallen man needed the guidance of authority to achieve salvation. The individual, in short, was weak, and needed the aid of human authority to realize its divine ends. The Court’s emphasis on individualism has been seen by many as liberal, but it can be deeply illiberal, as well. The Court’s jurisprudence betrays a view of the soul as unable to fend for itself, and therefore in need of the ministrations of the Court. In case after case, from Barnette through the “endorsement test” to Lee, Casey and Lawrence, the Court has assumed that the individual soul is in peril unless certain Constitutional norms are enforced. Thus, the compelled recital of the Pledge of Allegiance becomes an exercise in mind control. Being made to feel like an outsider is a Constitutionally cognizable wrong. A public prayer that might make one debate whether to stand in respect or sit down in protest is an “affront” and an “injury” to one’s deepest being. Having to wait for an abortion, or to tell one’s parents or spouse beforehand, may damage one’s right to sort out one’s

206 See supra, note 43 and accompanying text.
metaphysics. The prohibition of certain sexual behavior “demeans” people and constrains their “destiny.” In none of these situations did the Court allow itself to believe in the strength of the individual: that a schoolchild could recite the Pledge without believing it; that a middle-school student could respect the beliefs of others while maintaining her own beliefs and accepting her difference from the majority; that one could be regulated in one’s ability to obtain abortions without losing sight of one’s “spiritual imperatives”; that a soul, free to believe anything it chooses under any state of affairs addressed in these cases, could define itself and the mysteries of life even in the face of opposing views and opposing definitions. While the Court is concerned with the development of the soul, unlike its nineteenth-century forbears it does not respect the soul enough to believe that it can stand on its own.

Human weakness means that the ministry of the Court is needed to define the covenant, to speak “before all others” for its content, and to create the correct social conditions for the soul to flourish. It is true that from the Founding, the judiciary has been seen as a restraint on legislative excess and a protector of minorities. But the Court has exceeded this function by going beyond the discrete legal questions presented by concrete cases. Instead, it has replicated the Puritan model by making itself the architect of a particular spiritual status quo, and using law to defend it. The Puritans constructed an elaborate system of church, state and salvation because of their view of the essential weakness of humanity. So, too, the Court will enforce its vision of the right society to save us from our weaknesses, because we cannot be trusted to look out for ourselves. It is Constitutional law, not will or intellect or faith or independent thought,

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207 The Federalist No. 78 (Alexander Hamilton).
that must create the correct conditions for the soul’s progress. Small wonder, then, that one recent commentator could observe that “the Constitution in some ways serves to generate mass infantilization.”

The Court’s distrust of the individual soul also leads it to distrust the collective actions of individual souls; that is, to distrust democracy. In the cases discussed above, the Court struck down the actions of popularly elected legislatures and state officials, acting in light of what was arguably prevailing community sentiment. Might not such actions contain the People’s concepts of their own destinies; their collective views of “existence, of meaning, of the universe, and of the mystery of human life”? These laws were subject to normal democratic procedures, and could be changed any time those opposed to them mustered the will or the support necessary to change them. If the laws were wrong, that is, they could be fixed without judicial intervention. Or (a possibility the Court did not allow) perhaps some of the laws were right – perhaps the Constitution could be read to permit them, and perhaps the people and their delegates, in passing them, were undertaking their own interpretation of the Constitution and its covenant. The legal questions presented were not self-answering, for in none of these cases (except Brown) did all of the judges at every level of review agree on the answer. Why is it not possible for the People, or their delegates, to interpret the Constitution, and for the Court to yield when the issue is doubtful?

The answer is that the people are not the supreme authority, or even a coequal one, even in a democratic republic. If the individual is too weak to define himself apart from the state, then collections of individuals only magnify that fatal flaw. That is why

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the People’s understanding of themselves “is not readily separable from their understanding of the Court,” and that is why the Court must be the one to “speak before all others for their Constitutional ideals.” That is why it is a heresy deserving of the highest censure – judicial invalidation – for the People to attempt to govern themselves and one another in ways that do not square with the view of spiritual autonomy posited by the Court. We cannot claim direct revelation of Constitutional principles, because those principles must be mediated by the ministry of the Nine. Like Anne Hutchinson and her conscience, we must keep the covenant, or the Supreme Court must keep it for us.

The irony of all of this is that a system designed to protect the individual will in the end weaken the individual and his aggregate, democracy. If the soul is not allowed to stand on its own, then it will lose the habit of doing so. The new covenant of the Constitution is seductive and insidious; it offers an appealing freedom and an attractive vision of personal dignity while making that freedom and that dignity dependent on the guiding ministrations of a tribunal. We need not develop our own view of Constitutional principles, because our Court will provide them for us. In that process, however, we are called to sacrifice our independence of mind and action, and we are told that our own relationship to the meaning of the text is irrelevant and even heretical. This is a covenant, but it is a covenant on the Court’s terms. Law is the tool of choice for the saving of souls, and it is the Court, not we, who will decide how that spiritual goal will be achieved.

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The point here is not to decry any particular result. I do not necessarily disagree with the social values expressed by the Court’s decisions, and had those values been expressed democratically, instead of judicially, then this article might not have been written. But we are not ruled by ourselves in many of the most important aspects of our national life. Instead, we are ruled by a bevy of guardians who believe that they are the hierophants of a mystical covenant of constitutionalism. The Court’s jurisprudence may be less systemic than Puritan doctrine, but it is no less focused on using law to tend the spirits of its flock. The American program has once again become the saving of souls, and law is again called upon to administer a particular system of spiritual belief. If we are to live in a theocracy, then we should at least be sure that a theocracy is what we want.