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Covenant Origins of the American Polity

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The Covenant Origins Of The American Polity

Steven Alan Samson

It is not uncommon for historians to view America as an experimental laboratory in political theory and practice in which the American character is represented as a triumph of common sense over ideology. The title of one influential book, *Inventing America*, and the subtitle of another, *How Europe Imagined and America Realized the Enlightenment*, together reflect a long fascination with the "Yankee ingenuity" and "can do" spirit of a nation of tinkerers.[1]

This may help explain why history books often neglect to acknowledge the religious dimension of this experiment. Yet far from being inconsequential, religion – and particularly the Christian concept of vocation – is the wellspring of this spirit of practicality that gave substance to the desire for a greater degree of self-government and led to the development of greater religious and political liberty.[2] The so-called Protestant work-ethic to which Max Weber attributed the material progress of northern Europeans is simply one expression of the Pauline injunction to "work out your own salvation with fear and trembling" (Phil. 2:12).

It may be true, as well, that "pure Religious Liberty... may be confidently reckoned as of distinctly American origin", as Sanford Cobb claimed.[3] But like the Yankee ingenuity thesis, it is an oversimplification which fails to acknowledge the long train of historical circumstances and preconditions that made such liberty possible. After all, religious liberty did not spring, like Athena, in full armor from the head of Zeus. Unlike Eli Whitney, Alexander Graham Bell, and Thomas Alva Edison, not to mention a host of less famous figures, the inventors of our familiar liberties – if any existed – are practically unknown. Yet who would claim that these liberties are less important than the invention of interchangeable parts, the telephone, or the light bulb? Are they simply the result of historical accident? Or is there perhaps some rhyme or reason to their appearance at certain times and places?

Earlier Americans, including our most influential historians, generally regarded the settlement and development of our country less as a testimony to frontier inventiveness than as an indication of God's providential blessings. Indeed, they believed that America, both the land and the people, had been designed for a specific purpose and destiny.[4] Franklin Littell offered the following synopsis of this motif:

> For many of our forefathers, at least, the planting of America represented a major break from past history and a radical advance into a new age. God had hidden America until such a time as the Reformation could guarantee that the religion planted on these shores would be pure and evangelical. Certain writers linked three great events by which God's Providence prepared the coming of the New Age: (1) the invention of printing, whereby the Bible was made available to all; (2) the Reformation, whereby cult and confession were purified; (3) the discovery of America. Even such relatively sober men as Cotton Mather and Jonathan Edwards linked the discovery of America with the coming triumph of the eternal gospel.[5]

The once commonly held conviction, that God providentially directs the historical paths of men

1. Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (Garden City, NY: Doubleday, 1978); Henry Steele Commager, *The Empire of Reason: How Europe Imagined and America Realized the Enlightenment* (Garden City, NY: Doubleday, 1977).
2. A recent exception is the first volume of a massive cultural history that identifies and compares the contributions of "four British folkways" to the development of the American culture. See David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989). The author contends that regional and cultural differences in America are the legacy of several distinct groups from the British Isles – particularly the Puritans, Cavaliers, Quakers, and Borderers – who hailed from different regions, migrated during different historical periods, and took up residence indifferent regions: Massachusetts, Virginia, the Delaware Valley, and the Backcountry respectively.

3. Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: Macmillan, 1902; Burt Franklin, 1970), p. 36. David Hackett Fischer, *op. cit.*, by the way, distinguishes different conceptions of liberty that prevailed among the four British folk groupings: the ordered liberty of the Massachusetts Puritan (and later Yankee), the hegemonic liberty of the Virginia Cavalier, the reciprocal liberty of the Delaware Valley Quaker, and the natural liberty of the Backcountry Borderer.
4. The idea that America has a divine mission to perform was not limited to the majority Protestants. For example, shortly after the Civil War ended, Orestes A. Brownson wrote: "The United States, or the American republic, has a mission and is chosen of God for the realization of a great idea... Its idea is liberty, indeed, but liberty with law, and law with liberty. But its mission is not so much the realization of liberty as the realization of the true idea of the state, which secures at once the authority of the public and the freedom of the individual –the sovereignty of the people without social despotism, and individual freedom without anarchy." Orestes A. Brownson, "The American Republic [1866]", in *The Brownson Reader*, ed. Alvan S. Ryan (New York: P. J. Kenedy & Sons, 1955), pp. 70-71.

and nations, is a missing note in contemporary scholarship. So thoroughly secularized have our academic and popular histories become that any mention of Providence sounds quaint, insincere, or irrelevant.[6] Evocations of a distinctly Christian viewpoint on public occasions are rare today even compared with just forty years ago when Judge Learned Hand said the following in his famous "Spirit of Liberty" speech:

> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which waives their interest alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who, near 2000 years ago, taught mankind that lesson it has never learned, but never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.[7]

To be sure, the civil religiosity of 1944 vintage may sound anemic in comparison with the robust, sanguine expressions of public devotion that had stirred Americans only a century earlier. But neither was it the aggressive skepticism that already pervaded universities once dedicated to the training of ministers.[8] Carl Becker's 1931 series of lectures at Yale amply testifies to the change of intellectual fashion:

> No serious scholar would now postulate the existence and goodness of God as a point of departure for explaining the quantum theory or the French Revolution. If I should venture, as certain historians once did, to expound the thought of the eighteenth century as having been foreordained by God for the punishment of a perverse and stiff-necked generation, you would shift uneasily in your chairs, you would "register" embarrassment, and even blush a little to think that a trusted colleague should exhibit such bad taste. The fact is that we have no first premise. Since Whirl is king, we must start with the whirl, the mess of things as presented in experience. We start with the irreducible brute fact.... Our supreme object is to measure and master the world rather than to understand it.[9]

But "brute factuality" has proven an elusive quarry. Even with this emphasis on mastery rather than understanding, a strong case can be made that the sciences have fallen far short of what may once have seemed the more modest goal. As Gary North has pointed out, "secular scientists have *defined* science to exclude all forms of final, teleological causation."[10] So now mastery, which is itself an expression of purpose, is likewise excluded by definition and confounded in practice.

Ideas have consequences. Even the most brutal power is founded on belief, whether that belief excludes the possibility of a first premise – a final cause – or whether it starts with creation and providence. And it is this latter kind of faith – the theistic proposition – that a serious scholar must understand and even appreciate in order to make sense out of a way of life that gave birth to our American political institutions. The consequence of misreading historical evidence may be a gross misunderstanding of the phenomenon in question, followed by a practical denial of its importance. A generation of neglect is all that it takes to destroy a custom, an institution, or an entire culture.

Early in his career Samuel Eliot Morison confessed his own change of sympathy toward the Puritans and the beliefs that energized them:

> These ideals, real and imaginary, of early Massachusetts, were attacked by historians of Massachusetts long before "debunking" became an accepted biographical mode; for it is always easier to condemn an alien way of life than to understand it. My attitude toward seventeenth-century puritanism has passed through scorn and boredom to a warm interest and

5. Franklin H. Littell, "The Churches and the Body Politic", in *Religion in America*, ed. William G. McLoughlin and Robert N. Bellah (Boston: Houghton Mifflin, 1968), pp. 25-26. The Rev. S. W. Foljambe strictly adhered to this formula as late as 1876 in the annual election sermon he delivered in Boston. The sermon has been excerpted and reprinted as "The Hand of God in American History" in Verna M. Hall, comp., *The Christian History of the American Revolution: Consider and Ponder* (San Francisco: Foundation for American Christian Education, 1976), pp. 46-50.
6. This is not to say that the idea of Providence has disappeared from the secular mind. It simply assumes new guises. Herbert Schlossberg, *Idols for Destruction: Christian Faith and Its Confrontation with American Society* (Nashville: Thomas Nelson, 1983), p. 6, makes a similar point: "Western society, in turnings away from Christian faith, has turned to other things. This process is commonly called *secularization*, but that conveys only the negative aspect. The word connotes the turning away from the worship of God while ignoring the fact that something is being turned *to* in its place." Walter Lippmann, for instance, suggested that when a totalitarian regime like the Soviet Union describes its vision of a "socialist commonwealth embracing the whole world...", it ascribes to it the attributes of God: perfect authority and justice, miracles, omnipotence, and omniscience. "It is to believe not in human government but in a Providential state." Walter Lippmann, *The Good Society* (New York: Grosset & Dunlap, 1936: 1943), pp. 70-71.
7. Learned Hand, *The Spirit of Liberty: Papers and Addresses*, ed. Irving Dilliard (New York: Alfred A. Knopf, 1952), p. 190.
8. "... Dr. Henry P. Van Dusen says that of the 207 colleges established before the Civil War, 180 were denominationally sponsored, 21 were state universities, 6 were under public or semipublic control but not under religious auspices." Renwick Harper Martin, *The Fourth R in American Education* (Pittsburgh: Author, 1957), p. 4. Following passage of the Morrill Act of 1863, state-controlled institutions multiplied at a much greater rate.
9. Carl L. Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (New Haven: Yale University Press, 1932), p. 16.
10. Gary North, *The Dominion Covenant: Genesis* (Tyler, TX: Institute for Christian Economics, 1982), p. 262.

respect. The ways of the puritans are not my ways, and their faith is not my faith; nevertheless they appear to me a courageous, humane, brave, and significant people.[11]

When Morison wrote these words, Americans were still an essentially Puritan people, even though the confessional tradition had largely vanished from public life.[12] Much of the responsibility for this disappearance must rest with the children and grandchildren of English and Scottish Calvinists – Puritans by inheritance if not by confession – who loosened the ties that bound politics to religion and established what some have touted as the first modern secular state.[13]

The sentimentalization of the past we detect in so many nineteenth century literary themes may well have masked a conscious disavowal of the Puritan tradition.[14] The transvaluation of religious imagery in Transcendentalist literature and romantic nationalism may even represent a type of cultural patricide.[15]

Consequently, we are separated from America's founding era by a far greater divide than the mere passage of time. If we wish to understand what institutional relationships are presupposed by our constitutional tradition – between church and state, for example, or between religion and education – we must first understand their role in early American society and especially in what Oliver Wendell Holmes, Jr. called the "life of the law".[16]

The Idea Of Covenanted Self-government

A careful examination of the record shows that, historically, American political and religious liberty can neither be divorced from each other nor be understood apart from the struggle between church and state that wracked early modern Europe.

The American constitutional tradition of liberty and self-government is rooted in the biblical concept of the covenant. Sixteenth century Reformers used biblical and historical models to carefully develop the idea of covenanted self-government into a pillar of the ecclesiastical and political order, thus giving rise to covenant (or federal) theology and the idea of political federalism.

During the following two centuries these ideas were implemented by Dutch Calvinists, French Huguenots, English Puritans, and several groups of English dissenters who took refuge in America. It is owing to the unique position and inventiveness of the American Pilgrims and Puritans that these ideas were put to the test and forged into a new kind of constitutionalism.

NEW ENGLAND AS A POLITICAL LABORATORY

Religious dissent figures most prominently among the motives that led successive companies of colonists to emigrate from England to America. The Pilgrims who settled Plymouth Plantation in 1620 belonged to a congregation of Separatists who had pulled out of the Church of England around the turn of the century, suffered persecution at home, moved to Leyden where they suffered considerable hardships for twelve years, and then joined with a company of settlers bound for northern Virginia. Their ship, the Mayflower, reached Cape Cod in November of 1620, far north of any existing jurisdiction. Upon landing, the Pilgrims and other settlers, known as the Strangers, covenanted among themselves to form a civil body politic. Opening with the words "In ye name of God, Amen", the Mayflower Compact set a constitutional pattern that was to be frequently repeated up through the Constitution of 1787.[17]

Nearly a decade after the Mayflower landed, a much larger group

11. Samuel Eliot Morison, *Builders of the Bay Colony*, rev. ed. (Boston: Houghton Mifflin, 1958), p. vi.
12. Sydney Ahlstrom subsequently concluded that the Puritan era has drawn to a close. Sydney E. Ahlstrom, *A Religious History of the American People*, vol. 2 (Garden City, NY: Image, 1975), pp. 465-66.
13. The transition from Puritanism to liberal theology to nihilism, whether in higher education or the culture as a whole, is a phenomenon deserving closer scrutiny. A short story by Erik von Kuehnelt-Leddihn gives this theme a literary rendering in his treatment of four generations of a New England family. See Francis Stuart Campbell [pseud.], "The Whiff from the Empty Bottle," *The Catholic World*, 62 (October 1945): 20-27.
14. Two examples of this rejection are "The Deacon's Masterpiece: or, The Wonderful One-Hoss Shay" and "the Chambered Nautilus" by Oliver Wendell Holmes, Sr. See also Ann Douglas, *The Feminization of American Culture* (New York: Avon, 1978). On the transvaluation of religious imagery by romantic reformers and political figures, see Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* (New York: Oxford University Press, 1962), pp. 106-08; and M. E. Bradford, "Lincoln, the Declaration, and Secular Puritanism: A Rhetoric for Continuing Revolution", *A Better Guide Than Reason: Studies in the American Revolution* (La Salle, IL: Sherwood Sugden, 1979), pp. 184-203.
15. George B. Forgie, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age* (New York: W. W. Norton, 1979), examines the sentimentalism, indeed the idolatry, of antebellum America that culminated in a paroxysm of fratricidal and suicidal iconoclasm.
16. But the distinction between law and morality drawn by Holmes attempted to divorce common law from its religious roots. His memorable aphorism – "The life of the law has not been logic: it has been experience" – treats law as an accident of prevailing social conventions. Oliver Wendell Holmes, Jr., *The Common Law*, ed. Mark DeWolfe Howe (Boston: Little, Brown, 1963 [1881]), p. 5. For another view of the common law, see Eugen Rosenstock-Huessy, *Out of Revolution: Autobiography of Western Man* (New York: William Morrow, 1938), pp. 269-85.
17. William Bradford, *Bradford's History "Of Plimoth Plantation."* (Boston: Wright & Potter, 1898), pp. 11-35, 109-110. The continuity of the constitutional tradition from 1620-1787 is the thesis of Willmoore Kendall and George W. Carey, *The Basic Symbols of the American Political Tradition* (Baton Rouge: Louisiana State University Press, 1970), pp. 30-31, 150-52. The pastor of the Pilgrim congregation, John Robinson, was kept from joining his flock later because of anti-Separatist nationalists among the Adventurers who continually troubled the colony. See Leonard Bacon, *The Genesis of the New England Churches* (New York: Harper and Brothers, 1874), pp. 390-423.

of settlers – "nonseparating congregationalists" or presbyterians who were members of the Church of England – left England during the persecutions led by Bishop William Laud. After sailing to the New World with the vision of establishing a community of "visible saints", these Puritans established a colony at Massachusetts Bay. From there, numerous new congregations and colonies were to radiate throughout New England.

What the Pilgrims and the Puritans had in common was a conviction that family, church, and the civil polity must be governed covenantally according to biblical standards. Each individual and every relationship, in their view, must be governed according to God's Word and all are answerable to God accordingly. Each individual and community is part of a web of relationships, a hierarchy of authority and responsibility, that should emulate the divine order revealed in Scripture. Far from being original with them, the idea of the covenant had been undergoing a revival since mediæval times, especially during by the conciliar movement and the Protestant Reformation. The centrality of the covenant relationship between God and man – a covenant involving both promises and duties – was given considerable attention by theologians and political reformers, notably Heinrich Bullinger,[18] Philippe Duplessis-Mornay, and Johannes Althusius.[19]

18.See Heinrich Bullinger, "A Brief Exposition of the One and Eternal Testament or Covenant of God", in Charles S. McCoy and J. Wayne Baker, *Fountainhead of Federalism: Heinrich Bullinger and the Covenantal Tradition* (Louisville, KY: Westminster/John Knox Press, 1991), pp. 112-13: "Compare if you will, the law, the prophets, and the very epistles of the apostles with these main points of the covenant [see pp. 108-11], and you will discover that all of them return to this center as if to a target."

19.For a general survey, see Daniel J. Elazar, "The Political Theory of Covenant: Biblical Origins and Modern Developments", *Publius: The Journal of Federalism*, 10 (Fall 1980): 3-30. Elazar also cites Ulrich Zwingli, Oecolampadius, and Theodore Beza as contributors to this literature.

BULLINGER ON THE BIBLICAL COVENANT

Bullinger's early treatise on the Biblical covenant, *De testamento seu foedere Dei unico et aeterno* (1534), predated the first edition of John Calvin's *Institutes of the Christian Religion* by two years. Even if it is not the earliest statement of a covenant (or federal) theology, this seminal work has been described by Charles S. McCoy and J. Wayne Baker as "the point of origin or the fountainhead of federalism as it has increasingly come to permeate the world in the four and one half centuries since its publication."[20]

Bullinger began with a word study of "testament" or "covenant" (*berith* in Hebrew, *diatheke* in Greek), observing that as used in the New Testament the term may signify 1) a last will or inheritance, 2) a promise confirmed by oath, or 3) a pact (*foedus* in Latin). Bullinger believed this third use came closest to the Old Testament meaning and was the basis for his argument. "Latin grammarians think that *foedus* derives from the circumstance that in the making of a covenant (*foedus*) a pig was 'horribly' (*foede*), that is, cruelly, slain. Indeed, a covenant is properly made between enemies when ending a war."[21]

McCoy and Baker contend that Bullinger's "entire theological system was organized around the idea of a bilateral, conditional covenant, made first by God with Adam, a covenant that would endure until the end of the world."[22] Indeed, Bullinger called it the center around which all Scripture returns "as if to a target".[23]

The covenant also provides an institutional foundation for the civil government. Bullinger held that judicial or civil laws are "included in that very condition of the covenant which prescribes integrity and commands that we walk in the presence of God".[24] As evidence he cited the judicial powers exercised by Abraham and Moses. But his view of the inclusion of civil government within the covenant is most evident in the scorn he displays toward the early Anabaptist attitude toward government:

> What is more strange than the insanity that drives those who exclude the magistrate from the church of God, as if there were no need of his functions, or who consider his functions to be the sort that cannot or ought not to be numbered among the holy and spiritual works of the people of God? Nevertheless, those deeds of Abraham which are truly judicial are praised by the Holy Spirit of God as among the first and most excellent works.[25]

NEW ENGLAND THEOCRACIES

It is upon such a foundation of cooperation between church and state that the Pilgrims and Puritans established the earliest successful independent English settlements in America. Despite their differences, both adhered to a covenant or federal theology that placed a strong emphasis upon the continuity of the Old and New Testaments, local self-governing congregations within a national church, and covenanted church membership. The American tradition of written constitutions is an outgrowth of the covenanted church polity and the emphasis on the rule of law. It depended for its success on a consensus of faith, indeed, a community of the faithful who could articulate their faith and apply it in every field of endeavor. Soon after they crossed the Atlantic, and in some cases before, English

20.McCoy and Baker, *op. cit.*, p. 9.

21.*Ibid.*, p. 103. McCoy and Baker, like Daniel J. Elazar and Donald S. Lutz (cited below at note 39), are associated with the Center for the Study of Federalism at Temple University, which publishes *Publius*. Other scholars, such as Meredith Kline, have noted the similarity of the Sinaitic covenant to the vassal (or suzerainty) treaties imposed on vanquished kings by the victor, "the greater king".

22.*Ibid.*, p. 24.

23.*Ibid.*, p. 112.

24.*Ibid.*, p. 113.

25.*Ibid.*, p. 114.

dissenters began by establishing church covenants. Concerning these, Charles A. Barker has written:

> While nonseparating congregationalists remained at home, still members of their Church of England parishes, the most they could do was recognize about themselves their common belief and hope; where bishops ruled they could not create their own congregation, decide on the doctrinal terms of admission, and elect their own officers. All these things they felt obliged to do, once they reached the New World. Where the other covenants they believed in had the quality of being immaterial – the national covenant being their phrase for God's favor to the people He chose, and the covenant of grace being actually not of this world – the church covenant was a thing realized in paper and ink. "Natural covenantry and confederation of the saints in the partnership of the faith according to the Gospel is that which gives constitution and being to a visible Church," summarized Thomas Hooker.[26]

The sense of mission that figured in the founding of the New England colonies was not entirely absent even in the case of colonies like Virginia that began primarily as commercial ventures and transplanted the established traditions of the Church of England. Even so, among the merchant adventurers, reforming influences – though perhaps not so overt – sometimes found direct expression and colonial self-government was gradually, if grudgingly, introduced. The first charter of the Virginia Company of 1606 established the Church of England in the colony and the third charter of 1613 repeated as one of its main purposes "the propagation of Christian religion, and reclaiming of people barbarous to civility and humanity...."[27] In 1611, Sir Thomas Dale took over the failing Jamestown colony as its governor and ordained a set of "Lawes Divine, Moral and Martial." Although later repealed by the company because of their unusual severity, these moral regulations set a pattern of domination of state over church, known as Erastianism, that continued up to the disestablishment of the Church of England in the South between 1776 and 1785. The kind of religious liberty that finally resulted was premised to a greater extent upon the secularizing influences that were beginning to dominate European thought.

By contrast, the New England pattern of covenanted liberty and self-government, which persisted until the 1680s, may be more aptly termed "theocratic". Charles Barker states the case well:

> By definition, theocracy means either ruled under God or rule by God. In this principle the Puritans believed. In modern usage the word usually connotes rule by a priesthood – the absolute power in one or a few individuals, as in the history of the papal states and, in America, of the Mormons. The Puritans did not have such autocracy. Yet when their own understanding of church membership is taken at face value, the essential meaning of theocracy does apply. For where the government was not set over the church or church over government but "visible Saints" were made the source of authority in both church and government, the ideal of rule by God was met as fully as it can be.[28]

Behind the principle of the covenant lay the idea that the people – freemen and strangers alike – must agree under oath to abide by the laws and submit to the authority of elected magistrates who were ordained of God. Thus the colony or plantation was understood to be a community of faith and its success demanded a vigilant and educated electorate. At first, the magistrates claimed wide discretionary latitude, due in part to their obligation to rule with reference to biblical standards of justice, which often lacked specific penalties for infractions. But by 1635, Gov. Winthrop and the General Court began taking steps toward a codification of law in order to answer criticism that they were being self-serving and also head off possible outside interference.[29]

POLITICAL INNOVATIONS

New England politics and law drew on diverse sources from the beginning. It is important to note, first of all, that the colonists enjoyed a high degree of self-government – unlike their Spanish and French counterparts – because of what Edmund Burke called Britain's "salutary neglect".[30] As a consequence of this unexpected freedom from outside interference, American law was

26. Charles A. Barker, *American Convictions: Cycles of Public Thought, 1600-1850* (Philadelphia: J. B. Lippincott, 1970), pp. 66-67. The term "nonseparating congregationalism", first used by Perry Miller, is not very satisfactory. See Verna M. Hall, comp., *The Christian History of the Constitution of the United States of America: Christian Self-Government*, American Revolution Bicentennial Edition, ed. Joseph Allan Montgomery (San Francisco: Foundation for American Christian Education, 1975), pp. 241-44 [cited hereafter as Hall, I]. The Pilgrim example influenced the Puritans to adopt congregationalism. According to Charles Hodge, however, the Puritans preferred a presbyterian church polity. See Verna M. Hall, comp., *The Christian History of the American Revolution: Consider and Ponder* (San Francisco: Foundation for American Christian Education, 1976), pp. 106-10. The idea of the national covenant received a boost from the signing of the Solemn League and Covenant, which created the Scottish Kirk in 1638, was followed five years later during the English Civil War by another Solemn League and Covenant that embraced England and Ireland, as well.

27. Merrill Jensen, ed., *English Historical Documents*, vol. 9: *American Colonial Documents to 1776* (London: Eyre & Spottiswoode, 1955), p. 65; Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: Macmillan, 1902; Burt Franklin, 1970), pp. 74-79.

28. Barker, *op. cit.*, pp. 69-70.

29. George Lee Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960), p. 36.

not set in a single mold, but became highly experimental and drew upon various sources.

In New England, the Bible was commonly used as a major sourcebook for legal precedent, a practice that was followed wherever Reformation principles were allowed to take firm root. As early as 1550, Martin Bucer – a Reformer from Strasbourg who taught at Cambridge for a time – addressed his treatise on social ethics, *De Regno Christi*, to Edward VI in order to win acceptance for the establishment of a Christian commonwealth and the application of biblical law within this framework.[31] Other Protestant centers, especially those in Switzerland, Holland, and Scotland, pursued similar programs with some degree of success.

New England, which suffered little of the religious strife that disrupted European politics, proved better suited than the others for such political experimentation. Its lack of long-standing traditions, rigid social divisions, large landed estates, and ancient institutions proved advantageous as long as it was able to keep itself free from outside entanglements.

Ministers of the gospel, such as John Cotton and Nathaniel Ward, served on the committees called to draft legislation for the Bay Colony. Cotton proposed a legal code in 1636 that came to be known as "Moses his judicialls". Although it was not adopted, probably out of concern that it might be rejected back in England, Cotton's draft did influence the subsequent course taken by legislators. Ward, who had studied the common law, later authored the biblically-based "Body of Liberties", which was adopted in 1641.[32] That same year, Cotton published his "Abstract of the Laws of New England," which was filled with scriptural references, especially in the sections dealing with magistrates and crimes.

Demands for greater formalization of civil authority inspired an early codification movement[33] that produced "The Lawes and Liberties of Massachusetts" early in 1648. This code became the basis for statutory law throughout most of the rest of the century. Its internal consistency is what impressed one later commentator, George Haskins:

> Here was no mere compilation of English common-law rules or of established local custom, no haphazard syncretization of popular equity and biblical precepts, no mechanical piling of new legislation upon old; it was a fresh and considered effort to establish new provisions and revise former ones which were suitable to the conditions of a new civilization and which would also provide starting points for future development in the community.... Comprehensive as the Code was intended to be, perfection did not, even to its framers, seem possible.[34]

Haskins claimed the code reflected "the Puritan view that the path of the law was one of logic as well as experience" and its realism about the corruption of human nature set the tone of later constitutional developments.[35]

The Cambridge Platform of Church Discipline, adopted the same year by the synod of Massachusetts churches, complemented

30. The full force of this oft-quoted phrase is often missed. Burke led up to it by commenting on the enterprising character of the Americans and the global reach of their commerce and industry: "When I contemplate these things, – when I know that the colonies in general owe little or nothing to any care of ours, and that they are not squeezed into this happy form by the constraint of watchful and suspicious government, but that, through a wise and salutary neglect, a generous nature has been suffered to take her own way to perfection, – when I reflect upon these effects, when I see how profitable they have been to us, I feel all the pride of power sink, and all presumption in the wisdom of human contrivances melt and die away within me, – my rigour relents, – I pardon something to the spirit of liberty." Edmund Burke, "Speech on Moving His Resolutions for Conciliation with the Colonies", in *Edmund Burke: Selected Works*, ed. W. J. Bate (New York: Modern Library, 1960), p. 121. Actually this neglect was due to more to historical circumstance than British design. During the 1630s, the already strained relations between the king and Parliament deteriorated into a civil war (1642-1649), which was followed by a series of wars with the Dutch that began under Cromwell and continued during much of the Restoration Era. The ascension of James II threatened American liberty but he was removed in 1688 and a series of wars with the French followed immediately. All of these factors compelled Americans to be more self-reliant.

31. Jack Sawyer, "Introduction to Bucer's De Regno Christi", *The Journal of Christian Reconstruction*, 5 (Winter 1978-79): 8-10. A major and somewhat variant aspect of the Lutheran Reformation, according to Harold Berman, was the secularization of law and the emergence of a Christian positivist theory of law. "Just as we cannot reject the contribution of Christian natural-law theory to the development of law, so we cannot reject the contribution of Christian positivism. But we must recognize that Luther's concept that the development of positive law is the task of the secular authorities, of the State, and not the task of the Church as such, could only be proclaimed after more than four centuries of history in which Church and State together had succeeded in Christianizing law to a remarkable extent. A Protestant positivism which separates law from morals and finds the ultimate sanction of law in political coercion assumes the existence of a Christian people and a Christian State, a State governed by Christian rulers." Harold J. Berman, "The Influence of Christianity Upon the Development of Law", *Oklahoma Law Review*, 12 (1959): 94-95. This is not to imply that natural law theory is somehow above criticism, either from a legal or religious standpoint. It is part of an classical tradition revived by the medieval Schoolmen – particularly the nominalists – and lies at the foundation of modern Western law. But it represents only one side of the higher law tradition. Furthermore, the important differences between natural law theory, Lutheran positivism, and theonomic Calvinism – not to mention modern legal positivism – should not be minimized.

32. Haskins, *op. cit.*, pp. 124-32. See Hall, I, pp. 257-61; James B. Jordan, "Calvinism and 'The Judicial Law of Moses'", *The Journal of Christian Reconstruction*, 5 (Winter 1978-79): 17-48.

33. The better known nineteenth century codification movement in New York was led by David Dudley Field, the son of a New England congregationalist minister and the older brother of a later Supreme Court justice, Stephen Field.

34. *Ibid.*, pp. 137-38.

35. *Ibid.*, p. 140. Haskins here revises the familiar apothegm of Oliver Wendell Holmes, Jr. – "The life of the law has not been logic; it has been experience" – mentioned above in note 15.

the Code of 1648 through its clear affirmation that the jurisdictions of church and state must be kept distinct. The Cambridge Platform made it "unlawful for Church-Officers to meddle with the Sword of the Magistrates" and unlawful for magistrates to "compel their subjects to become church members".[36]

The Puritans of Massachusetts also set a pattern of local self-government that was a natural extension of their congregational church polities, a pattern that was imitated throughout New England even by those who – like Roger Williams in Rhode Island – objected to the prominent religious role played by civil officers. One of these critics, the Rev. Thomas Hooker, helped found a new colony at Hartford, then assisted in the drafting and adoption of the Fundamental Orders of Connecticut in 1639. According to John Fiske, who wrote in 1889:

> It was the first written constitution known to history, that created a government, and it marked the beginnings of American democracy, of which Thomas Hooker deserves more than any other man to be called the father. The government of the United States to-day is in lineal descent more nearly related to that of Connecticut than to that of any of the other thirteen colonies. The most noteworthy feature of the Connecticut republic was that it was a federation of independent towns, and that all attributes of sovereignty not expressly granted to the General Court remained, as of original right, in the towns.[37]

Connecticut began as a true federal union, perhaps the first in history, more than two decades before these new forms were confirmed and given official sanction from the British crown in the charter of 1662.

Thus the three decades from 1620-1650 witnessed early practices and innovations – covenants, congregationalism, local self-government, oaths, representation, federalism, constitutionalism, codification, bills of rights, separation of church and state – that have come to be identified with the American constitutional tradition. Here it is appropriate to reexamine their origins and analyze their rationale in greater depth.

"The Perfect Law Of Liberty"

From the start, the Bible was the primary source of colonial ideas about law and liberty. The Pilgrims drew sustenance from the Geneva Bible with its marginal notes. King James I was so persuaded of its seditious influence that he permitted no notes in the new Authorized Version, which became the Bible of the Puritans.

In his study of colonial education, Lawrence Cremin stated that the Bible was "the single most important cultural influence in the lives of Anglo-Americans" throughout the first century of settlement.[38]

> Though the Bible had been richly valued for generations, it was not until the seventeenth century that it was widely read and studied. The message of Protestantism was that men could find in Scripture the means to salvation, the keys to good and evil, the rules by which to live, and the standards against which to measure the conduct of prince and pastor. And so men turned to the Bible with reverence and restless curiosity, finding there, not an abstruse exposition of high-flown principles, but an imaginative portrayal of the life of a historic people, contending in their families and communities with day-to-day problems of belief and conduct, freedom and authority, virtue and depravity.[39]

Even beyond its use as an instrument of moral instruction, the Bible was particularly valued as a source of law and government. Its historical illustrations provided a practical foundation for government during the long period prior to independence when the colonies enjoyed relative peace and a high degree of self-government. Indeed, this was the case long before the influence of Enlightenment rationalism and the later Whig interpretation of history modified the earlier Puritan concept of the Biblical Commonwealth.

As Protestants, the New England colonists shared the Reformation belief that the basis of civil government is a covenant binding the ruler and the people. They put this belief into practice by inventing and developing the written constitution from out of customs that had been adopted by religious dissenters in the late 1500s.[40]

Originally, the church covenant was a formal agreement made "by members of a congregational church to constitute themselves as a distinct religious community."[41] It rested on the consent of the members, who promised to walk in accordance with God's holy ordinances while observing mutual love and forbearance. The covenant was sealed by an oath witnessed and secured by God. The Rev. Samuel Rutherford, a Scottish Presbyterian minister whose ideas about resistance to tyranny were part of a tradition that linked Locke and Mayhew back to Calvin and Knox, provides an example of this belief:

> the covenant betwixt the king and the people is clearly differenced from the king's covenant with the Lord, 2 Kings xi.17.... There was no necessity that this covenant should be made publicly before the people, if the king did not in the covenant tie and oblige himself to the people; nor needed to be made solemnly

36. *Ibid.*, p. 88. See Kirk, *op. cit.*, p. 109.
37. John Fiske, *The Beginnings of New England, or The Puritan Theocracy in Its Relations to Civil and Religious Liberty* (Boston: Houghton Mifflin, 1930), pp. 137, 140.
38. Lawrence A. Cremin, *American Education: The Colonial Experience, 1607-1783* (New York: Harper Torchbooks, 1970), p. 40.
39. *Ibid.*, p. 40.
40. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), pp. 6-7, 43-44.
41. *Ibid.*, p. 17.

before the Lord in the house of God.[42]

The Puritans and other settlers likewise believed that, when political authority is subject to the rule of God's law, liberty is one of its fruits. The Apostle James described the Scripture as "the perfect law of liberty" (Jas. 1:25). The Apostle Paul counseled: "Stand fast therefore in the liberty wherewith Christ hath made us free...." (Gal. 5:1).

The influential Westminster Confession provided a model for religious liberty – or liberty of conscience – in section two of the twentieth chapter:

> God alone is lord of the conscience, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his word, or beside it, in matters of faith or worship. So that to believe such doctrines, or to obey such commandments out of conscience, is to betray true liberty of conscience: and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[43]

Finally, the early Calvinists and Puritans emphasized that various degrees of resistance to tyranny are permitted where life is endangered or impiety decreed. In his *Institutes*, John Calvin was led to write: "We are subject to the men who rule over us, but subject only in the Lord. If they command anything against Him let us not pay the least regard to it...."[44] The Huguenot tract *Vindiciae contra tyrannos* further developed Calvin's suggestion of resisting tyranny through lesser magistrates. In this, the *Vindiciae* anticipated the later American practice of using elected magistrates and official committees of correspondence to register colonial grievances as well as to discuss possible courses of action.[45]

The concern for procedure generally shown during the later struggle for American independence illustrates Rutherford's recommendation that the proper sequence of steps to follow is supplication before flight, and flight before violence. Only where supplication fails and flight is out of the question is violent resistance lawful.[46] In fact, Rutherford advanced the idea of resistance as an assertion of law when the law of the land has been violated by the ruler:

> The covenant giveth to the believer a sort of action of law, and *jus quoddam*, to plead with God in respect of his fidelity to stand to that covenant that bindeth him by reason of his fidelity, Psa. xliii. 26; lxiii. 16; Dan. ix. 4,5; and far more a covenant giveth ground of a civil action and claim to a people and the free estates against a king, seduced by wicked counsel to make war against the land, whereas he did swear by the most high God, that he should be a father and protector of the church of God.[47]

Here, in short, is the original basis for John Locke's more secularized version of resistance as an "appeal to heaven" when the social contract is violated.[48] In fact, both Locke and the American colonists were heirs of a Puritan tradition that worshiped God as the author of law. Various secular, rationalist influences to the contrary notwithstanding, the Christian religion provided a basis for a "government of law, not men".[49]

PULPIT AND PRESS

The conservative nature and limited objectives of the later War for Independence reflected the religious sentiments of Americans in a way that is difficult to appreciate apart from an understanding of the essentially biblical world-view of the colonists.

The pulpit and the independent press proved to be the most effective instruments for spreading republican political ideas during the decades preceding the Declaration of Independence. While the relative influence during this period of American Puritan traditions in comparison with Whig political ideology is still a debated point among historians, Mark Noll has recently acknowledged the seminal role played by Puritanism:

> Yet without the fertile soil of the American religious tradition, without particularly Puritan preoccupations with original sin, the ongoing battle against Satan, and the "liberty wherewith Christ hath made us free," Whig ideology would not have exerted such a powerful sway in leading the thought and guiding the actions of the Patriots. Similarities between the view of life in the world developed by American Christianity and Real Whig conceptions of political reality

42. Samuel Rutherford, *Lex, Rex, or the Law and the Prince; a Dispute for the Just Prerogative of King and People* (London: John Field, 1644; reprint ed., Harrisonburg, VA: Sprinkle, 1982), p. 54.
43. *The Confession of Faith; the Larger and Shorter Catechisms, with the Sum of Saving Knowledge* (Inverness: The Publications Committee of the First Presbyterian Church of Scotland, 1976), pp. 86-87.
44. John Calvin, *Institutes of the Christian Religion*, trans. Henry Beveridge, vol. 2 (Grand Rapids: Wm. B. Eerdmans, 1979), p. 675. Book 4, chapter 20, section 32.
45. William Ebenstein, *Great Political Thinkers: Plato to the Present*, 4th ed. (Hinsdale, IL: Dryden Press, 1969), pp. 334-35. For selections from the committees of correspondence, see Verna M. Hall, comp., *The Christian History of the Constitution of the United States of America: Christian Self-Government with Union*, American Revolution Bicentennial Edition, ed. Joseph Allan Montgomery (San Francisco: Foundation for American Christian Education, 1979), pp. 478-527 (cited hereafter as Hall, II). This is a second volume to the work cited in note 25.
46. Rutherford, *op. cit.*, p. 160.
47. *Ibid.*, p. 54.
48. John Locke, *Two Treatises of Government*, revised ed. (New York: Mentor, 1965), p. 477, paragraph 242 of the second treatise.
49. Archie P. Jones, "The Christian Roots of the War for Independence", *The Journal of Christian Reconstruction*, 3 (Summer 1976): 32-33. See Winthrop S. Hudson, "John Locke: Heir of Puritan Political Theorists," in *Calvinism and the Political Order*, ed. George L. Hunt (Philadelphia: The Westminster Press, 1965), pp. 108-29; Harold J. Berman, "Religious Foundations of Law in the West: A Historical Perspective", *Journal of Religion and Law*, 1 (Summer 1983): 29 n36.

> imported from England were responsible for the sense of cosmic importance and the fervent religiosity that permeated the Whig expressions of many Christians.[50]

The influence worked both ways. It was perhaps natural that the churches helped spread Whig ideas because the liberalism of the Whig pamphleteers drew on Puritan and other dissenting sources from the Cromwell era.[51]

The New England clergy, in particular, owed their high degree of political sophistication and influence to a long-established tradition of public preaching. Election sermons, artillery election sermons, and thanksgiving sermons served as customary vehicles for teaching – in the manner prescribed in the Mosaic law – the principles of individual and corporate self-government, including the duties of magistrates and soldiers, as well as for commenting on important public concerns. Many of these sermons were published and widely circulated, joining the growing political literature circulated by the colonial press. According to John Wingate Thornton:

> Protestantism exchanged the altar for the pulpit, the missal for the Bible; the "priest" gave way to the "preacher," and the gospel was "preached". The ministers were now to instruct the people, to reason before them and with them, to appeal to them; and so, by their very position and relation, the people were constituted the judges. *They* were called upon to decide; *they* also reasoned; and in this way – as the conflicts *in* the church respected *polity* rather than *doctrine* – the Puritans, and especially the New Englanders, had, from the very beginning, been educated in the consideration of its elementary principles. In this we discover how it was, as Governor Hutchinson remarked, that "men took sides in New England upon mere speculative points in government, when there was nothing in practice which could give any grounds for forming parties".[52]

These and other traditions of what Francis Lieber later called "freedom of communion" shaped the tenor and character of the growing political debate in the 1760s and 1770s. In the face of what they regarded as illegal taxation, colonists joined in common cause to resist the threat it posed to their accustomed liberty and self-government, leading at last to a secession of the American states from British rule.

The Intolerable Acts

Following the very expensive French and Indian War (1754-1763), a series of awkward efforts by Parliament to tax the colonists without first securing their approval led to coordinated resistance throughout the colonies. Matters finally came to a head in 1774 when Parliament passed the so-called Coercive or Intolerable Acts, imposing stern collective punishment on Boston and Massachusetts specifically and the other colonies generally. These laws gave impetus, first, to a national self-consciousness or sense of American identity that grew out of a common response to a common threat, then to organizing a continental government, and finally to a demand for political independence.

Perhaps the most notable aspect of the colonial resistance protests is the scrupulous attention given to procedural proprieties. For more than a decade, patriot leaders objected to one tax after another by issuing manifestos, circulating petitions, organizing committees of correspondence, and sponsoring boycotts of British goods. Through all these activities a sense of kinship and common identity as fellow Americans emerged that at the same time effectively gave birth to a political union. Ministers were accused by the authorities of preaching rebellion in their churches. Presbyterians, in particular, were blamed for trouble in the middle and southern colonies.[53]

> The British were aware of the tremendous influence the clergy wielded in the Colonies, and saw with alarm that it was thrown on the side of rebellion. Indeed they were accused of being at the bottom of it. In 1774, the Governor of Massachusetts refused the request of the Assembly to appoint a fast: "for", said he, "the request was only to give an opportunity for sedition to flow from the pulpit."[54]

The political influence of the pulpit was so strong as to lead another commentator, J. T. Headley, to conclude that "if the clergy of New England had from the outset taken the decided and determined stand *against* the cause of the colonies, which they did for it, the *result would have been totally different*."[55]

After the port at Boston was closed by the British, Massachusetts issued a call for what became the First Continental Congress. Dozens of resolutions conveying colonial

50. Mark A. Noll, *Christians in the American Revolution* (Washington: Christian University Press, 1977), p. 150.

51. Jones, *op. cit.*, pp. 32-33. See Bernard Bailyn, *The Origins of American Politics* (New York: Vintage, 1970), pp. 39-40, 52-57.

52. John Wingate Thornton, *The Pulpit of the American Revolution: or, The Political Sermons of the Period of 1776.* (Boston: Gould and Lincoln, 1860), pp. xxvi-xxvii. Thornton notes that Edmund Burke attributed the independent spirit of Americans to the character of their education and their familiarity with law.

53. As a consequence, churches were singled out for reprisals during the war. H. Niles, *Principles and Acts of the Revolution in America* (Baltimore: William Ogden Niles, 1822), p. 361. See Larry R. Gerlach, ed., *The American Revolution: New York as a Case Study* (Belmont, CA: Wadsworth, 1972), pp. 94-95; James H. Smylie, ed., "Presbyterians and the American Revolution: A Documentary Account", *Journal of Presbyterian History,* 52 (Winter 1974): 303-487; Jedidiah Morse, *Annals of the American Revolution; or a Record of the Causes and Events Which Produced, and Terminated in the Establishment of the American Republic.* (Hartford, CT: n.p., 1824), p. 274.

54. Headley, *op. cit.*, p. 59.

55. J. T. Headley, *The Chaplains and Clergy of the Revolution* (New York: Charles Scribner, 1864), pp. 14-15.

grievances were sent ahead by counties throughout the land. In Virginia, the Fairfax County General Meeting of July 18, 1774 was chaired by George Washington. The delegates proposed to raise a subscription to assist the inhabitants of Boston and sardonically resolved "that this Colony and Dominion of Virginia cannot be considered as a conquered country, and, if it was, that the present inhabitants are the descendants, not of the conquered, but of the conquerors...."[56] That same week, the Provincial Meeting of Deputies in Philadelphia attacked the concept of parliamentary sovereignty:

> From what source can Great Britain derive a single reason to support her claim to such an enormous power? That it is consistent with the laws of nature, no reasonable man will pretend. That it contradicts the precepts of Christianity, is evident. For she strives to force upon us terms, which she would judge to be intolerably severe and cruel, if imposed on herself. "Virtual representation" is too ridiculous to be regarded. The necessity of a supreme sovereign Legislature, internally superintending the whole Empire, is a notion equally unjust and ridiculous.[57]

The Quebec Act compounded the injury by establishing the Catholic Church in the western territories, including areas claimed by three of the colonies. This was taken as further proof of Parliament's tyrannical intent and helped keep the issue of religious interference at the center of the public debate.[58]

With war approaching, the colonies had begun to speak a common political and religious language. The journals of the Continental Congress are filled with religious references intermingled with regular political business. The eruption of occasional controversies over prayer and the appointment of chaplains were duly recorded, contradicting the notion that the business of creating a new American polity had been secular in design and purpose.

On June 12, 1775, Congress issued a call for "a day of publick humiliation, fasting, and prayer" that was couched in the familiar language of covenant theology. Perry Miller observed that,

> in effect, Congress added the other nine colonies (about whose status New Englanders had hitherto been dubious) to New England's covenant. Still, for most of the population in these nine, no novelty was being imposed. The federal theology, in general terms, was an integral part of the Westminster Confession and so had long figured in the rhetoric of Presbyterians of New Jersey and Pennsylvania. The covenant doctrine, including that of the society as well as of the individual, had been preached in the founding of Virginia, and still informed the phraseology of ordinary Anglican sermonizing. The Baptists, even into Georgia, were aware of the concept of the church covenant, for theirs were essentially "congregational" polities; they could easily rise from that philosophy to the analogous one of the state. Therefore the people had little difficulty reacting to the Congressional appeal.[59]

By then, war was a reality. Six months later, the "Political Bands" connecting the colonies with Britain were effectively dissolved when Parliament passed the Prohibitory Act, removing the colonists from the king's protection and treating them as foreign enemies.[60]

American Political Theology

Archie Jones has summarized the connection between early American political thought and Biblical doctrine as follows:

> What were the teachings of this New England theo-political philosophy? Its starting premise was the Puritan concept of God as *sovereign* of the universe, who made man a rational creature, put "Law into the very Frame and Constitution of his Soul," and deals with men on the basis of conditional and obligatory compacts or covenants. This sovereign God is the Lawgiver, who has established perfectly wise, just, and good laws, founded upon the nature and relation of things, which are of universal obligation. This fixed and funda-

56. *American Archives: Fourth Series: Containing a Documentary History of the English Colonies in North America, from the King's Message to Parliament, of March 7, 1774, to the Declaration of Independence by the United States*, vol. 1 (Washington: M. St. Clair Clarke and Peter Force, 1837), p. 597.

57. *Ibid.*, pp. 578-79.

58. *Ibid.*, p. 829; Carl Bridenbaugh, *Mitre and Sceptre: Transatlantic Faiths, Ideas, Personalities, and Politics, 1689-1775* (New York: Oxford University Press, 1962), pp. 333-34. A letter dated London, October 8, 1774, that is contained in the *American Archives* expresses a sympathetic British viewpoint and counsels the colonists to continue firm in the preservation of their liberties.

59. Perry Miller, "The Moral and Psychological Roots of American Resistance", in *The Reinterpretation of the American Revolution, 1763-1789*, ed. Jack P. Greene (New York: Harper & Row, 1968), pp. 254-55.

60. Gene Fisher and Glen Chambers, *The Revolution Myth* (Greenville, S.C.: Bob Jones University Press, 1981), pp. 37-44, 112-17. Henry Cabot Lodge believed the revolution came precisely because the Americans were so accustomed to being well-governed: "The abuses of aristocracy and monarchy in England were as nothing to what they were on the Continent. The subjects of George III were not ground down by taxes, were not sold into military service, were not trampled on by an aristocracy and crushed by their king, they were the freest, best-governed people on earth, faulty as their government no doubt was in many respects. Yet it was among the English-speaking people that we detect the first signs of the democratic movement, for, as they were the least oppressed, so they were the most sensitive to any abuse or to any infringement upon the liberties they both prized and understood." The key word is "understood". The concept of Christian liberty had come to inform family and community life. "America rebelled, not because the colonies were oppressed, but because their inhabitants were the freest people then in the world and did not mean to suffer oppression." Quoted in Rosenstock-Huessy, *op. cit.*, pp. 653-54.

mental law is threefold, including the law of nature, the law of the Old Testament, and the law of Christ. The law of nature is not distinct from the law of God. Rather, it is as legally binding as any other part of the divine law, and gains greater force as a part of God's law, especially since it is clarified by the binding portion of Old and New Testament law. Since God's government is founded and limited by law, all human governments must be so founded and limited.[61]

According to the Bible, it is the ministry of civil officers to enforce this law and the ministries of the church and family to teach it (I Pet. 2:13-14; Matt. 28:19-20; Deut. 6:6-7). The final responsibility, however, rests with each individual, who is expected to walk by faith: that is, by the inward desire to obey God. As R. J. Rushdoony comments:

> Law is good, proper, and essential in its place, but law can save no man, nor can law remake man and society. The basic function of law is *to restrain* (Rom. 13:1-4), not to regenerate, and when the function of law is changed from the restraint of evil to the regeneration and reformation of man and society, then law itself breaks down, because an impossible burden is being placed upon it. Today, because too much is expected from law, we get less and less results from law, because law is put to improper uses.[62]

By 1787 the chief presuppositions that were to undergird the American system of government had been carefully articulated. Modern ideas about political and religious liberty are founded upon a Christian understanding of man's nature and destiny. The two traditions of covenant thought – theological and political – converge in a concept of limited government that begins with the self-governing individual within society and leads to the development of practical institutions for mutual assistance and voluntary cooperation. The reverse side of this same covenantal tradition may be described as separation of powers, multiple jurisdictions, or sphere sovereignty. These later political developments are inherent to the Biblical covenant and the federal theology of the Puritans. They represent – as do the documents that gave shape to them – practical outgrowths of the covenantal principle. Together they form the basis of what Verna Hall calls "Christian self-government with union".[63]

THE FOUNDING DOCUMENTS

In its rhetorical design, the Declaration of Independence displays a close affinity with the principles of "the New England theo-political philosophy", along with an attitude of lawful resistance to abuses of power:

> In form, the Declaration is *a plea at law against the king* in Parliament, charging him with failure to uphold his contractual obligations as feudal lord over the colonies. As such, it is a powerful assertion that rulers are under law, that their powers, even though they be a popular or quasi-popular assembly, are limited by fundamental law, and that both George III and Parliament are unjustified in attempting to assert their supposed right to absolute rule.[64]

The principle of limited government pronounced by the Declaration firmly places this document within the higher law tradition of English constitutionalism. Here a case can be made – and has been made – for the influence of Biblical covenantalism long predating the Reformation.[65] The exigencies of frontier life favored a revival of the ancient English custom of local self-government. The relative freedom of the colonists from direct oversight enabled them to put their theology into practice experimentally, although some of their adaptations technically violated their charters, as when the Pilgrims of Plymouth Plantation abandoned communal farming in favor of private ownership.

Furthermore, decentralized political institutions required the existence of healthy social institutions, which included voluntary associations.[66] The mainstays of society in Plymouth Colony were, first, the family, then the church and the state in supporting roles. As John Demos points out, the family combined the attributes of a business, school, vocational institute, church, house of correction, and welfare institution.[67] And so it was to remain for some time after the War for Independence, sometimes supporting a larger charitable outreach.[68]

It is this combination of ingredients that lends a peculiarly libertarian quality to American social institutions. The civil government was regarded as a constituent rather than a constitutive element of society. By 1781, a "perpetual union" was in operation under the Articles of Confederation. The Constitution

61. Jones, *op. cit.*, p. 35.
62. Rousas John Rushdoony, *Law and Liberty* (Fairfax, VA: Thoburn Press, 1977), pp. 4-5.
63. Hall, II, *passim*. Similarly, M. E. Bradford writes: "Christianity taught of the integrity of the individual soul. In England that translated into liberty under law, in community." Bradford, *op. cit.*, p. 210.
64. Jones, *op. cit.*, p. 43.
65. See Helen Silving, "The Origins of the Magna Cartae", *Harvard Journal of Legislation*, 3 (1965): 117-31.
66. Peter F. Drucker, *The Future of Industrial Man: A Conservative Approach* (New York: John Day, 1942; Mentor Executive Library, 1965), pp. 172-73. See Rousas John Rushdoony, *The Nature of the American System* (Fairfax, VA: Thoburn Press, 1978), pp. 5-11, on localism.
67. John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (London: Oxford University Press, 1970), pp. 183-84. The cooperation of churches, families, and local authorities was also characteristic of later efforts to address social needs. See Robert H. Bremner, *American Philanthropy* (Chicago: University of Chicago Press, 1960), pp. 5-19; Walter I. Trattner, *From Poor Law to Welfare State: A History of Social Welfare in America* (New York: The Free Press, 1974), pp. 25-27.

of 1787 formed "a more perfect union" rather than an entirely new system of government.[69]

One of the great practical advantages of the covenant design is the possibility of reconciling a number of self-governing entities within a larger union or commonwealth, such as family, church, and state. As Daniel J. Elazar notes, "a covenant provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect which protect the individual integrities of all parties to it."[70]

Given the limited character of civil government, the supremacy clause of Article VI is best understood in the context of an already mature constitutional tradition within which the new federal structure was fitted to work cooperatively with existing governments and not force-fitted like a Procrustean bed.[71] It does not simply replace an earlier parliamentary or state sovereignty with another of its own. R. J. Rushdoony emphasizes this distinction:

> The Constitution established neither a confederation nor a national state but a federal union. Its conception of power was Christian: power *is ministerial*, not *legislative*, i.e., powers in any area, church, state, school or family, are not endowed with ability to create laws apart from the higher law but only to administer fundamental law as man is able to grasp and approximate it. Civil government is thus an administrator rather than a creator of law; it is not sovereign over law but is under law.[72]

The representation of the Constitution as "the supreme law of the land", like the phrase "law of the land" in the Magna Carta, refers to more than the document itself. It is unnecessary to speculate about the exact intent of the founders when the very language of the Constitution attests to its continuity with and even incorporation of higher law concepts. Indeed, this understanding was affirmed by the founders themselves and has been periodically reaffirmed by members of the judiciary.[73] As Edward S. Corwin contended:

> The attribution of supremacy to the Constitution on the ground solely of its rootage in popular will represents, however, a comparatively late outgrowth of American constitutional theory. Earlier the supremacy accorded to constitutions was ascribed less to their putative source than to their supposed content, to their embodiment of an essential and unchanging justice.... *There are*, it is predicated, *certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, all together regardless of the attitude of those who wield the physical resources of the community.*[74]

The principles of higher law jurisprudence may be traced to the earliest period of modern western

68. Rousas John Rushdoony, *Revolt Against Maturity: A Biblical Psychology of Man* (Fairfax, VA: Thoburn Press, 1977), pp. 216-24, on Rev. Elias Cornelius and the Salem Society for the Moral and Religious Instruction of the Poor. See also Robert T. Handy, *A Christian America: Protestant Hopes and Historical Realities* (New York: Oxford University Press, 1971), pp. 42-54. Handy and Rushdoony, however, both note that nativist agitation helped bring discredit on evangelical organizations.

69. See the First Inaugural Address (1861) of Abraham Lincoln in *The Harvard Classics*, vol. 43: *American Historical Documents, 1000-1904*, ed. Charles W. Eliot (New York: P. F. Collier & Son, 1910), p. 337. This argument was developed earlier by Daniel Webster. But taken alone, the constitutional argument in favor of the perpetuity of the Union is not above criticism. Garry Wills has recently argued that, in the Gettysburg Address, Abraham Lincoln successfully revised the meaning of the Declaration of Independence and, in effect, reinvented the founding traditions to support the Northern cause during the Civil War, but his recently published *Lincoln at Gettyburg* is only the most recent salvo in a long scholarly debate. See M. E. Bradford, "Lincoln, the Declaration, and Secular Puritanism: A Rhetoric for Continuing Revolution", *op. cit.*, pp. 185-203; and "The Lincoln Legacy: A Long View," *Remembering Who We Are: Observations of a Southern Conservative* (Athens: University of Georgia Press, 1985), pp. 143-56. Francis Lieber and Orestes Brownson appear to be on firmer ground than Webster and Lincoln with their organic view of American nationality and by defending the integrity of the Union on the basis of national sovereignty. See, for example, Francis Lieber, "On the Rise of the Constitution of the United States, *Miscellaneous Writings*, vol. 2: *Contributions to Political Science* (Philadelphia: J. B. Lippincott, 1881), pp. 66, 69-74; and Brownson, *op. cit.*, pp. 68-99.

70. Elazar, *op. cit.*, p. 6.

71. Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven: Yale University Press, 1957), pp. 96-97, 101-03, on the meaning of "supreme law of the land," including a citation of relevant cases. See also Willmoore Kendall and George W. Carey, *The Basic Symbols of the American Political Tradition* (Baton Rouge: Louisiana State University Press, 1970), pp. 115-18.

72. Rousas John Rushdoony, *This Independent Republic: Studies in the Nature and Meaning of American History* (Fairfax, VA: Thoburn Press, 1978), p. 37.

73. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, NY: Cornell University Press, 1955), p. 89. See R. Kemp Morton, *God in the Constitution* (Nashville: Cokesbury Press, 1933), pp. 110-16. M. E. Bradford writes: "According to the Old Whig view of the English Constitution, it was not a contract but a *source of identity* – with no author but the nation and its history, with God an implicit party to the process. As covenant *qua* law it grew out of the interaction of people and princes living out of the nation's *genius*, with God's blessing its confirmation. These assumptions undergird most of the early American political documents." M. E. Bradford, "And God Defend the Right: The American Revolution and the Limits of Christian Obedience", *Christianity and Civilization*, 2 (Winter, 1983): 239. Henry Steele Commager in a 1938 essay cited several affirmations of this sort as expressions of an early higher law tradition in early American jurisprudence. Although Commager claimed that the tradition's underlying philosophy had been repudiated three-quarters of a century earlier, he still acknowledged its importance in constitutional history: "Americans, having discovered the usefulness of natural law, elaborated it, and having justified its application by success, protected that success by transforming natural into constitutional law: the state and federal constitutions. And in so far as natural law had found refuge in written law, there was little reason to invoke it; it was automatically invoked whenever the constitution was invoked, and this was the logic of Marshall in the Marbury case. Henry Steele Commager, "Constitutional History and the Higher Law", in *The Constitution Reconsidered*, ed. Conyers Read, revised ed. (New York: Harper Torchbooks, 1968), pp. 228.

74. *Ibid.*, p. 4.

law. For example, Gratian wrote in the twelfth century: "Enactments (*constitutiones*), whether ecclesiastical or secular, if they are proved to be contrary to natural law, must be totally excluded."[75]

The new federal union, in sum, has been given the authority to coordinate the political system but not to dominate it. Its overall success depends upon the continued good health of the various social institutions, such as families and churches, that also exercise powers of a governmental nature. The covenantal tradition, as ever, requires the cultivation of a politically and theologically literate citizenry. Our system of constitutional liberties and safeguards ultimately depends upon the consensus and self-restraint of its component parts: that is, upon a widespread covenantal understanding of the rights and duties of the people and their public officials.[76]

Conclusion

The single most influential political expression of the covenantal principle in American history is the Constitution of 1787. While it may be criticized as a further secularization of the covenant tradition, it also represents a culmination of sorts. Like its predecessors, it requires the active participation of a citizenry educated in its principles and committed to its preservation. The founders frequently extolled what they called "republican virtue", which they contrasted with "corruption". The separation of political powers was meant to guard against corruption by restraining the exercise of power and protecting against even the appearance of impropriety.

For a while the system worked fairly well. But the passing of the founding generation and the diminution of external threats permitted domestic disagreements to loom larger. Regional jealousies and policy differences led after several decades to a civil war that ended, unfortunately, with the victorious side tipping the constitutional balance in favor of central control.[77] The resulting tendency toward centralization, bureaucratization, and the fragmentation of local mediating institutions may be seen in the subsequent history of all sectors of American life.

Today, the idea of liberty is in many ways being abandoned in favor of an equality of enforced fraternity. Particularly troubling is the slide of American churches away from the covenant tradition they helped develop and their unwillingness to effectively challenge the "New Morality" that erases the distinction between "sheep and goats".[78] As Brownson, Tocqueville, Lieber, and so many early commentators recognized, this is the danger of popular government: that it may slide into "social despotis,m" "tyranny of the majority", or "democratic absolutism", and that liberty may turn into license.

The declining influence of American churches has ramifications that reach into every area of American life. In the absence of political consensus and principled self-restraint, what Edward S. Corwin called the "Constitution of Powers" has gradually displaced the old "Constitution of Rights".[79]

But despite evident setbacks, the Constitution of 1787 and the covenant tradition that led up to it are milestones in the great experiment in self-government that still presses forward. That Constitution has given rise to a great literature of political wisdom, in which the Federalist Papers, John C. Calhoun's theory of the concurrent majority, and Francis Lieber's theory of institutional liberty may be included.[80] It is this peculiarly American political tradition that has kept the idea of covenanted liberty and self-government alive to this day in all corners of the world and continues to shake principalities and powers. Perhaps even yet it may develop the capacity to overcome the spoilage of its own fruits. CM

75. Harold J. Berman, "The Origins of Western Legal Science", *Harvard Law Review*, 90 (1977): 925.

76. Edmund Burke, whose sentiments are echoed in the nineteenth century by Lieber, Alexis de Tocqueville, and Robert Winthrop, among others, got right to the heart of the matter in his 1791 "Letter to a Member of the National Assembly" of France: "Men are qualified for civil liberty in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love of justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of knaves. Society cannot exist, unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters." Quoted in *The Portable Conservative Reader*, ed. Russell Kirk (n.p.: Penguin Books, 1982), p. 48.

77. Orestes Brownson recognized as early as 1866 that the "humanitarian democracy" adopted by Northern socialists and abolitionists might triumph following the defeat of what he called the "personal democracy" of the South. See Brownson, *op. cit.*, pp. 86-93.

78. John Dewey appears to have regarded the marginalization, if not the elimination, of "spiritual aristocracy" as one of the chief tasks of democratic education. "I cannot understand how any realization of the democratic ideal in human affairs is possible without surrender of the conception of the basic division [between sheep and goats] to which supernatural Christianity is committed." John Dewey, *A Common Faith* (New Haven: Yale University Press, 1934), p. 84. Here we have, very succinctly, a formula for the elimination of Christianity from the public sphere, but also for moral confusion. See John O'Sullivan's preface to Digby Anderson, ed. *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* (n.p., UK: The Social Affairs Unit, 1992), pp. ix-xiv.

79. Edward S. Corwin, *Total War and the Constitution* (New York: Alfred A. Knopf, 1947), pp. 170-72.

80. In the nineteenth century, Francis Lieber developed a nationalistic theory of "institutional liberty" (*hamarchy*) in response to Calhoun's concurrent majority. Francis Lieber, *On Civil Liberty and Self-Government*, 3rd ed. revised, ed. Theodore D. Woolsey (Philadelphia: J. B. Lippincott, 1877), pp. 297-373; *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law*, Part I (Boston: Charles C. Little and James Brown, 1838), pp. 411-14. See C. B. Robson, "Francis Lieber's Theories of Society, Government, and Liberty", *The Journal of Politics*, 4 (1942): 227-49.