

COMMONWEALTH AS CIVIC COMMUNION

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During the seventeenth century, some of the most robust commonwealth theorizing in Anglo-America grew out of the religious movement of Puritanism. This Article focuses on the ways in which Massachusetts's "First Charter" period (1630–1689) functioned as a proving ground for an ideal of civic life that understands individuals as literally knit together into one body (whether speaking of the body of Christ in the church, or of the body politic). In particular, I highlight the work of Puritan minister Thomas Shepard on the connection between inward and outward government: man must first be able to recognize and address his own sinful nature by exercising an "inward government" over his actions and desires in order to appreciate and appropriately participate in the various forms of "outward government" to which he falls subject.

I. INTRODUCTION

A Model of Christian Charity (Model), John Winthrop's exhortation to the founding generation of the Massachusetts Bay Colony, is so well known for its fleeting reference to the new colony as a "city upon a hill" that we tend to forget that this image is really little more than a rhetorical flourish at the end of a very dense work of political theory.¹ Though he never used the term "commonwealth," the speech is an extended meditation on the theme as Winthrop offers a vision of a political community based on the radical application of the principles of "brotherly affection" in the pursuit of "the

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¹ See John Winthrop, *A Model of Christian Charity* (1630), reprinted in 2 WINTHROP PAPERS, 1623–1630, 282 (Stewart Mitchell ed., Mass. Historical Soc'y 1931). The speech was recognized as a significant statement of the ideals and aspirations of the colony very early on. A 1635 letter to John Winthrop, Jr. asks him to send a copy of "the Model of Charity" back to London. See Letter from Henry Jacie to John Winthrop, Jr. (Feb. 1634/35), in 3 WINTHROP PAPERS, 1631–1637, 188 (Allyn Bailey Forbes ed., Mass. Historical Soc'y 1943). For further analysis of Puritan society, see Sarah A. Morgan Smith, *With a Publick Spirit: Community and Commitment in New England* (May 2016) (unpublished Ph.D. dissertation, Rutgers University) (on file with the University of Rutgers Library).

glory of [the] Creator and the common good of the creature, Man.”² Winthrop argued this two-fold end will only be met if individuals can both give and receive love (or “charity”) to one another, guided by the twin “rules” of “Justice and Mercy.”³ Of the two, Winthrop found mercy—because it is the active expression of love applied within the context of particular relationships—to be of more value. He therefore focused the bulk of his attention in the *Model* on laying out the dimensions and scope of an understanding of mercy that could serve as the foundation for a community.⁴ He carefully defined the terms of a new commonwealth in which relationships of mutual love expressed with mercy between individuals would form the basis for all other political and social exchanges, creating a civic communion.⁵ For Winthrop, the common good of political life was fundamentally about the relationships between its members, which he argued must parallel the type of unity-realized-through-diversity found in the communion of the saints.⁶

Drawing on 1 Corinthians 7:20⁷ and the doctrine of predestination, Reformed theologians taught not only that all types of honest work were worthy of pursuit, but that each individual was specifically gifted and guided by the divine for a particular vocation.⁸ As each individual practiced their specific calling, they contributed to the diversity and vitality of their society, while also benefiting from the gifts of those around them. For New Englanders, this was far more than a simple economic exchange; it represented the intertwining of lives in a network of mutuality. Although the doctrine of vocation seemed to emphasize the individual, at its best it both elevated the dignity of the individual and created a sense of communion, of a society literally *knit* together as Winthrop would say, by Christian charity, or love.⁹

I have adopted the term communion to describe the Massachusetts Puritans’ understanding of a commonwealth precisely because in this period, the term “communion” was used to describe relationships so intimate as to

² See Winthrop, *supra* note 1, ¶ 4, at 282, 283.

³ See *id.*

⁴ See *id.*

⁵ See *id.* ¶ 5, at 284.

⁶ See *id.* ¶¶ 5–6, at 284.

⁷ 1 Corinthians 7:20 (King James) (“Let every man abide in the same vocation wherein he was called.”).

⁸ See *Calling*, OXFORD ENGLISH DICTIONARY (3d ed. 2016). On this point, see also CHARLES TAYLOR, *God Loveth Adverbs*, in *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 211 (1992). Taylor contrasts the Protestant version of the doctrine (which he describes as “the Affirmation of Ordinary Life”) with the hierarchical Catholic view that elevated religious vocations above all others. *Id.*

⁹ See Winthrop, *supra* note 1.

make the parts all but inseparable once joined, yet wherein which each individual part still retained its distinctive nature (for example, the relationship between various parts of the body to one another, as well as the relationship between the members of the trinity, or the members of the church to Christ, to one another).¹⁰ In Massachusetts, Winthrop and his colleagues applied this concept to civil society as they attempted to cultivate the virtue of love or charity. Love, which “shall cover the multitude of sins”¹¹ was the aspirational impulse behind the Puritan vision of community life, which envisioned civil society as a communion of persons willing to sacrifice and serve for one another, as well as the greater good.¹² The success of such a polity depended upon three key factors: proximity, permanence, and personalism.

II. COMMONWEALTH AS COMMUNION: PROXIMITY

As originally granted, the Charter for the Massachusetts Bay Company was almost entirely unremarkable—it outlined the purposes of the colony, as the glory of God and of England, laid out the physical boundaries of the colony, and established a rough structure for governing the corporation.¹³ In one critical respect, however, the Charter of 1629 was unusual: it failed to specify the location for meetings of the colony’s governing body, the General Court.¹⁴ This oversight allowed the leaders of the Massachusetts Bay Company to transfer the government of the plantation to those that would inhabit it.¹⁵ The decision to transfer the authority of the charter government into the hands of those actually planning to migrate to New England had significant theoretical as well as practical consequences. Even before the

¹⁰ My use of the word stands in contrast to that of Herman Schmalenbach, who argued that bonds of “communion” required a loss of individuality. *Compare Communion*, OXFORD ENGLISH DICTIONARY (3d ed. 2009), with Herman Schmalenbach, *The Sociological Category of Communion*, in 1 THEORIES OF SOCIETY: FOUNDATIONS OF MODERN SOCIOLOGICAL THEORY 331, 333, 339 (Talcott Parsons et al. eds., 1961).

¹¹ 1 Peter 4:8 (King James).

¹² See Winthrop, *supra* note 1.

¹³ See *The Charter of Massachusetts Bay (1629)*, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1846 (Francis Newton Thorpe ed., 1909).

¹⁴ See *id.* In his account of the absent clause, Ronald Dale Karr argues that the lack of specificity was more than likely a matter of accident or clerical laziness than intrigue, and that the matter has received undue significance because it lends an aura of providential mysticism to the founding of New England. See Ronald Dale Karr, *The Missing Clause: Myth and the Massachusetts Bay Charter of 1629*, 77 NEW ENG. Q. 89, 106 (2004).

¹⁵ John Winthrop, *The Agreement at Cambridge* (Aug. 26, 1629), reprinted in 2 WINTHROP PAPERS, 1623–1630, 151, 152 (Stewart Mitchell ed., Mass. Historical Soc’y 1931).

details of the decision were fully worked out, the members of the General Court recognized that the “whole adventure grows upon the joint confidence we have in each other’s fidelity and resolution herein, so as no man of us would have adventured it without assurance of the rest.”¹⁶ That is, they were jointly invested, not only in the material success of the company as a whole, but in one another, and to “others that shall join with us in this action.”¹⁷ They expected that the promise of genuine self-government through locally elected representatives would serve as an inducement to “persons of worth and quality [to] transplant themselves and [their] families thither.”¹⁸ In other words, the sort of migrants viewed as most desirable by the Massachusetts Bay Company leadership—those who possessed “worth and quality,” a phrase which suggests an interest in both the moral as well as social or fiscal fitness of the persons in question—were quite likely to be the very sort of people who would chafe at the prospect of life under the hand of a distant government, and who would be incentivized by the prospect of a more robust level of political engagement. This move signaled the commitment of the founders of Massachusetts Bay to securing a government based on personal relationships, as well as the liberties of the people—liberties that could only be upheld when informal communal relationships were strong enough to overcome the lack of authoritarian institutional structures.

III. COMMONWEALTH AS CIVIC COMMUNION: PERMANENCE

The decision to transfer government “of persons”¹⁹ to the new world not only created the type of physical proximity between rulers and ruled necessary for the Puritan vision of a commonwealth as a civic communion, it also signaled that this was to be a permanent endeavor, which in turn, enhanced the sense of the community. Permanence was symbolically significant, for without it, the colonists could never truly own and commit to the commonwealth, but would always be merely visitors, whose true allegiance lay across the Atlantic. When the reality of the hardships of life in Massachusetts sometimes resulted in a less-permanent settlement by individuals or families, it was disruptive to the commonwealth as a whole. Winthrop recorded several instances of disappointment in those who chose

¹⁶ *Id.* (spelling modernized).

¹⁷ *Id.* (spelling modernized).

¹⁸ *A Gen’al Court, Holden at Mr. Deputyes House* (July 28, 1629), in 1 RECORDS OF THE GOVERNOR AND THE COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 47, 49 (Nathaniel B. Shurtleff ed., 1853) (spelling modernized).

¹⁹ *Id.*

either to return to England or relocate to Connecticut,²⁰ at one point noting that those considering leaving New England behind should examine their motivations carefully: “Ask thy conscience, if thou wouldst have plucked up thy stakes, and brought thy family 3000 miles, if thou hadst expected that all, or most, would have forsaken thee there.”²¹

In Massachusetts, the colonists hoped to create “a place of their own,”²² not only as a temporary refuge from their troubles in England, but a permanent home in a *new* England, with all the hope and idealism that the term conveyed. Using 2 Samuel 7:10 as his sermon text,²³ John Cotton argued that permanency was part of the divine purpose behind the proposed plantation.²⁴ The Israelites’ possession of their land—and the colonists’ of America—was to be “firm and durable,” Cotton wrote.²⁵ No longer would they be captives or sojourners in the lands of others; instead, they would find “peaceable and quiet resting [where] the sons of wickedness shall afflict them no more.”²⁶ Cotton indicated in a marginal note in the text that although the Israelites were often long-term residents in other nations, they were still sojourners in the important sense of “dwelling as strangers, because they neither had the sovereign government of the whole country in their own hand, nor yet did incorporate themselves into the commonwealth of the Natives.”²⁷ Similarly, the nonconforming Englishmen and women gathered around to hear Cotton’s sermon had become increasingly alienated from the larger society, forced to live as “strangers” and outcasts on account of their religious practices.²⁸ Under King James, failure to observe the ceremonies of the Anglican rite and “sermon gadding” (the practice of traveling to other parishes to hear ministers other than one’s own) carried potential civil penalties as well as serious social consequences: anti-Puritan libels accused

²⁰ See JOHN WINTHROP, *THE JOURNAL OF JOHN WINTHROP* 126–27, 414–16 (Richard S. Dunn et al. eds., 1996) [hereinafter WINTHROP JOURNAL]; see also Andrew Delbanco, *Looking Homeward, Going Home: The Lure of England for the Founders of New England*, 59 *NEW ENG. Q.* 358 (1986).

²¹ WINTHROP JOURNAL, *supra* note 20, at 416.

²² See 2 *Samuel* 7:10 (King James); see also John Cotton, *Gods Promise to His Plantation* (London 1630), reprinted in *THE KINGDOM, THE POWER, & THE GLORY: THE MILLENNIAL IMPULSE IN EARLY AMERICAN LITERATURE* 1 (Reiner Smolinski ed., Kendall Hunt Publ’g 1998), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1022&context=etas>.

²³ 2 *Samuel* 7:10 (King James) (“Moreover I will appoint a place for my people Israel, and I will plant them, that they may dwell in a place of their own, and move no more.”).

²⁴ See Cotton, *supra* note 22.

²⁵ *Id.* at 2.

²⁶ *Id.* (spelling modernized).

²⁷ *Id.* at 5.

²⁸ See TIM HARRIS, *REBELLION: BRITAIN’S FIRST STUART KINGS 1567–1642*, 110–14 (2014).

non-conformists of disloyalty to king and country.²⁹ Against such a background, Cotton's allusions to the Israelites' divinely sanctioned place of rest and respite would have made the opportunity to establish their own government, customs, and traditions far from monarchical interference seem like a powerful promise indeed.

The idea of permanence is important because it implies not only commitment in the present, but also for the future. Cotton likened the Israelites' possession of the land to that of a freeholder, a form of absolute property ownership that conveyed political as well as social status in seventeenth century England.³⁰ The concept dates to the Anglo-Norman period, when it was "used to denote the holding of an estate in land with the rights of a free man, as opposed to a villein."³¹ The contrast between being a free man or woman and one who owed "bond-service" to another was stark: villeinage proper described a form of serfdom equivalent to slavery, in which the villein was regarded as merely a human component of the manorial property.³² Later, the term was used more generally to describe anyone lacking the legal and financial status to control their own destiny.³³

The concept of freeholding was also used figuratively as early as 1611 as the preface to the King James Bible included the observation "he that medleth with men's Religion in any part, medleth with their custom, nay, with their freehold."³⁴ And just as freeholders not only had the ability to utilize their property as they saw fit during their lifetimes, they also had the ability to will their property to designated heirs within certain limitations such as primogeniture.³⁵ Cotton's auditors would have understood these ancillary aspects of freeholding implicitly; freeholding was the idealized form of land

²⁹ See *id.* For examples of anti-Puritan libels, see *O Stay Your Teares Yow Who Complaine*, in EARLY STUART LIBELS (Alastair Bellany & Andrew McRae eds., 2005), <http://www.earlystuartlibels.net/htdocs/pdf/n/Nvi1.pdf>.

³⁰ Cotton, *supra* note 22, at 2.

³¹ See *Freehold*, OXFORD ENGLISH DICTIONARY (3d ed. 2008); see also *Frank-tenement*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

³² Milton makes this comparison describing the status of French peasants. See John Milton, *A Sovereigne Salve to Cure the Blind* (London 1643), <https://quod.lib.umich.edu/e/eebo/A89494.0001.001?rgn=main;view=fulltext>; see *Villeinage*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

³³ *Villein*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

³⁴ *Introduction* to KING JAMES BIBLE (1611), KING JAMES BIBLE ONLINE <https://www.kingjamesbibleonline.org/1611-Bible/1611-King-James-Bible-Introduction.php> (last visited Mar. 20, 2019).

³⁵ On freeholding as an aspiration in English society during this period, and its rhetorical significance in political discourse, see LAURA BRACE, *THE IDEA OF PROPERTY IN SEVENTEENTH-CENTURY ENGLAND: TITHES AND THE INDIVIDUAL* (1998).

ownership in seventeenth century England.³⁶ They would likewise have appreciated the comparison between willing property and attempting to convey intangibles such as civic commitments to one's heirs. The concept of inheritability would not transfer as readily to the intangible good of civic communion, which is part of what made the perpetuation of the commonwealth an urgent political problem. Yet, if the men and women who were about to venture across the North Atlantic would make the most of their opportunity to start anew in America, Cotton argued, then they might expect to be "planted" there.³⁷

As trees successfully planted grow "in tallness and strength," so too the successful New Englander might expect to see him or herself grow "to more firmness and eminency."³⁸ Perhaps more importantly, such an individual ought also to bear fruit in a variety of ways.³⁹ Only in their commitment to "planting" a permanent settlement, however, could the people of New England cultivate the mutually loving personal relationships they believed were necessary for their communion to flourish.

IV. COMMONWEALTH AS CIVIC COMMUNITY: PERSONALISM

The third major facet of the Puritan conception of a commonwealth was that of personalism: civic communion depended upon a sense of intimacy between the persons who comprised the political community, for it is impossible to truly love that which we do not know. Such personalism does not obscure difference; rather it celebrates it. Winthrop's *Model* for example, opens with a brief statement of the undeniably unequal material conditions of man's life—his relative wealth or poverty, as well as his social status and civil power.⁴⁰ Yet he urged his auditors not to regard these differences as points of division, but rather as opportunities to celebrate the diversity among people that also contributes to their interdependence. Diversity among men, Winthrop argued, glorifies God by displaying his "wisdom" as well as his "power" in the apportionment and design of such differences (which might otherwise lead to chaos and destruction) so that they work together "for the

³⁶ See *id.* Karen Ordahl Kupperman has argued that the success of the Bay Colony depended on the promise of freemanship, inasmuch as it offered tangible benefits to those settlers who were [eventually] disenfranchised from participating in elections for the General Court. See Karen Ordahl Kupperman, *Definitions of Liberty on the Eve of the Civil War: Lord Saye and Sele, Lord Brooke, and the American Puritan Colonies*, 32 *HIST. J.* 17, 18 (1989).

³⁷ Cotton, *supra* note 22, at 14–15.

³⁸ *Id.* at 14 (spelling modernized).

³⁹ *Id.* at 15.

⁴⁰ Winthrop, *supra* note 1, ¶ 2, at 282–83.

preservation and good of the whole.”⁴¹ The differences between the material conditions of various men create opportunities for them to both give and receive love (or “charity”),⁴² which in turn, fosters the individual and community relationships essential to the Puritan notion of the commonwealth.

Because the diversity of gifts among men makes them interdependent, they are better able to fulfill the obligation of each man “to love his neighbor as himself” to the best of his ability.⁴³ This principle enlarges the rule of mercy such that every man is not only obliged to help others in “every want or distress,” but to do so “out of the same affection which makes him careful of his own good.”⁴⁴ In essence, Winthrop argued that the core principle of the golden rule was a recognition of the moral equality of persons which precluded the use of material or circumstantial differences between individuals as measures of worth.⁴⁵ The moral law obliges man universally to recognize his essential similitude to other men “as the same flesh and image of God,”⁴⁶ and therefore to accord his fellow men a certain degree of respect and even, as we shall see, affection. Diversity, however counterintuitively, promotes the only kind of equality that can provide meaningful unity within the body politic.

While the general principle of moral equality was derivable from nature, Winthrop also offered a specifically Christian extension of the principle. While the Law of the Gospel recognizes that a genuine distinction exists between those of the family of God and those yet outside of it, it also expands the application of equality in a surprising way.⁴⁷ Because the moral law was given to man prior to the fall, Winthrop believed it could offer “no rules for dealing with enemies for all are to be considered as friends in the state of innocence.”⁴⁸ The Law of the Gospel, on other hand, commands “love your enem[y],” a dramatic extension of the principle of equality (and the application of mercy derived from it) to encompass virtually all levels of human interaction: friend, foe, or neighbor.⁴⁹

By highlighting the dispensation of mankind into various orders as within the “most holy and wise providence” of the Creator for the general good,

⁴¹ *Id.* (spelling modernized).

⁴² *See id.*

⁴³ *Id.* ¶ 4, at 283 (spelling modernized).

⁴⁴ *Id.* ¶ 4, at 283–84 (spelling modernized).

⁴⁵ *See id.*

⁴⁶ *Id.* ¶ 5, at 284 (spelling modernized).

⁴⁷ *Id.*

⁴⁸ *Id.* (spelling modernized).

⁴⁹ *See Matthew 5:43–48* (King James).

Winthrop was able to frame his entire discourse as a relatively conventional Pauline reflection on the organization of civil and church communities.⁵⁰ Yet in addressing his specific advice to the relatively homogenous group of soon-to-be founders before him, he simultaneously drew out the more radical implications of such a teaching. The doctrine establishes the sort of logical framework that recognizes the dignity and relative equality of persons because of their shared nature, and offers a motivation for the creation of the sorts of social traditions and institutions that will help to cultivate those attributes which make community life more pleasant for all—rich or poor, mighty or lowly. This, in turn, paved the way for a broadly representative political community grounded in the consent of the people, rather than organized in a top-down hierarchy.

We see a similar commitment to the moral equality of individuals and its political manifestation in the form of personal, relational civic interactions in Cotton's *Promise*.⁵¹ Among the "good things" that might motivate migration, Cotton noted the conviction that a man might "employ his Talents and gifts better elsewhere, especially when where he is, he is not bound by any special engagement."⁵² Cotton's justifications for this were, in part, economic; England—which he referred to as the "hive of the Commonwealth"—had suffered from tremendous inflation in the early seventeenth century and poverty was both severe and widespread, to the point that "Tradesmen . . . eat up one another."⁵³ Such a state of affairs was not only worrisome economically, it also deprived men of the ability to freely exercise those "talents and gifts" which God had given them, both for their own good as well as for the good of others.⁵⁴ Migration, therefore, would not only relieve some of the economic pressures in the home country, it would at the same time allow each individual to better realize their discrete gifts. This, in turn, would enrich the common good as individuals in positions suited to their personal callings were likely to find themselves better equipped to help others than individuals struggling in employments for which they had little aptitude or appreciation.

Among the other "good things" that might legitimately induce a man to migrate, Cotton included "merchandize and gaine-sake."⁵⁵ This was not to be used for the exclusive use or benefit of the individual, however, but rather

⁵⁰ Winthrop, *supra* note 1, ¶ 1, at 282; see 1 *Corinthians* 12 (King James).

⁵¹ Cotton, *supra* note 22.

⁵² *Id.* at 9.

⁵³ *Id.*; see KEITH WRIGHTSON, *EARTHLY NECESSITIES: ECONOMIC LIVES IN EARLY MODERN BRITAIN* 7–8 (Yale Univ. Press 2000).

⁵⁴ See Cotton, *supra* note 22, at 9–12.

⁵⁵ *Id.* at 8.

with an attitude of stewardship and orientation toward the fulfillment of the civic communion.⁵⁶ Likewise, as Winthrop noted, when the entire community was threatened, Christians might be called to give all of their belongings or estate to the poor, or less extravagantly, to “give beyond their ability” in order to ward and serve their neighbors.⁵⁷ This kind of community-oriented attitude toward the stewardship of one’s financial resources was not limited to times of emergency, but was also meant to guide the ordinary processes of “giving, lending and forgiving.”⁵⁸ Here, personalism provides the grounds for a broad-based generosity of spirit, the sort of “public spirit” that forgives faults in others as readily as their debts.⁵⁹

V. CHRISTIAN LOVE AND CIVIL COMMUNION

Combining the elements of proximity, permanence, and personalism allowed the founders of the Bay Colony to establish a civic communion, a form of commonwealth strong enough to counterbalance both the hierarchical, autocratic polity from which they had fled and the overly individualistic, rights-focused political system they so presciently feared might develop out of their own commitment to the moral equality of persons. The project of establishing a new society would obviously require constant care and mutual concern, and a willingness to sacrifice what Winthrop described as “mere” justice to the demands of mercy.⁶⁰ The manifestation of justice between either individuals or an individual and an institution, such as the state, presupposes a certain inflexibility and impersonality that Winthrop believed was inappropriate in times of political and social upheaval such as the founding of a new colony. Upon these occasions, Winthrop argued what

⁵⁶ For the classic statement of the manifestation of the doctrine of vocation in individualistic, entrepreneurial activity, see MAX WEBER, *PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Routledge 2001). For some essential correctives to Weber’s thesis, see Richard L. Means, *Protestantism and Economic Institutions: Auxiliary Theories to Weber’s Protestant Ethic*, 44 *SOC. FORCES* 372 (1966), which suggests that the “capitalistic” values identified by Weber are with equal reasonableness attributable to a variety of other theological sources, such as a commitment to conscience or a commitment to literacy, etc. *Id.* at 373–74, 378. See also David Little, *Max Weber Revisited: The “Protestant Ethic” and the Puritan Experience of Order*, 59 *HARV. THEOLOGICAL REV.* 415, 416 (1966) (addressing Weber’s overemphasis on the individualistic aspects of Calvinism).

⁵⁷ Winthrop, *supra* note 1, ¶ 6, at 284 (spelling modernized).

⁵⁸ *Id.* ¶ 7, at 284 (spelling modernized). For a contrary reading of this section of the *Model* as primarily a secular reflection on commercial relationships, see Scott Michaelsen, *John Winthrop’s “Modell” Covenant and the Company Way*, 27 *EARLY AM. LITERATURE* 85, 92–93 (1992).

⁵⁹ On Winthrop’s later attempts to encourage such generosity in political relationships, see John H. Schaar, *Liberty/Authority/Community in the Political Thought of John Winthrop*, 19 *POL. THEORY* 493, 496–99 (1991).

⁶⁰ Winthrop, *supra* note 1, ¶ 4, at 283.

was necessary was not the “blind” virtue of justice, but rather the “seeing,” knowing, relational virtue of love.⁶¹

In general, although Winthrop attempted to demonstrate “the goodness or necessity of the work” of mercy to his audience, he readily admitted that a rational assent to a doctrine was not the same as “a habit in a soul, as shall make it prompt upon all occasions” to exercise mercy.⁶² Love, however, “will as naturally bring forth [mercy], as any cause doth produce the effect,”⁶³ for it is “the bond of perfection.”⁶⁴ Winthrop conceived of mercy—the activity of love in those relationships that might otherwise operate merely on the level of justice—as an essential element in the community he hoped to see planted in New England. Drawing on its roots in both the law of nature and the law of grace, Winthrop outlined the application of mercy in three separate, but related areas that would be critical to the success of the new community.⁶⁵ Mercy, he argued, would be a force for union between disparate individuals, an incentive to generosity toward those in need, and the primary motivation for elevating public over private interests.⁶⁶

The Law of the Gospel, Winthrop argued, attempts to recapture a sense of the familial relation originally established for mankind in Eden, and thus places an extended burden upon the redeemed to act lovingly toward one another.⁶⁷ As Winthrop put it, “[d]o good to all, especially to the household of faith,”⁶⁸—rather in the same way that one might expect children to be kind to neighbors and even strangers, but especially so toward their siblings, who share an essential similitude with themselves and an equal standing as children of the same parents.⁶⁹ The primary ramification of this attitude for the founding generation of New England was an intense inward focus: having conceived of their venture as a strategic withdrawal from the mixed, and

⁶¹ See *id.*

⁶² *Id.* ¶ 20, at 288 (spelling modernized).

⁶³ *Id.* (spelling modernized).

⁶⁴ *Id.* ¶ 21, at 288.

⁶⁵ *Id.* ¶¶ 22–31, at 289.

⁶⁶ *Id.*

⁶⁷ *Id.* ¶ 5, at 284. On the importance of Edenic imagery, see ZACHARY MCLEOD HUTCHINS, *INVENTING EDEN: PRIMITIVISM, MILLENNIALISM, AND THE MAKING OF NEW ENGLAND* (2014); Jesper Rosenmeier, *New England's Perfection: The Image of Adam and the Image of Christ in the Antinomian Crisis, 1634 to 1638*, 27 WM. & MARY Q. 435 (1970).

⁶⁸ Winthrop, *supra* note 1, ¶ 5, at 284 (spelling modernized).

⁶⁹ The scriptural basis for Winthrop's statement is Galatians 6:10. “As we have therefore opportunity, let us do good unto all men, especially unto them who are of the household of faith.” *Galatians* 6:10 (King James).

corrupted community of England, they were eager to apply the teachings of the early church on the union of believers.⁷⁰

Winthrop demonstrated this aspirational tendency when he utilized the traditional Christian metaphor of the body to define the proper relationships between community members (on the assumption that the community was made up only of the elect).⁷¹ As the human body is joined together with sinews, ligaments, and so forth, love acts to join together the disparate parts of Christ's body, the church: "It makes each part so contiguous to others as thereby they do mutually participate with each other, both in strength and infirmity, in pleasure and pain."⁷² As each part of the human body suffers with injury to any other part, so the individual members of the body of Christ should share in the sufferings of their fellows.⁷³ Winthrop was candid about the fact that this extreme degree of other-regarding love would be impossible for the wholly natural man, who is "born with this principle in him to love and seek himself only."⁷⁴ Only the regenerate, united first *with* Christ and then *through* him to each other, will be able to experience this radical love of other-as-self, which Winthrop argued manifests itself in both outward and inward forms.⁷⁵

Remember, he urged "whatsoever we did, or ought to have done, when we lived in England, the same must we do, and more also, where we go."⁷⁶ New England was not only to be different from Old in locality, but also in spirit.⁷⁷ They were to take the hard teachings of Christianity which "most" professed but did not act upon, and:

[B]ring [them] into familiar and constant practice, as in this duty of love, we must love brotherly without dissimulation, we must love one another with a pure heart fervently. We must bear one another's burdens. We must not look only on our own things, but also on the things of our brethren.⁷⁸

To avoid such a fate both for themselves and for the generations to follow, Winthrop advised the company to "follow the counsel of Micah, to

⁷⁰ See THEODORE DWIGHT BOZEMAN, *TO LIVE ANCIENT LIVES: THE PRIMITIVIST DIMENSION IN PURITANISM* (2d ed. 2011).

⁷¹ Winthrop, *supra* note 1, ¶ 21, at 288–89.

⁷² *Id.* ¶ 21, at 288 (spelling modernized).

⁷³ *Id.* ¶ 27, at 289.

⁷⁴ *Id.* ¶ 30, at 290 (spelling modernized).

⁷⁵ *Id.* ("1 John 4:7 — Love cometh of God and every one that loveth is born of God, so that this love is the fruit of the new birth, and none can have it but the new creature.")

⁷⁶ *Id.* ¶ 41, at 293 (spelling modernized).

⁷⁷ *Id.*

⁷⁸ *Id.* (spelling modernized).

do justly, to love mercy, to walk humbly with our God.”⁷⁹ What this meant in practical terms was to embrace the ideal of union, if not unity: they were to be “knit together, in this work, as one man.”⁸⁰ If they were to succeed in establishing a godly community, it was imperative that each one seek the good of the whole community prior to the accomplishment of any individual good. They were to “delight in each other, make others’ conditions our own . . . always having before our eyes our commission and community in the work . . . as members of the same body.”⁸¹ Love, Winthrop argued, is rooted in our “apprehension of some resemblance in the things loved” to the lover.⁸² Thus, when God displays his love to mankind in general, it is because they are His image-bearers, no matter how fallen; as for the elect, he “beholds them in His beloved son.”⁸³ So too, the human soul “is of a sociable nature” which inclines it to cleave to that it perceives to be like itself.⁸⁴

This interaction between self and other in giving and receiving goods is the model of the community of affection that Winthrop hoped to foster among New Englanders, for having proclaimed themselves to be united as a particular “company” in accepting the King’s charter, they ought therefore to accept the moral burden of being “knit together by this bond of love and live in the exercise of it.”⁸⁵ The “work” of establishing the colony, undertaken “by a mutual consent,” Winthrop predicted, would require them to remember that the “care of the public must overshadow all private respects.”⁸⁶ This was not only good theology, he pointed out, but also prudential politics, “for it is a true rule that particular estates cannot subsist in the ruin of the public.”⁸⁷ Adopting such qualities as “meekness, gentleness, patience, and liberality” would allow the founding generation to come together and approach the ordinary activities of life—working, playing, laboring, rejoicing—as opportunities for mutual edification and encouragement in carrying out their “Commission and Community in the work” of building a godly commonwealth.⁸⁸ Over the first twenty years of the settlement, the colonists would do this primarily through the development of both a robust education

⁷⁹ *Id.* ¶ 45, at 294 (spelling modernized).

⁸⁰ *Id.* (spelling modernized).

⁸¹ *Id.* (spelling modernized).

⁸² *Id.* ¶ 31, at 290 (spelling modernized).

⁸³ *Id.* (spelling modernized).

⁸⁴ *Id.* (spelling modernized).

⁸⁵ *Id.* ¶ 38, at 292 (spelling modernized).

⁸⁶ *Id.* ¶ 39, at 293 (spelling modernized).

⁸⁷ *Id.* (spelling modernized).

⁸⁸ *Id.* ¶ 45, at 294 (spelling modernized).

system grounded in the liberal arts and a legal system designed to facilitate the development of genuine community rooted in love.⁸⁹

VI. COMMUNION FOSTERED THROUGH THE LIBERAL ARTS

The Word of God, not only preached but read, was the inheritance of all men and women regardless of station: “Reading of [Scriptures] is an ordinance of God,” wrote John Cotton, meant to improve the believer’s understanding of Christ’s nature and will.⁹⁰ Thomas Shepard charged readers with the task of applying their intellects to the study of Scripture to satisfy their longing for truth: to utilize “reason, reading, and comparing [would] help [the] heart to a full persuasion,” he wrote.⁹¹ As hearts more fully persuaded of the truth of Scripture were (in the Puritan view) better equipped for the sort of self-sacrificing civic communion they hoped to create, providing at least a rudimentary education for all was a secular as well as a spiritual desideratum.

In a 1642 order, the General Court chided those who failed “in training up their children in learning, and labor, and other employments which may be profitable to the commonwealth.”⁹² In order to correct the problem, the Court empowered the “chosen men appointed for managing the prudential affairs” of each town to “take account from time to time of all parents and masters, and of their children, concerning their calling and employment of their children, especially of their ability to read and understand the principles of religion and the capital laws of this country.”⁹³ The wording of the law illuminates several aspects of the public nature of education. First, the delegation of the subject to the care of those charged with administering the “prudential affairs” of the several towns underscores the civic purposes of education: if education of the young is one of the prudential affairs of public life, and if prudence, or practical wisdom, is the preeminent political virtue, then education must contribute something to the welfare of the community.⁹⁴

⁸⁹ See SAMUEL ELIOT MORISON, *INTELLECTUAL LIFE OF COLONIAL NEW ENGLAND* 27–56 (New York Univ. Press 2d ed. 1956); see *infra* note 153 and accompanying text.

⁹⁰ JOHN COTTON, *THE SINGING OF PSALMS: A GOSPEL ORDINANCE* (Quinta Press 2011) (1650), http://quintapress.webmate.me/PDF_Books/John_Cotton/Singing_of_Psalms_v1.pdf.

⁹¹ THOMAS SHEPARD, *Certain Select Cases Resolved* (Boston 1747), reprinted in 1 *THE WORKS OF THOMAS SHEPARD* 299, 328 (Doctrinal Track & Book Soc’y 1853), <https://archive.org/details/worksofthomashe01shep/page/n8>.

⁹² *Generall Court Proceeding* (June 14, 1642), in 2 *RECORDS OF THE GOVERNOR AND THE COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND* 6–7 (Nathaniel B. Shurtleff ed., 1835) (spelling modernized).

⁹³ *Id.* (spelling modernized).

⁹⁴ See ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, at 94 (W.D. Ross trans., Batoche Books 1999) (c. 384 B.C.E.) (discussing practical wisdom). In their defense of the New England way against English

The essentially civil character of education at this most basic level is further underscored by the fact that such institutions were controlled by the towns directly, and not officially under the oversight (although clearly subject to the influence of) the churches.⁹⁵

Second, the combination of “learning” and “calling and employment” under the same law indicates that education was understood to have both intellectual and practical elements. The overseers were to not only ensure that the young people were being provided with proper training in their particular callings, but also with a set of peripheral skills to utilize during those periods where their employments might be less active than others. The law mentions, for example, that children tasked with watching livestock also be given some other task such as “spinning upon the rock, knitting, weaving tape, etc.”⁹⁶ This highlights New Englanders’ commitment to the purposeful encouragement of individual industry, not only as a way to keep the economy of the community functioning smoothly, but also as a way to keep children from the sort of “wanton, dishonest, or immodest behavior” that might tempt them were their hands idle.⁹⁷ The law alludes to the ideal of communion as well, for the townsmen were to “divide the town amongst them” so that each of them had “a certain number of families to have special oversight of.”⁹⁸ Such oversight reflects both Cotton and Winthrop’s discussion of public spiritedness and communion, the special care toward one’s fellow citizens that recognizes in *their* good—and their virtue—the good of the community as a whole.

The importance of such a level of critical thought is further illustrated by New Englanders’ approach to catechesis, or the practice of doctrinal education typically accomplished using a set of questions and answers.⁹⁹ The purpose of catechizing was not the mere rote memorization of doctrinal statements, but rather, to provide a set of categories within which the catechumen could organize theological truths so that they would be most useful to individuals in their everyday lives. Catechizing, Ezekiel Rogers observed to Winthrop in 1639, is essential in ensuring that “the body of the

critics, John Allen and Thomas Shepard observed that God had left “civil societies and government thereof . . . to rules of humane prudence.” JOHN ALLEN & THOMAS SHEPARD, *A TRYALL OF THE NEW CHURCH-WAY IN NEW-ENGLAND AND IN OLD* 86 (London 1648), <https://quod.lib.umich.edu/e/ebo/A23641.0001.001?rgn=main;view=fulltext> (spelling modernized).

⁹⁵ Ministers in New England did not hold political office and thus had no more formal control over the schools or their curriculum than any other interested towns person.

⁹⁶ *Generall Court Proceeding*, *supra* note 92, at 6.

⁹⁷ *Id.* at 7 (spelling modernized).

⁹⁸ *Id.* (spelling modernized).

⁹⁹ *See supra* note 2; *see also infra* note 101 for examples of catechesis.

land” became as pure “as we must be.”¹⁰⁰ While the ministers appear to have been unable to agree upon a singular catechism, they quickly produced an abundance of printed catechisms.¹⁰¹

John Fiske’s published catechism *The Watering of the Olive Plant* is a particularly excellent example of the civic benefits of such a form of education.¹⁰² Its stated goals were to teach the Christian child the virtues of humility and self-sacrifice in learning “to prefer: the things of God before our own, those of public before those of private concernment, and spiritual blessings before those temporal.”¹⁰³ There are echoes of both Cotton’s *Promise* and Winthrop’s *Model* here: just as Cotton and Winthrop had exhorted their listeners to act with generous spirits and take on the burden of self-sacrifice in the task of planting the commonwealth, Fiske’s catechism calls for a radical form of other-regarding even in the privacy of one’s heart and prayers.¹⁰⁴ These, he urged, are to be oriented not toward one’s own desires or comforts, but first toward God and then toward the community.¹⁰⁵ Inasmuch as Fiske’s catechism helped to foster such virtues, it was not only a form of spiritual education, but also a means of civic formation.

It would be difficult to discuss the role of education in Puritan Massachusetts without at least mentioning Harvard. Because a residential college offered undergraduates the experience of living and working with a community of their peers in a relatively low-stakes environment, the Puritans believed that establishing such an institution was essential to their vision of a civic communion.¹⁰⁶ During the course of their education, young men

¹⁰⁰ Letter from Ezekial Rogers to John Winthrop (Dec. 8, 1639), in 4 WINTHROP PAPERS, 1638–1644, 159, 159–60 (Allyn Bailey Forbes ed., Mass. Historical Soc’y 1944).

¹⁰¹ See HUGH PETER, MILK FOR BABES AND MEAT FOR MEN (London 1630), <https://quod.lib.umich.edu/e/cebo/A09518.0001.001?rgn=main;view=fulltext>; JOHN COTTON, THE KEYS OF THE KINGDOM OF HEAVEN (Quinta Press 2017) (1644), http://quintapress.webmate.me/PDF_Books/John_Cotton/The_Keys_2017_v3.pdf; EZEKIEL ROGERS, CHIEF GROUNDS OF THE CHRISTIAN RELIGION SET DOWN BY WAY OF CATECHISING, GATHERED LONG SINCE FOR THE USE OF AN HONOURABLE FAMILY (London 1642); JOHN COTTON, MILK FOR BABES DRAWN OUT OF THE BREASTS OF BOTH TESTAMENTS (Paul Royster ed., Am. Studies Commons 2007) (1646), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1018&context=etas>; JOHN NORTON, BRIEF AND EXCELLENT TREATISE CONTAINING THE DOCTRINE OF GODLINESS, OR LIVING UNTO GOD (London 1648); SHEPARD, *supra* note 91.

¹⁰² See JOHN FISKE, WATERING OF THE OLIVE PLANT IN CHRISTS GARDEN (Cambridge 1657), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;rgn=main;view=text;idno=N00020.0001.001>.

¹⁰³ *Id.* at 18. Fiske regularly referred to the use of catechizing in his account of church meetings. See JOHN FISKE, THE NOTEBOOK OF REVEREND JOHN FISKE, 1644–1675, 125, 128–30, 136, 158–59, 200, 222, 233 (Robert G. Pope ed., 1974), <https://www.colonialsociety.org/node/1071>.

¹⁰⁴ *Fiske*, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ See MORISON, *supra* note 89, at 33–34.

learned to rely upon one another for support and encouragement, regardless of their families' socio-economic differences, and to challenge each other civilly in the course of academic disputations.¹⁰⁷ The effect of such shared intimacies among the students was to create a strong social network that continued throughout their lives.¹⁰⁸

VII. THE BRAMBLE AND THE TREES: LAW, LIBERTY, AND CIVIC COMMUNION IN MASSACHUSETTS BAY

The goal of civic communion manifested itself in the development of the colony's legal system as well. The process of drafting and publicizing the law code is a complex story.¹⁰⁹ Among the many technical twists and turns, leading to the 1648 *Laws and Liberties*, two significant theoretical points emerge. First, we see that Massachusetts's political leaders regarded their community to be a self-governing commonwealth (both in the sense of being largely independent from England and in the sense of relying on the consent of the governed). Second, in the writings of respected minister Thomas Shepard from this period, we see a thoughtful reflection on the political nature of communion in his commentaries on the importance of the people's active engagement in their own governance.¹¹⁰

In May 1631, the Massachusetts General Court voted to open freemanship to all church members (roughly 50% of the colony's adult male population); this was a decision well in keeping with the earlier move to place control of the day-to-day governance of the colony in the hands of the

¹⁰⁷ See *id.* at 33–40.

¹⁰⁸ See FRANCIS J. BREMER, CONGREGATIONAL COMMUNION: CLERICAL FRIENDSHIP IN THE ANGLO-AMERICAN PURITAN COMMUNITY, 1610–1692, 5–6 (1994) (discussing the importance of friendships among Puritan ministers in particular); see also DAVID D. HALL, FAITHFUL SHEPARD: A HISTORY OF THE NEW ENGLAND MINISTRY IN THE SEVENTEENTH CENTURY (Univ. of N.C. Press 1972). To my knowledge, no similar study has been conducted of the social networks among university graduates who did not enter the ministry, which would make an interesting project; John Langdon Sibley's *Harvard Graduates* does at least provide anecdotal references to the ongoing connections between alumni over time in passing. Letter from Lucy Downing to John Winthrop (Mar. 4, 1637), in 3 WINTHROP PAPERS, 1631–1637, 367, 367–69 (Allyn Bailey Forbes ed., Mass. Historical Soc'y 1944); Letter from Emmanuel Downing to John Winthrop (Mar. 6, 1637), in 3 WINTHROP PAPERS, 1631–1637, 369, 369–71 (Allyn Bailey Forbes ed., Mass. Historical Soc'y 1944); see also MORISON, *supra* note 89, at 33–34.

¹⁰⁹ For an overview of the historiography of the development of the *Laws and Liberties*, see Richard J. ROSS, *The Career of Puritan Jurisprudence*, 26 L. & HIST. REV. 227 (2008); Mark D. Cahn, *Punishment, Discretion, and the Codification of Prescribed Penalties in Colonial Massachusetts*, 33 AM. J. OF LEGAL HIST. 107 (1989).

¹¹⁰ See Thomas Shepard, Election Sermon (1638), in 24 NEW ENG. GENEALOGICAL & HIST. REG. 361 (Albert Harrison Hoyt ed., 1870) [hereinafter Shepard Election Sermon]; see also THOMAS SHEPARD, *Subjection to Christ in all His Ordinances and Appointments the Best Means to Preserve Our Liberty*, in 3 THE WORKS OF THOMAS SHEPARD 273 (Doctrinal Track & Book Soc'y 1853).

colonists themselves.¹¹¹ Less than a year later, the leadership of the Watertown church voted to resist a tax levy on the grounds that they were not represented in the Massachusetts General Court.¹¹² Winthrop recorded this incident with some sense of outrage: the Watertown men were clearly in the wrong from his perspective and were, “after much debate,” made to see the error of their position.¹¹³ Yet his journal entry also conveys a grudging sense that such complaints might be justified under certain circumstances:

The ground of their error was, for that they took this Government to be no other but as of a mayor & Aldermen, who have not power to make laws or raise taxations without the people: but understanding that this Government was rather in the nature of a Parliament, & that no assistant could be chosen but by the freemen, who had power likewise to remove the Assistants, & putt in others, & therefore at every general Court (which was to be held once every year) they had free liberty to confer & propound anything concerning the same, & to declare their grievances without being subject to Question or etc.¹¹⁴

The critical mistake of the Watertown freemen was to confuse Massachusetts Bay for a town: in “t[a]k[ing] this Government to be no other but as of a mayor and Alderman,”¹¹⁵ the Watertown dissenters failed to appreciate the scope of political authority which the founders had claimed for themselves. The Bay Colony was not subservient to higher levels of political authority in the same way a town was subject to a county and ultimately, to the King in Parliament. On the contrary, Winthrop presented the founders’ intention as the establishment of a genuinely sovereign commonwealth, equivalent to Parliament itself in the scope of its powers.¹¹⁶

¹¹¹ *A Gen’al Court, Holden at Boston* (May 18, 1631), in 1 RECORDS OF THE GOVERNOR AND THE COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, 86, 87 (Nathaniel B. Shurtleff ed., 1853). Studies of freemanship from various periods and places in the colony abound and are subject to the usual problems of missing records, limited sample sizes, etc. Few of them attempt to gather colony-wide data, with the notable exception of Robert Emmett Wall, Jr.’s 1970 study. See Robert Emmet Wall, Jr., *The Massachusetts Bay Colony Franchise in 1647*, 27 WM. & MARY Q. 136 (1970). Wall found that in the four counties of the Massachusetts Bay Colony in 1647, the percentage of adult males registered as freemen ranged from a low of 40% in Norfolk and 38% in Essex (the counties with settlements at the greatest distance from the colonial capitol), to a high of 54% in Suffolk and 53% in Middlesex. *Id.* at 138. The expansion of the franchise beyond the initial stockholders to include even the roughly 50% of the male population accounted for by Wall’s data is a remarkable triumph for the period.

¹¹² WINTHROP JOURNAL, *supra* note 20, at 63.

¹¹³ *Id.* (spelling modernized).

¹¹⁴ *Id.* (spelling modernized).

¹¹⁵ *Id.* (spelling modernized).

¹¹⁶ See *id.*

For Winthrop to describe the government of Massachusetts Bay as “in the nature of a Parliament” was at once a tremendous glorification of its power and independence and a nod to traditional notions of limited government vis-à-vis Parliament’s role as the protector of the rights of Englishmen and the ancient constitution.¹¹⁷ Winthrop’s attempt to portray the General Court as a type of parliament was strategic inasmuch as it allowed him to simultaneously assert a strong claim of sovereignty for the magistrates as a political body and rhetorically concede the limitations of that sovereignty by the authority of the people themselves, signified by the power of election and removal.¹¹⁸

The larger theoretical issue revealed by the Watertown complaints was only temporarily resolved by this rhetorical posturing; however, on May 8, 1632, the General Court ordered every town to send two delegates (soon to be known as deputies) to “advise with the Governor & Assistants about the raising of a public stock, so as what they should agree upon should bind all etc.”¹¹⁹ These limited advisory roles were expanded a few years later so that the representatives of the towns were able to “assist in making Laws, disposing lands etc.”¹²⁰ The creation of the office of the deputy would ultimately only delay rather than resolve the conflict over their political structure—yet the Court’s willingness to move with relative speed toward a system of tiered accountability is indicative of a general inclination to regard government as very much a public thing, in the sense of belonging to (and deriving its legitimacy from) the people themselves.

The dispute moved from the realm of theory to practice in September 1634 in the form of a controversy over the propriety of allowing the magistrates to exercise a veto (or “negative voice”) over the deputies, and spiraled over the next several years into accusations of arbitrary government.¹²¹ During the early days of the conflict, John Cotton addressed the General Court on the need for the interdependence of the various elements of society.¹²² Rather than simply support one party, Cotton “showed how all of these [people, magistrates, and clergy] had a negative voice” over the others, a rudimentary version of what might be termed checks and balances.¹²³ Winthrop tells us that Cotton used “Haggai 2:4 etc.” as the

¹¹⁷ *See id.*

¹¹⁸ For examples of English pamphlets on this subject, see *THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH-CENTURY ENGLISH POLITICAL TRACTS* (Joyce Lee Malcolm ed., 1999).

¹¹⁹ *WINTHROP JOURNAL*, *supra* note 20, at 68 (spelling modernized).

¹²⁰ *Id.* at 116 (spelling modernized).

¹²¹ *Id.* at 127–28.

¹²² *Id.* at 128.

¹²³ *Id.* (spelling modernized).

textual basis for his position and it was an apt passage—in the biblical text, the prophet Haggai was exhorting a prince, a priest, and “all the people of the land” to continue in the work of rebuilding the Temple in Jerusalem after their return from exile.¹²⁴

Just as this endeavor had required the combined resources of a prince, a priest, and the people, so too the success of the New England experiment would depend on the cooperation of the same order within society. In the event of a true deadlock between these various elements, however, Cotton instructed his audience that “the ultimate resolution etc.: ought to be in the whole body of the people” and closed with “a declaration, *of the people’s duty & right to maintain their true Liberties against any unjust violence etc.*”¹²⁵ Likewise, John Norton pointed out in a *Small Treatise on the Negative Vote* that “scripture, nature, and reason teach the people not to suffer their hand to be tied by [such] a vote but to arm themselves in their own defense.”¹²⁶ Even Nathaniel Ward, a minister less sanguine about the role of the people, conceded that they “may not be denied their proper and lawful liberties.”¹²⁷ It appears to have been rather universally accepted, in other words, that the people had a responsibility to engage in watchful oversight of their rulers, in order to ensure that they were not unjustly exercising their power.

Delegating their political authority to the magistrates and deputies did not absolve the people themselves from the responsibility of carefully overseeing their representatives’ actions. Among the issues most troubling to the freemen was the colony’s lack of a settled code of laws and the “danger” to the people arising from this oversight. Allowing the magistrates to act with undue discretion was seen to undermine the genuine sense of mutual investment and belonging upon which civic communion rested.¹²⁸ To remedy the error, the deputies recommended “some men should be appointed to frame a body of grounds of laws, in resemblance to a magna Carta: which being allowed by some of the ministers and the general court should be

¹²⁴ *Id.*; see also *Haggai* 2:4 (King James).

¹²⁵ WINTHROP JOURNAL, *supra* note 20, at 128 (emphasis added) (spelling modernized).

¹²⁶ John Norton, *Small Treatise on the Negative Vote* (1643), in 46 PROC. OF MASS. HIST. SOC. 279, 284 (Oct. 1912–June 1913) (spelling modernized).

¹²⁷ Letter from Nathaniel Ward to John Winthrop (Oct. 22, 1639), in 4 WINTHROP PAPERS, 1638–1644, 162 (Allyn Bailey Forbes ed., Mass. Historical Soc’y 1944) (spelling modernized).

¹²⁸ Winthrop, of course, understood the principle of civic communion rather differently, and argued that because those entrusted with the exercise of magisterial discretion were drawn from the people themselves and united to them in a permanent way, their power could be no significant threat to the community. John Winthrop, *A Reply in Further Defense of an Order of Court Made in May, 1637*, reprinted in 3 WINTHROP PAPERS 1631–1637, 463, 466 (Allyn Bailey Forbes ed., Mass. Historical Soc’y 1943).

received for fundamental laws.”¹²⁹ This motion was approved by the whole Court and in 1635, the first committee on the laws was formed.¹³⁰

As a result of his reputation as a man of learning, Thomas Shepard (along with a few others) was appointed to advise the General Court on the subject of the laws in 1636.¹³¹ Shepard seems to have held an expansive understanding of his role: in both his 1638 election sermon and his 1641 lecture series on Christian liberty, he articulated an understanding of civic communion as requiring a certain amount of watchfulness over one’s fellow citizens (including those in elected office).¹³²

For the 1638 election sermon, Shepard preached from a short parable in the book of Judges on the bramble and the trees.¹³³ The parable highlights one of the potential dangers of politics based on consent: that the people will, to their own detriment, grow weary of the work of participating in their own governance and become susceptible thereby to tyrannical rule. In the parable, the trees (“the rational men, in a Commonwealth”) decide they need a king to reign over them and they go first to the olive and then to the fig and then to the vine—each representative of a class of men (the wise, rich, or holy) who have particular gifts—asking them each in turn to “advance [themselves] above the trees.”¹³⁴ Each one refuses, declaring that to do so would be to reject their natural gifts of “fatness,” “sweetness,” and “wine” and thus upset the natural (divinely approved) order of things.¹³⁵ Finally, the trees go to ask the bramble—a plant with no good fruit to offer of its own—to be king, and he is more than willing, but since he knows he cannot keep their loyalty by virtue of his fruit, he threatens the trees.¹³⁶ With “a speech beseeming the majesty of a bramble sharp and bloody,” he tells the trees that if they do not stay “under [his] shadow,” he will destroy them.¹³⁷ What we learn from this

¹²⁹ WINTHROP JOURNAL, *supra* note 20, at 146 (spelling modernized).

¹³⁰ *Att the Gen'all Court, Holden at New Towne* (May 6, 1635), in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, 145, 147 (Nathaniel B. Shurtleff ed., 1853).

¹³¹ *Att the Gen'all Court, Holden at Boston* (May 25, 1636), in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, 173, 174 (Nathaniel B. Shurtleff ed., 1853).

¹³² See *supra* note 110.

¹³³ See *Judges* 9:7–15 (1599 Geneva Bible). Although John Cotton preached the first known election sermon in 1634, Shepard’s sermon is the first example of the genre to survive as a more-or-less complete text. See Shepard Election Sermon, *supra* note 110; see also R. W. G. Vail, *A Checklist of New England Election Sermons*, 45 PROC. OF AM. ANTIQUARIAN SOC. 233 (1935).

¹³⁴ See Shepard Election Sermon, *supra* note 110, at 362 (spelling modernized); see *Judges* 9:7–15 (1599 Geneva Bible).

¹³⁵ *Judges* 9:7–15 (1599 Geneva Bible).

¹³⁶ *Id.*

¹³⁷ See Shepard Election Sermon, *supra* note 110, at 362; *Judges* 9:7–15 (1599 Geneva Bible).

short parable is simple, Shepard argued: “In free states where the government depends upon popular election,” the people have no one but themselves to blame when they find themselves under unjust or corrupted rulers.¹³⁸

While Shepard’s sermon—delivered just prior to the actual casting of votes—unsurprisingly highlights the importance of selecting the right sort of rulers, it also alludes to the responsibilities citizens have to contribute to their own governance during non-election periods.¹³⁹ For example, he observed that in order to make sound choices in elections, the people must be able to look beyond their immediate good to “the consequences of things.”¹⁴⁰ That is, they must cultivate and practice a healthy level of skepticism toward those who present themselves as candidates for public office, particularly those who offer too eagerly to ease the burden of civic responsibility from the shoulders of the citizens themselves.¹⁴¹ In warning his listeners against the tendency of self-governing *citizens* to exchange their political power and its attendant responsibilities for the presumably “easier” role of *subjects*, Shepard alluded to the request of the people of Israel that God give them a king so that “we also will be like all other nations, and our king shall judge us, and go out before us *and fight our battles*.”¹⁴² The burdens of citizenship in a free government are real, Shepard acknowledged—but he also warned the people against trying to take the easy way out and abdicating their political responsibilities.¹⁴³

In order to help strengthen the citizens’ ability to resist their (natural) temptation to change the governors—with potentially ruinous results—Shepard urged them to embrace the idea of a strong legal system.¹⁴⁴ Law not only functions as a restraint on the ability of individual men to injure one another, it also restrains the temptation of the “bramble” to seek power.¹⁴⁵ “Where laws rule, men do not,” he observed—if the laws are shaped well, then there will be less of an opportunity for persons with interests opposed to

¹³⁸ See Shepard Election Sermon, *supra* note 110, at 362.

¹³⁹ Indeed, the people of Massachusetts had just come through a particularly trying example of such a time, the Antinomian Controversy of 1636–1638. Shepard’s sermon was delivered just two months after Anne Hutchinson’s excommunication. See DAVID D. HALL, *THE ANTINOMIAN CONTROVERSY, 1636–1638: A DOCUMENTARY HISTORY* (Duke Univ. Press 2d. ed. 1990).

¹⁴⁰ See Shepard Election Sermon, *supra* note 110, at 362.

¹⁴¹ See *id.*

¹⁴² *Id.*; 1 *Samuel* 8:20 (1599 Geneva Bible) (emphasis added).

¹⁴³ See Shepard Election Sermon, *supra* note 110, at 362.

¹⁴⁴ *Id.* at 363.

¹⁴⁵ Shepard stated the “sins of men are like [a] raging sea, which would overwhelm all if they have not banks; the banks are wholesome laws.” *Id.* (spelling modernized). Shepard noted the insufficiency of law apart from some party charged with their care and enforcement: “These banks will break down unless some keep them, hence: magistrates.” *Id.* (spelling modernized).

the common good to assert their ambitions.¹⁴⁶ Shepard cited 1 Timothy 2:2 to assert that the divinely appointed “ends” for government are “that we may lead a quiet and a peaceable life, in all godliness, and honesty.”¹⁴⁷ In this final exhortation, Shepard drew attention to the ability of published laws to further the end of genuine communion when they help secure the means by which individual men exercise their particular gifts and enable them to live in harmonious relationships with one another.¹⁴⁸

It would take approximately a decade for Shepard’s vision of a commonwealth grounded in the consent of the governed and guided by strong laws to be realized. In the same General Court session at which Shepard preached the “Bramble” sermon, the General Court ordered the freemen of every town to “collect the heads of such necessary and fundamental laws as may be suitable to the times and places where God by His providence hath cast us,” and to submit them to the committee tasked with overseeing the legal codification project, which would collate them and prepare a report for the Court to review.¹⁴⁹ Together, these two actions—each of which depended upon the participation of the freemen to an unprecedented extent—mark the first serious effort by the General Court to address the concerns raised by the deputies three years earlier. Indeed, 1638 marks a decisive turning point both in the development of the colony’s legal code, and in the ongoing struggle between those who preferred a “thin” definition of consent and representation and those who wanted to define these principles more robustly. Intentionally or not, the Court gave legitimacy to those who asserted that the people themselves were able to evaluate and respond appropriately to God’s will in defining their civil order:

Over the next several years, the Court slowly worked its way toward a draft of a full legal code, soliciting input from ministers John Cotton, Nathaniel Ward, and the freemen at large.¹⁵⁰ This was then to be distributed “to the several towns, that the elders of the churches and freemen may

¹⁴⁶ *Id.* (spelling modernized)

¹⁴⁷ *Id.*; 1 Timothy 2:2 (1599 Geneva Bible).

¹⁴⁸ See Shepard Election Sermon, *supra* note 110, at 363.

¹⁴⁹ *A Generall Court, Held at Newtowne* (Jan. 12, 1637/38), in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, 220, 222 (Nathaniel B. Shurtleff ed., 1853) (spelling modernized); *Generall Court* (June 6, 1639), in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, 260, 262 (Nathaniel B. Shurtleff ed., 1853).

¹⁵⁰ Although no copy of this committee report on the laws has survived, all indications are that the committee largely accepted Ward’s draft, as the document copied and distributed for review by the freemen is so referenced after its enactment into law. See David D. Hall, *Scribal Publication in Seventeenth-Century New England: An Introduction and a Checklist*, 115 PROC. OF AM. ANTIQUARIAN SOC. 29, 59 (2005).

consider of them against the [] Court.”¹⁵¹ Finally, at the December 1641 meeting of the General Court, a document known to history as the *Body of Liberties* was adopted.¹⁵² The purpose of the document was to publicly state “all such freedoms” as the citizens of the Bay Colony were able to imagine would be of use to themselves or to successive generations, in order to ensure that these freedoms would be protected while the process of establishing the governmental institutions continued.¹⁵³

In the same year that the *Body of Liberties* was adopted, Thomas Shepard preached a public lecture series on Christian liberty: the lectures highlighted the connection between inward and outward government.¹⁵⁴ Man, Shepard argued, must first be able to recognize and address his own sinful nature by exercising an “inward government” in order to appreciate and appropriately submit to the various forms of “outward government” to which he falls subject.¹⁵⁵

Although ideally, Shepard observed “all laws for public good should hurt no particular man,” all laws infringed upon someone’s exercise of a liberty they might legitimately claim, were it not for the competing claim of the broader society.¹⁵⁶

The heaviest end of a staff that is to be borne must fall on some man’s shoulder, and such laws must be made. Hence a man is to bear and submit cheerfully, i.e., from the rule of love, which will abate of particular for the general good; love that more than mine own. [] The law of justice: a man is to do as he would be done by; there is no man, but if his good was advanced by the general, but would be content that some particular should be pinched.

¹⁵¹ *The Generall Court at Boston* (Sept. 5, 1639), in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1628–1641, 276, 279 (Nathaniel B. Shurtleff ed., 1853) (spelling modernized). The towns were apparently slow to respond and, at the next session of the General Court, were asked to return their responses “in the next eighth month.” *Id.* at 292–93, 320, 346.

¹⁵² *The Body of Liberties* was published from a manuscript copy in the Collections of the Massachusetts Historical Society. See Francis C. Gray, Remarks on the Early Laws of Massachusetts Bay (Little & Brown 1843), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112104872231;view=1up;seq=7>.

¹⁵³ The Massachusetts Body of Liberties (1641), <https://history.hanover.edu/texts/masslib.html>. Stephen Innes argues that among the most innovative aspects of the *Body of Liberties* is its treatment of land as an “economic commodity” unencumbered by feudal laws about primogeniture, etc. and instead, as something freely to be partitioned, sold, or inherited, according to the purposes and desires of the landowner. See STEPHEN INNES, CREATING THE COMMONWEALTH: THE ECONOMIC CULTURE OF PURITAN NEW ENGLAND 214–16 (1995). This advancement is certainly in accord with Puritan notions of improvement and permanency as expressed by Cotton in *Promise*.

¹⁵⁴ The sermons were published posthumously as a single volume, *A Wholesome Caveat for a Time of Liberty*, in the early 1650s when they were “transcribed by a godly brother, partly from the author’s own notes, partly from what he took from his mouth.” See SHEPARD, *supra* note 110, at 283.

¹⁵⁵ *Id.* at 291.

¹⁵⁶ *Id.* at 349.

□ The law of nature: the stomach is content to be sick, and the body weak, to heal the whole body.¹⁵⁷

Note the echoes of Winthrop and Cotton's earlier arguments about the nature of civic communion, which depends upon the willingness of the people to sacrifice their own particular interests for the good of the community as a whole.

At the core of Shepard's lecture series is a discussion of the freedom of an individual believer to dissent in thought, word, or deed, on the basis of his or her private conscience. For Shepard, the legitimacy of the laws made by an external government depended upon them being "deliberately made [and] prudently published, for the public peace, profit, [and] comfort of the place"—and that this be "apparently so, and not in saying so only."¹⁵⁸ Moreover, the magistrates were to limit their lawmaking efforts to subjects included in the moral or natural law: they were not to "make what laws they will about civil, religious, or indifferent things, and then people to submit to them for no other reason but because of their will."¹⁵⁹ By limiting the scope of the legitimate lawmaking to those things in the moral or natural law, Shepard intended to curb magisterial discretion from the start.¹⁶⁰

To understand the limitations upon both the authorities and the people, Shepard posed two questions. He invited the magistrates and deputies to consider "what prudence should be used in making laws," while to his fellow citizens, he asked "how far those human laws and town orders bind conscience"—that is, to what extent an individual was required to submit to laws they found objectionable on principle.¹⁶¹ The two questions were related, and he exhorted both groups to remember that "what is of Christian liberty hath its freedom from the word [of God] . . . and hence the word only hath absolute power to bind masters, servants, and princes how they govern, and people how they subject."¹⁶² Where Scripture was silent, in other words, the individual (whether among the governed or the governor) had a degree of latitude over their choices.

To the body of the people living under the authority of others, Shepard urged first and foremost, a measure of charity with their rulers.¹⁶³ Although

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 343–45.

¹⁵⁹ *Id.* at 343.

¹⁶⁰ Such laws have been characterized in more recent scholarship as "written on the heart" or as things we "can't not know." See J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW (1997); J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW: A GUIDE (2011).

¹⁶¹ SHEPARD, *supra* note 110, at 345.

¹⁶² *Id.* at 346.

¹⁶³ *Id.*

it was true that “human laws and town orders [bound] conscience” only insofar as they could be shown to be in accordance with the higher laws of Scripture, for the sake of order, Shepard counseled forbearance.¹⁶⁴ Were he to encounter a law not in keeping with the teachings of Scripture, Shepard suggested the citizen “come in private, and confer with [the magistrates], and hear what may be said, and be willing to give and take reason.”¹⁶⁵ By avoiding the scandal of a public confrontation, both parties would be spared the necessity to engage in strategic grandstanding, and could perhaps, engage in some meaningful dialogue about the purpose and application of the law in question.

Shepard did not limit his advice to the disgruntled in conscience to this, however. As he sadly acknowledged, there was “[n]othing more usual than to make civil laws and orders crossing God’s law, and to pretend public good, which ever prove the public pests.”¹⁶⁶ If, after duly approaching the magistrate to discuss the offending law, it still appeared that the law “be made for public hurt, [then] that law is not of God.”¹⁶⁷ Laws that were “only in appearance and pretense for public good, and not really, they bind not,” Shepard said simply.¹⁶⁸ Shepard did not intend to advocate for widespread disregard of duly created legislation merely on the basis of individual conscience. Yet despite its potential for misuse, the individual citizen still retained a right to assess the legitimacy of the laws made ostensibly for his or her good, and even to refuse to obey them where they appeared to the contrary. The exhortation takes on additional poignancy when we recall that Shepard was preaching the sermon series over the same period of time during which the freemen of the colony were being asked to review and comment upon the proposed body of fundamental laws. Indeed, Shepard’s sermon might have helped to assuage the doubts of those among the freemen (or the magistrates) who questioned either the need for, or the safety of, such an exercise.

Shepard went on to offer some practical advice to guide such legal review. He suggested the citizens pay particular attention to the following types of harmful legislation, either of which could be resisted for conscience’s sake: first, things which were “forbidden plainly” by the laws of God and could therefore never be for the public good; second, things “indifferent in their nature . . . but inconvenient in their use”—that is, laws which created a firm rule in matters “which may as well be left undone as

¹⁶⁴ *Id.* at 345.

¹⁶⁵ *Id.* at 347.

¹⁶⁶ *Id.* at 348.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

done.”¹⁶⁹ Here, Shepard adopted a standard defense of theological dissent to legal or civil dissent: things indifferent were neither good nor bad in themselves, and without either warrant or exclusion from the word of God. They were therefore considered to be areas in which individual believers had liberty to act according to the dictates of their own consciences, free of the coercive power of either church or state.¹⁷⁰ Shepard noted that although “the clawbacks of princes” think they exercise the most power in these areas, “the truth is, he hath least power here: because they are idle and idol laws.”¹⁷¹ They are *idle*, in the sense that the laws fail to support any acknowledged public good, and, indeed, because they are “inconvenient,” often hinder it; and *idol*, in that the laws are a usurpation by the magistrate of power over an area not given to him by God. Laws touching on such things can be legitimately resisted on the grounds that they are “inconvenient” and thus, are “not for public good, whatever is pretended,” Shepard argued; there was no legitimate reason to restrict the freedom of the people with laws in such matters.¹⁷²

Even after the *Body of Liberties* had been enacted, tensions between the magistrates and the deputies over the seemingly unbounded discretionary powers of the magistrates continued to mount. Although it has been commonplace for scholars to assume a continuity of interest between the clergy and the magistrates as members of a cultural elite in the colony, Shepard’s lectures illustrate that such an alliance—when and if it existed at all—was only partial at best.¹⁷³ The ministers were no more interested in living under an authoritarian regime than any other class of freemen in the colony; indeed, based on their experience in England, they had specific fears about an enlarged sphere of civil authority.¹⁷⁴ For the purity of both church,

¹⁶⁹ *Id.*

¹⁷⁰ Puritan reformers frequently framed their objections to the Church of England on the grounds that many of the practices of the church—kneeling, wearing the surplice, the observation of holy days, etc.—were not sanctioned by any passage of the Bible.

¹⁷¹ SHEPARD, *supra* note 110, at 348–49.

¹⁷² *Id.* at 348. On the other hand, he observed that things “indifferent in their nature, but convenient and comfortable in their use, those are indeed according to God.” *Id.* The critical point for Shepard was the liberty of the individual believer: “Christ hath purchased [this liberty] by his blood, and which God’s law gives, no law of man can abolish or take away.” *Id.*

¹⁷³ On the supposed alliance between the ministry and the magistracy, see PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (Harv. Univ. Press 1954); DARREN STALOFF, *THE MAKING OF AN AMERICAN THINKING CLASS: INTELLECTUALS AND INTELLIGENTSIA IN PURITAN MASSACHUSETTS 77–80* (1998). More recently, Michael Winship has demonstrated the natural alliance between the ministers and the deputies. See MICHAEL P. WINSHIP, *GODLY REPUBLICANISM: PURITANS, PILGRIMS, AND A CITY ON A HILL* (2012).

¹⁷⁴ On the support of Puritan clerics for limited government and constitutionalism in England dating back to the reign of Elizabeth I, see Michael P. Winship, *Freeborn (Puritan) Englishmen and Slavish*

and state, no member of the New England clergy held political office during the seventeenth century, and even when the clergy were called in to consult with the General Court on political matters, there was no guarantee that they would side with the magistrates rather than with the deputies. Indeed, throughout the 1640s, whenever the deputies challenged the magistrates' claims to virtually unlimited discretionary powers, the clerical commentary tended to favor the position of the lower house.¹⁷⁵

In a series of *Answers of the Reverend Elders to Certain Questions Propounded to Them* (1641–1646), the clergy repeatedly affirmed that the colony's charter gave the freemen (or their deputies) “full power and authority” and that this power extended to legislative as well as “consultative or directive” matters.¹⁷⁶ The use of the terms “power and authority” was evidently meant as a rebuke to the magistrates, who had repeatedly pressed their view that the people had “liberty” only, a position the ministers clearly rejected: “We conceive by the patent, as the people have liberty of counsel so they have also other power or authority, as we have expressed in our answers to the two first questions sent unto us by our honored magistrates.”¹⁷⁷ Finally, the elders observed that even at levels below the General Court, the institutions of justice in Massachusetts Bay were by nature “mixed”—although the judges ruled “aristocratically” in a sense, “even in these courts there is some place for a democratical dispensation in respect of the jurors.”¹⁷⁸ The ministers, in other words, were careful to assert the rights and responsibilities of the people to participate in their own government on a more than mechanistic level.

The other major way in which the clergy supported the deputies was in repeatedly urging the General Court to adopt a fixed code of laws. The ministers were particularly adamant that the colony should enact and publicize prescribed penalties for various crimes.¹⁷⁹ In response, in May

Subjection: Popish Tyranny and Puritan Constitutionalism, 124 ENG. HIST. REV. 1050 (2009); Nicholas Tyacke, *The Puritan Paradigm of English Politics, 1558–1642*, 53 HIST. J. 527 (2010).

¹⁷⁵ STALOFF, *supra* note 173, at 76–80.

¹⁷⁶ The contributors to this document are not named, nor is any date given. The editors of the *Hutchinson Papers* argue that it may actually represent a compilation from a series of such exchanges dating from the period after the Antinomian Controversy and prior to 1646. See *Answers of the Reverend Elders to Certain Questions Propounded to Them*, in 1 HUTCHINSON PAPERS 205, 208 (1865) (spelling modernized).

¹⁷⁷ *Id.* at 211 (emphasis added) (spelling modernized).

¹⁷⁸ *Id.* at 212 (spelling modernized). On the democratic nature of juries in the English tradition, see WILLIAM PENN, *The People's Ancient and Just Liberties Asserted* (Sept. 1670), in THE POLITICAL WRITINGS OF WILLIAM PENN 3 (Andrew Murphy ed., Liberty Fund 2002); see also Andrew Murphy, *Trial Transcript as Political Theory: Principles and Performance in the Penn-Mead Case*, 41 POL. THEORY 775 (2013).

¹⁷⁹ WINTHROP JOURNAL, *supra* note 20, at 558.

1643, the General Court ordered a committee to “examine and perfect the laws”; a year later, they ordered each of the counties in the colony to create a committee composed of a magistrate, a minister, and some freemen, for the purpose of consultation on the subject.¹⁸⁰

It was during this period that Winthrop delivered his famous *Little Speech on Liberty*.¹⁸¹ Winthrop told the people that liberty consisted of two kinds: natural and civil. Natural liberty was nothing more than the assertion of will: “Man as he stands in relation to man simply, hath liberty to do what he lists: it is a liberty to evil as well as to good.”¹⁸² Civil liberty, on the other hand, existed “in the moral law, and the politic covenants and constitutions, amongst men themselves,” and was “a liberty to that only which is good, just, and honest.”¹⁸³ The problem in Massachusetts was that the people had mistaken the one for the other: they had forgotten that they were not simply beasts, but members of a covenanted community whose freedom was limited by the purposes for which the community had been gathered.¹⁸⁴ Winthrop used several metaphors to make his point: it is like the freedom of a woman, who having chosen her spouse, must accept his authority as the head of her household per biblical teaching, or that of the new Christian, who having been set free from sin and death by Christ, must no longer keep on sinning, but conform himself to the image of Christ.¹⁸⁵ Likewise, although New Englanders (through their deputies) had repeatedly claimed their liberties were in jeopardy for want of a legal code, Winthrop argued quite the opposite: the liberty which New Englanders claimed depended upon the extent to which their lives were intertwined in a network of mutuality.¹⁸⁶ Whatever individual rights they might claim could only be realized within the commonwealth, and it was the wisdom of their leaders (not the laws) which secured their liberty.¹⁸⁷

Winthrop’s understanding of citizenship blends with Shepard’s in the dedicatory epistle of the eventually published *Laws and Liberties*, the

¹⁸⁰ *A Generall Court of Elections, Held at Boston* (May 10, 1643), in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 1642–1649, 33, 39 (Nathaniel B. Shurtleff ed., 1853) (spelling modernized); *A Generall Court, Held at Boston* (Mar. 7, 1643/44), in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 1642–1649, 54, 61 (Nathaniel B. Shurtleff ed., 1853).

¹⁸¹ John Winthrop, *Little Speech On Liberty* (1645), <http://teachingamericanhistory.org/library/document/on-liberty/>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ WINTHROP JOURNAL, *supra* note 20, at 586–89.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ On this point, Winthrop’s thinking is not too far from Locke’s in some respects.

members of the General Court urged the inhabitants to study and understand the laws presented in the document as a means to encourage greater self-government.¹⁸⁸ Indeed, they apologized for its imperfections by asserting their desire to publish the volume as expeditiously as possible in response to the *citizens'* "longing expectation, and frequent complaints for want of such a volume to be published in print: wherein (upon every occasion) you might readily see the rule which you ought to walk by."¹⁸⁹ Clearly, the expectation from both the magistrates and the people was that the publication of the laws would enable the citizens to read and internalize them—law in this sense was instructive, not merely prohibitory, and citizens consented to the laws through their practice of obedience.

Just as the people had consented through their votes to the selection of the magistrates and deputies, and had "given [them] power to make these laws," so too they had to consent to the laws in practice or "execution."¹⁹⁰ "We must now call upon you to see them executed," the Court exhorted the public, "remembering that old and true proverb, The execution of the law is the life of the law."¹⁹¹ In this context, execution seems to refer to the practice of private citizens in observing the laws, rather than to coercive actions taken after the fact by the government. Understanding the execution of the law as a private or individual practice here seems to suggest something more than the minimal notion of tacit consent; rather, it evokes the ideals of self-restraint and the internal cultivation of virtue, characteristic of Reformed teachings on the theological process of sanctification, and applies them in a civic context.

Consent in the form of law-abidingness could also generate communion in other ways. The General Court reminded the citizens that they were members of a body politic, and must, therefore, obey some laws not for their own benefit, but for the greater good.¹⁹²

If any of you meet with some law that seems not to tend to your particular benefit, you must consider that laws are made with respect to the whole person, and not to each particular person: and obedience to them must be yielded with respect to the common welfare, not to thy private advantage, and as thou yields obedience to the law for common good, but to thy disadvantage: so another must observe some other law for thy good, though

¹⁸⁸ The Laws and Liberties of Massachusetts (1648), reprinted in *COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY* 95–135 (Donald S. Lutz ed., 1998).

¹⁸⁹ *Id.* at 98.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

to his own damage; thus must we be content to bear one another's burdens and so fulfill the Law of Christ.¹⁹³

The founding aspiration of communion is combined with an appeal to private interests; individual citizens can find an incentive to obey the law even when it appears to conflict with their private goods, if they remember that at other times, others will be doing the same to their benefit. The language here is very close to that of Shepard's lecture, and echoes Winthrop and Cotton's earlier arguments about the nature of civic communion. This robust vision of "enforcement" of the law through the ongoing consent of the people in the form of law-abidingness can thus be understood as both private and public in its orientation.

As the individual members of the community practice law-abidingness, they are not only gaining experience in restraining their own private will for the good of the community, but they are also participating in the cultivation of a public ethos in which self-governance (the political manifestation of moral equality) is understood to be not simply a matter of individual choice, but of the right sort of choice, the exercise of liberty within the restraints of virtue. In formulating consent as ongoing law-abidingness, the founders of Massachusetts created a way to incorporate the vast majority of inhabitants of the physical community into their civic communion, thus using one aspirational principle to help cement the other. Non-freemen (persons without the franchise) are just as able to help execute the laws through this sort of internalized observation thereof as freemen.¹⁹⁴ Although citizenship in the formal sense of suffrage was still limited to church members, the only persons exempted from the communion in the more practical sense of consent discussed above would be those who chose to exempt themselves by breaking the laws.

In substance, the 1648 *Laws and Liberties* was, as it was intended to be, a perfection of the laws: "Both a restatement of the law [already enacted] and a code of statutes for the future" in response to the careful survey work done by multiple committees over the preceding decades.¹⁹⁵ The *Laws and Liberties* served as a monument to New England's independent political existence—their laws, although in accordance with their charter, not

¹⁹³ *Id.*

¹⁹⁴ Note that in 1647, non-freemen twenty-four and older were given the vote in town meetings, and the obligation to serve on juries; every inhabitant was made eligible to participate and present bills to the Court, etc. *A Gen'ral Court of Election* (May 26, 1647), in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1642–1649, 186, 197 (Nathaniel B. Shurtleff ed., 1853).

¹⁹⁵ GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 136 (Macmillan Pub. Co. 1960).

repugnant to those of England, were nevertheless, wholly their own. The *Laws and Liberties* of Massachusetts Bay, then, are best understood as the institutionalization of civic communion.

As a constitution of sorts for the commonwealth, the *Laws and Liberties* depended on the preservation of civic communion, and unsurprisingly, contain several provisions tending toward the same. In response to the tendency of “many” church members to shirk their civic responsibilities by failing to apply for freemanship, the Court ordered “all such members of Churches in the several towns within this Jurisdiction shall not be exempted from such public service as they are from time to time chosen to by the Freemen of the several towns.”¹⁹⁶ Similarly, the Court suggested the various towns allow non-freemen who were willing to “take the Oath of fidelity to this Government” to serve on juries and vote in town meetings.¹⁹⁷ The purpose of both laws was to strengthen the connections between otherwise disenfranchised persons and the rest of the community, while also increasing the community’s ability to draw on the diversity of gifts and callings of as many citizens as possible, regardless of their status as church members or landholders.¹⁹⁸

Although nothing in either law would have allowed non-freemen to vote in colony-wide elections, or enabled them to serve in a civic or political capacity at the county or colony level, in extending additional political rights and responsibilities on the *local* level, these provisions strengthened the bonds between such persons and their nearest civic association. As Winthrop had said about the magistrates, such relationships served a regulatory purpose; the non-freemen who might otherwise have resented the authority of their town governments as something alien to themselves, would no longer have a reason to do so, and thus, might more easily comport themselves to the local ordinances.¹⁹⁹

Furthermore, although the presumption of the law is that non-freemen are at least sometimes in that category by their own choice, they are still considered members of the commonwealth, and thus, can be forced to serve when the common good requires it: their participation is a moral responsibility first. Nothing in the *Laws and Liberties* suggests that the non-freemen could refuse to serve if called upon by their local community. Likewise, nothing in the laws about election of magistrates or deputies provided for the possibility that individuals so chosen might prefer not to

¹⁹⁶ The *Laws and Liberties* of Massachusetts, *supra* note 188, at 116 (discussing freemen and non-freemen) (spelling modernized).

¹⁹⁷ *Id.* at 132 (discussing Townships Law No. 5) (spelling modernized).

¹⁹⁸ *See id.* at 116, 132.

¹⁹⁹ *See* WINTHROP, *supra* note 128, at 466.

serve. This attitude toward representative government privileges the will of the majority (as represented by the electors in any particular town) over the independent agency of the non-freemen dragooned into serving on juries, etc., who then become, in some ways, the bondservants of the public.²⁰⁰ It is this sense of a public spirit in which the individual is in some ways, inseparable from the broader civic communion of which they are a part, and the tensions inherent between that ideal and the other founding aspirations, that would prove most difficult to maintain over the remainder of the seventeenth century.

VIII. CONCLUSION

The Puritan idea of a commonwealth as a civic communion encourages us to think about how a sense of duty (toward one's self, God, and others) can also lead us to the truth of human freedom (agency) and how that sense can shape our future as a free people with shared interests and capacities. A free society requires a sense of mutuality—my rights, my capacity for freedom can only be fully realized when my neighbors' rights and capacities are similarly realized.²⁰¹

As Rabbi Abraham Joshua Heschel wrote, "God has a stake in the life of man, of every man. But this idea cannot be imposed from without; it must be discovered by every man; it cannot be preached, it must be experienced."²⁰² Like the Puritans, Heschel reminds us that our responsibilities are created and are liberating insofar as they demand of us a sense of agency and sacrifice. Insofar as our political commitments can point us toward the larger purposes of our freedom and dignity, they are more than merely utilitarian and rather can help us to more truly realize our own best flourishing even while we contribute to the flourishing of others through the common good. Heschel even uses the language of communion, writing: "Man's true fulfillment cannot be reached by the isolated individual, and his true good depends on communion with, and participation in, that which transcends him. . . . Freedom is . . . a spiritual event."²⁰³ At no time in American history

²⁰⁰ The Laws and Liberties of Massachusetts, *supra* note 188, at 109–10, 126–28 (discussing deputies for the General Court and magistrates).

²⁰¹ I'd like to thank Sarah Beth Kitch for introducing me to the writings of Joshua Heschel and encouraging me to think deeply about the role of the prophetic voice in establishing the boundaries of a civic communion as something with applications for the current century, not only the seventeenth!

²⁰² ABRAHAM JOSHUA HESCHEL, *Religion in a Free Society*, in THE INSECURITY OF FREEDOM: ESSAYS ON HUMAN EXISTENCE 3, 13 (Farrar, Straus & Giroux 1975) (1954).

²⁰³ *Id.* at 16.

has this been more clearly and productively the case than during the Puritans' struggle to create the Commonwealth of Massachusetts.