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C. Scott Pryor

Glenn M. Hoshauer

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PURITAN REVOLUTION AND THE LAW OF CONTRACTS

C. Scott Pryor[†] *and Glenn M. Hoshauer*[††]

ARTICLE ABSTRACT

The revolutionary political, economic, and religious changes in England from the time of Henry VIII through the execution of Charles I accompanied the creation of the modern law of contracts. Most legal historians have ignored the impact of the Protestant Reformation and the rise of Puritanism on the development of the common law. Only a few historians have considered the influence of Puritanism on the law but have come to conflicting conclusions. This paper considers the question of Puritanism's impact on three aspects of the common law of contracts: the rise of the writ of assumpsit, the rationalization of the doctrine of consideration, and the independence of promissory conditions. The Authors conclude that Puritan theology was irrelevant to assumpsit and consideration but could have influenced the framework of analysis of the application of virtually absolute liability in Paradine v. Jane.[1]

Second, the Puritan emphasis on discipline—personal, social, and ecclesiastical—represents an independent source of influence on the development of the common law of contracts. The disciplined life grew in cultural significance with the Reformation and the subsequent process of confessionalization. Of the three confessional traditions arising from the Reformation, the Reformed, which included the Puritans, implemented discipline to the greatest extent. The Puritan tools of discipline—self-examination, literacy, catechizing, and local ecclesiastical implementation—proved effective. The emerging modern state valued a disciplined citizenry and eventually co-opted the social gains produced by Puritanism. The particular forms of Puritan theology and discipline were contributing factors to the English Civil War. The Civil War both precipitated the monopolization of judicial power in the common law courts and exacerbated the need for the imposition of social order from above. These factors also underlay the decision in Paradine v. Jane.[2] *Thus, the Authors believe that Puritan social practice influenced the common law of contracts.*

† Associate Professor of Law, Regent University School of Law. J.D. 1980, University of Wisconsin Law School. M.A. 1997, Reformed Theological Seminary. Those to whom thanks are due are legion. In particular, I would like to thank Regent University School of Law for the research grant that helped make this Article possible and Texas Wesleyan School of Law for co-sponsoring the conference marking the 150th anniversary of *Hadley v. Baxendale* where I presented an initial draft and received many encouraging comments. On a personal level, I must thank Professors Joseph Perillo and Val Ricks, as well as the Hon. L. J. Priestley, Q.C., for their useful insights and Professor Craig Stern for his invaluable assistance with translations from Latin. William Magee's research assistance was helpful. Special thanks, however, must go to Professor Harold Berman, whose work inspired this project and whose willingness to discuss my conclusions, even where they differed from his, exemplifies the spirit of Christian humility.

†† B.A. 1991, Grove City College. M.Div. 1995, Gordon-Conwell Theological Seminary. J.D. (anticipated 2005) Regent University Law School.

1. 82 Eng. Rep. 519 (K.B. 1647).
2. *Id.*

I. INTRODUCTION

England experienced significant changes in at least four areas during the century before the execution of Charles I in 1649. Notable changes occurred in the common law of contracts, England's political topography, its principal mode of economic activity, and its religious

landscape. With respect to the law of contracts,[3] three subjects of transformation stand out as most significant: development of a new form of action to vindicate contract claims, the creation and rationalization of a new doctrine of consideration, and the ever-increasing treatment of promises as absolute obligations. From early in the sixteenth century, the writ of assumpsit increased in usefulness until it became a commonplace writ for contract cases by the early years of the next century. In the 1530s, a knowledgeable observer might have confused consideration for civil law *causa*. Within a few years, the contours of consideration in assumpsit had changed from a tool for redress for injury to the promisee to vindication of the promisor's expectation. So, too, a party's duty to perform a promise, which might have been discharged for several reasons in the sixteenth century, was virtually absolute one hundred years later.

Second, radical political change marked the era beginning with Henry VIII and ending with the execution of his distant nephew, Charles I. Following the turmoil of the fifteenth century, the strong Tudor monarchs actively pressed for the expansion of the royal prerogative.[4] The nobility, still greatly reduced from the War of the Roses, was in no position to oppose Tudor aggrandizement. For over half of the sixteenth century, a population anxious for political stability acquiesced. A constitutional crisis began to grow during the latter years of the reign of Elizabeth and reached crisis proportions during the Stuart monarchy. The end of this study will see the complete reversal of Henry's efforts. Rather than a strong King-in-Parliament, there will exist a Parliament without a king—a constitutional revolution. The ideological resources for England's constitutional revolution came from a working combination of Puritans with their ecclesiology and covenant theology together with the common lawyers with their ancient law.[5]

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3. Reference to generic contracts for this period in English history bears the risk of ambiguity. The historically correct referent of the writ of debt sur contract is too narrow to capture my intent, and the modern concept of contracts is anachronistic. For purposes of my introduction, and with a nod to the Restatement (Second) of Contracts, I intend "contract" to mean those claims cognizable at common law for failure to keep one's promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

4. *See* LEWIS W. SPITZ, THE PROTESTANT REFORMATION 1517–1559, at 249 (1985) ("England had emerged from the ruinous civil War of the Roses only a few years before, thanks to the strong arm of Henry VII.").

5. "In appealing to precedents that limited the arbitrary power of the king, the Puritans could look to the support of the common lawyers, including many who were by no means sympathetic with the Puritan cause as such." Harold J. Berman, *Religious Foundations of Law in the West: A Historical Perspective*, 1 J.L. & RELIGION 3, 33 (1983).

Third, substantial economic changes also characterized a period that historians have described as England's first industrial revolution.[6] The dissolution of the monasteries in 1536 enriched Henry. His subsequent sales of the monasteries' property enriched the growing non-noble gentry who, in turn, adopted new agricultural efficiencies which led to enclosures and subsequent rural depopulation. A rise in numbers of the urban poor quickly followed. Continued expansion of the commercial, mercantile, and industrial middle class took place after 1540.[7] The medieval patrimonial social order was giving way to modern liberalism. Following nearly two centuries of disruptions marked by plague and civil war, the pace at which contract replaced feudal status increased. With the rise to power of a new class, a much freer market economy would come to dominate the production and control of wealth in England.

Finally, substantial religious change also marked this long century of changes. While Henry broke with papal jurisdiction over the Church in England in 1531, early Tudor reforms of doctrine were limited. Henry sought no changes of internal ecclesiastical structure or practice.[8] His occasional tendencies toward Lutheranism never matured, and Henry died committed to substantially all of received Catholic dogma.[9] With the accession of Edward VI in 1547 and Elizabeth I in 1558 and for the balance of the century, a more distinctively Reformed or Calvinistic form of Protestantism gradually took hold in the Church of England.[10] Yet, during the Stuart monarchies in the seventeenth century, the tenor of the Church of England became less satisfactory both theologically and in practical administration to many known as Puritans. Thus, by 1642, Anglicanism and all England were convulsed with a civil war in which both king and bishop were de-

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6. *See generally* CHRISTOPHER HILL, SOCIETY AND PURITANISM IN PRE-REVOLUTIONARY ENGLAND 99–117 (St. Martin's Press 1997) (1958) [hereinafter HILL, SOCIETY AND PURITANISM] (devoting a chapter to the problem of labor and industry during this period).

7. *See generally* R. H. Britnell, *The English Economy and the Government, 1450–1550*, *in* THE END OF THE MIDDLE AGES? 89 (1998) (discussing slow development of the English economy until the 1540s and the sale of monastic estates).

8. Steady-state ecclesiology must be distinguished from Henry's position on the monasteries. Henry made no change to the formal structure of the Church of England except to substitute himself as its civil head. *See, e.g.*, A.G. DICKENS, THE ENGLISH REFORMATION 333–35 (1964).

9. As noted by Spitz:

> [In 1540 Henry] present[ed] to Parliament . . . the Six Articles Act. It was truly Henry's own, for he revised the initial draft himself and sat in on the debate in the House of Lords. The Six Articles reverted to (1) a Catholic definition of transubstantiation in the sacrament; (2) celibacy of the clergy as a divine order; (3) the binding character of the oaths of regular clergy; (4) communion under one kind; (5) the appropriateness and necessity of private masses; and (6) private confession.

SPITZ, *supra* note 4, at 267.

10. *See id.* at 278 ("Elizabeth had an exclusively Protestant council, men theologically more Protestant than she and some even favorable to Puritanism.").

posed. A hierarchical Church rooted in the Middle Ages and centered on the administration of grace through the sacraments was (nearly) replaced by a Church (or churches) focused on self-governance, preaching, and—most importantly—discipline.

That the political and religious changes discussed above were subsequently partially reversed should not obscure the long-term significance of these areas of transformation. The Restoration of Charles II in 1660 did not re-establish a king with political powers like those of his Tudor and Stuart ancestors. A new constitutional order was confirmed. Even re-establishment of the Church of England restored an ecclesial body in which tempered Puritan religious ideas had become commonplace. With respect to legal and economic changes, the Restoration only accelerated what had preceded it.

Articulation of a relationship between legal, political, economic, and religious changes in early modern English history is not new. Puritan apologists of the seventeenth century were quick to read the hand of divine Providence in at least the constitutional changes of this era. Yet, with the Restoration, what had been the hand of God was considered to have been a great rebellion and formally ignored as "nonhistory."[11] Over two hundred years later, the early twentieth century sociologist Max Weber suggested there was a close relationship between England's nascent capitalism and developing Puritan theology.[12] A few decades later, R.H. Tawney gave priority of place to material changes in the means of production and asserted that it was economic changes, exemplified by capitalism, which transformed the epiphenomenum of religion as well as public and private law.[13]

With respect to the role of religion in history, some in contemporary academic circles still exhibit the attitude that law professor Stephen Carter describes as the trivialization of religious belief.[14] This trivialization may carry over to the subjects of historical research so that religious motives are downplayed in favor of geo-political or economic factors. Other contemporary historians exhibit a finely nuanced approach, acknowledging the simultaneous reciprocal interplay of multiple factors for changes in law and religion.[15] Religion, then, is one of

11. Thus, the Protectorate of Oliver Cromwell became the "interregnum," and Charles II was deemed to have ascended the throne in 1649 at the death of his father.

12. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 98–128 (Talcott Parsons trans., 1958).

13. *See* R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM (1926). For a rebuttal of Tawney's equation of Puritanism as economism, see DICKENS, *supra* note 8, at 316–17.

14. *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993).

15. *See, e.g.*, CHRISTOPHER HILL, PURITANISM AND REVOLUTION: STUDIES IN INTERPRETATION OF THE ENGLISH REVOLUTION OF THE SEVENTEENTH CENTURY (St. Martin's Press 1997) (1958) [hereinafter HILL, PURITANISM AND REVOLUTION]; JOAN LOCKWOOD O'DONOVAN, THEOLOGY OF LAW AND AUTHORITY IN THE ENGLISH

the many factors which the historian must take into account in "doing history."

Most legal historians fall into the first category described and simply ignore the role of religion in the development of the common law.[16] Developments in the law are described solely in terms of internal dynamics of doctrinal development or as a response to economic progress.[17] Over the past thirty years, a new historical awareness not only of the importance of religion to Western history, but, more importantly, a new awareness of *how* religion has affected that history has gained currency. Beginning in the mid-nineteenth century, the standard for analyzing the Reformation and its aftermath was to focus on its first fifty years on the Continent—from Luther's 95 Theses in 1517 to the Peace of Augsburg in 1555.[18] Political developments re-

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REFORMATION (John Witte, Jr. & Joan Lockwood O'Donovan eds., 1991); M. M. KNAPPEN, TUDOR PURITANISM: A CHAPTER IN THE HISTORY OF IDEALISM (1939).

16. *See, e.g.*, ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW (1966); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (Little, Brown & Co. 5th ed., 1956) (1929); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1987) [hereinafter SIMPSON, A HISTORY OF CONTRACT]; KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT (Paul L. Murphy ed., 1990); John W. Salmond, *The History of Contract*, 3 L.Q. REV. 166 (1887).

17. *See, e.g.*, Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 36 (1983).

> Most treatises on the early common law of contract can be described as "internal" historiographies. They are almost universally concerned with doctrinal legal history and primarily offer a "description" rather than a "thesis." They either ignore or openly avoid analysis of causation in legal development . . . . Those rare departures from the doctrinal legal history mold have constructed rather vague economic paradigms that depict the development of contract law as an evolutionary process paralleling the movement of English society from a feudal to a market-based economy.

Id. Two historians of the common law and notable exceptions to this general rule. John Eusden and Harold Berman have each written extensively on the relationship of Puritanism and the law. *See, e.g.*, HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003) [hereinafter BERMAN, LAW AND REVOLUTION, II]; JOHN DYKSTRA EUSDEN, PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH-CENTURY ENGLAND (1958).

18. PHILIP S. GORSKI, THE DISCIPLINARY REVOLUTION: CALVINISM AND THE RISE OF THE STATE IN EARLY MODERN EUROPE 15 (2003) ("[T]he old framework for studying the Reformation advanced by Ranke almost 150 years ago has given way to a new framework focusing on confessionalization.") (footnote omitted). For examples of the older framework, see ROLAND H. BAINTON, THE REFORMATION OF THE SIXTEENTH CENTURY (1952); JOHN P. DOLAN, HISTORY OF THE REFORMATION: A CONCILIATORY ASSESSMENT OF OPPOSITE VIEWS (1965) (interpreting, with a Catholic distinction, the Reformation ending in the 1560s); HANS J. HILLERBRAND, THE REFORMATION (1964) (stating that first-person selections begin at the time of the birth of Martin Luther and end with the Council of Trent); STEVEN OZMENT, THE AGE OF REFORM 1250–1550: AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE (1980) (beginning his account in 1250, Ozment, nonetheless, ends in the sixteenth century); SPITZ, *supra* note 4.

ceived attention only in so far as the politics of the day contributed to the spread of doctrines, liturgies, and sacramental practices. Economic developments were usually ignored, and the interplay between the Reformation and social practices such as education, sexual behavior, and legal systems received short shrift.[19] However,

> Recent accounts have adopted a very different periodization, dividing the Reformation into three, overlapping segments, each with its own distinctive sociopolitical dynamic: (1) a diffuse evangelical movement (ca. 1517–25), which advocated religious reform based on the Gospels, often with strong social and communal overtones; (2) a reformation from above . . . (ca. 1520–45), in which the civil authorities effected various liturgical and ecclesiastical reforms; and (3) a confessional age (ca. 1540–1648), in which the construction of national or territorial churches and wars of belief reinforced and drove one another forward.[20]

The phrase "confessionalization paradigm" has been applied to this contemporary approach to history of the Reformation period.[21] The confessionalization paradigm provides a framework for connecting the significant religious changes that marked the Reformation with broader political, economic, and social changes. No longer should "religion" be relegated to the private sphere of individual belief, nor ought religion to be treated as a mere epiphenomenon of material (*i.e.*, economic) changes.[22]

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19. *See* JOHN WITTE, JR., LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION (2002) (taking seriously the effects of the Lutheran Reformation on the full range of German laws—civil-ecclesiastical jurisdiction, jurisprudence, education, and marriage).

20. GORSKI, *supra* note 18, at 15–16.

21. PHILIP BENEDICT, CHRIST'S CHURCHES PURELY REFORMED: A SOCIAL HISTORY OF CALVINISM xix (2002) ("The boldest macrointerpretations of the past three decades have depicted Catholicism, Lutheranism, and Calvinism as spurring parallel, not contrasting, transformations in European society, notably a process of 'confessionalization' according to which all three promoted state integration and the production of disciplined, obedient subjects . . . .").

22. *See generally* Wolfgang Reinhard, *Pressures Towards Confessionalization? Prolegomena to a Theory of the Confessional Age*, *in* THE GERMAN REFORMATION 169, 172–92 (C. Scott Dixon et al. eds., 1999) (discussing that the confessionalization paradigm also presents a technique for a holistic analysis of the differences and similarities among the three confessional strands that came from the Reformation: the Lutheran, the Calvinist, and the Catholic). While the theological doctrines of the three Christian confessional traditions emerging from the 150 years ending in 1648 differed significantly, it is of interest to the historian that the statecraft and social practices of lands dominated by each of the three doctrines were similar in some respects and differed in others. In each early modern European nation state, "political identity was . . . created . . . through consistent internal confessionalization." *Id.* at 186. The varying theological understandings of the three large groups transformed the relationship between the sacred and the secular in their respective territories. At the same time, the political, economic, and social soil in which the confessional groups flourished guided the ultimate theological results. Finally, competition among the three confessions reinforced their distinctives, increased the power of their corresponding states, and unified those states around their distinctives. *See id.* at 183.

With respect to the common law of contracts, the confessionalization paradigm offers a context in which to consider the relationship between religious change in England and changes in the common law of contracts. Such a comparison does not presuppose any direct correlation between the two. Chronologically, the expansion of the use of assumpsit began long before the rise of Puritanism. With respect to the legal doctrines of consideration and the independence of promises and the theological doctrine of the covenant, it turns out that Puritan covenant theology was overwhelmingly soteriological in focus and, in any event, sufficiently diverse as to support divergent paths of development in contract law. There is no causative relationship between this crucial Puritan *doctrine* and legal developments.

On the other hand, the nature of Puritan *life* had a significant impact on England in the late sixteenth and early seventeenth centuries. The Protestant/Puritan religious emphasis on the "new man" in Christ, stressing the virtues of instrumental rationality, literacy, ordered diligence, and vocational productivity, together with a renewed emphasis on mutual discipline, helped create a culture which was oriented toward increasing the efficiency of the means and tools of production, including substantive law. Moreover, the virtues inculcated by Puritanism were consistent with centralization of state power, including expanding the range of centralized, unified judicial power.[23] In short, it was the social practices of Puritanism, ultimately grounded in Puritan theology, which effected the development of contract law in England.

The Authors' thesis will be developed along the following lines: In Part II, one must briefly consider the constitutional crisis provoked by the expanding Tudor-Stuart assertions of the royal prerogative. In Part III, one will slow down to consider Puritan covenant theology at length. Few will deny that the doctrine of the covenant occupied a central place in Puritan theology. It is in the doctrine of the covenant where, if anywhere, there will be identifiable correlation between Puritan theology and contract law. Moreover, the Puritan doctrine of covenant has been so frequently misrepresented that a correction is needed in any event. This section will also address Puritan discipline, both individual and ecclesiastical. In Part IV, a number of cases will be looked at to see how and when the English courts expanded the reach of assumpsit, how they refined the notion of consideration, and how they dealt with the defenses to contractual liability once undertaken. Finally, in Part V, the Conclusion, the Author hopes to tie the theological beliefs and social practices predominant in Puritanism to-

23. The English Civil War and execution of Charles I seem to contradict treating Puritanism as a force of enhanced state power. Yet, concentration of political power with the central state continued apace under the Commonwealth and Protectorate, and it was at this time that the common law's triumph over its rivals was at its greatest. *See also infra* text accompanying notes 64–69.

gether with developments in law of contracts. While Puritan theology made no unique contributions to contract law, developments in this field of law were informed by this distinctively English tradition of Protestant Christianity. And when these long-standing approaches to life and the law eventually exploded in Puritanism and the English Revolution, they helped channel developments in the law of contracts.

II. STATECRAFT AND ECONOMICS IN REFORMATION ENGLAND

A. *Dominium Politicum et Regale to Royal Rule*

After nearly a century of weak monarchs, culminating in the civil War of the Roses, England's move toward a strong central government gained impetus with the accession of Henry VII to the throne in 1485.[24] Henry VII's marriage to Elizabeth of York united the houses of York and Lancaster, which contributed to stabilizing the dynastic succession of the English monarchy.[25] Thus, Henry VIII inherited a secure throne and "felt strong enough to give his Council great authority and latitude."[26] With a powerful Council which he could dominate and trust, Henry was able to expand the effective reach of the monarchy's power.[27] The powerful aristocracy which had dominated England during the preceding century had eliminated each other by 1509.[28] Henry not only delegated the growing executive authority to his Council but also reinvigorated and greatly expanded centralized administrative and judicial power through the Court of the Star Chamber, the Council of Wales, the Council of the North, the Court of Requests, and the like.[29] These feudal quasi-judicial or administrative courts had lain dormant for years, but with their renewal, they provided the crown with means by which it could control areas of ter-

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24. As an English historian has noted:

> Henry VII came to the throne with a weak title; yet people were so weary of war, the peerage had been so enfeebled, and the Crown was now so strongly supported by the rising classes of gentry and merchants that Henry with his wise caution was able to overcome all difficulties.

A.R. MYERS, ENGLAND IN THE LATE MIDDLE AGES 211 (8th ed. 1971).

25. *See id.* at 203 (noting that Henry married Elizabeth of York, "eldest daughter of Edward the IV" and "the person with the strongest hereditary right" to the throne of England).

26. *Id.* at 212.

27. *Id.* Myers states:

> The fact that the Council had greater prominence in the government of Henry VIII than it had had . . . did not mean that the royal control had in any way weakened . . . . Henry VIII felt strong enough to give his Council great authority and latitude while he still remained in complete command of affairs.

Id.

28. *Id.* at 206 ("Civil war, sterility, and mortality had so thinned the ranks of the older peerage that by 1509 only one duke and one marquis were left in England.").

29. *See id.* at 213–14; *see also* David Ogg, *Introduction* to IOANNIS SELDENI, AD FLETAM DISSERTATIO li–lvii (David Ogg ed., 1925) (1647) (containing an excellent discussion of each of these prerogative courts).

ritory and aspects of life effectively ungoverned by any central authority for one hundred years.[30] Yet, until after the accession of James I in 1603, the common understanding of the relationship of the king and his subjects remained consistent with the long standing medieval paradigm, the *dominium politicum et regale* (royal and political rule).

John Fortescue (ca. 1396-ca. 1486) was both a common lawyer and the leading English constitutional theorist until Edward Coke.[31] In *De natura legis naturae* (*Concerning the Law of Nature*),[32] Fortescue asserted that "the king of England cannot change the laws of the realm at his pleasure, and that statutes are made not merely by the prince's will, but with the 'assent of the whole kingdom.'"[33] Fortescue contrasted what he characterized as England's constitutional structure—*dominium politicum et regale*—with what he believed was the absolute monarchy of France—*dominium regale* (royal rule).[34] Royal rule was the exertion of the will of the one on the many and quickly degenerated into "tyranny . . . because it neglects the common good and lacks the consent of the governed."[35] Royal and political rule, by contrast, originates in an understanding that a governing head (*regale*) is necessary but that such a head needs the input of the many (*politicum*) to be directed to the common good.[36] Fortescue never had the occasion to work out a resolution to the problem that would arise when the head and the many disagreed about the common good,[37] but skillful heads were able to avoid such a conflict until the seventeenth century. The Tudor line from Henry VII to Elizabeth I continued to garner power into the monarchy, but each made full use

30. *See* MYERS, *supra* note 24, at 212–13 ("[I]t was not so much that the councillors [sic] exercised new powers as that the traditional powers of the Council were revived and enforced by men who acted solely in accordance with the king's wishes.").

31. *See* LOCKWOOD O'DONOVAN, *supra* note 15, at 43 ("Fortescue [was] a common lawyer, devoted to the legal and judicial welfare of his country . . . . Fortescue's political thought . . . [was] oriented to steering England's limited monarchy toward increased respect for the rule of law.").

32. John Fortescue, *De Natura Legis Naturae*, *in* THE WORKS OF SIR JOHN FORTESCUE (Thomas Fortescue ed., 1869) (1486).

33. MYERS, *supra* note 24, at 220 (quoting JOHN FORTESCUE, *De Natura Legis Naturae*); *see* Fortescue, *supra* note 32, at 77 ("The kings make not laws, nor impose subsidies on their subjects, without the consent of the three Estates of the Realms.").

34. MYERS, *supra* note 24, at 220.

35. LOCKWOOD O'DONOVAN, *supra* note 15, at 52.

36. *See* Fortescue, *supra* note 32, at 346 (Royal and political rule is "a body of men joined together in society by a consent of right, by a union of interests, and for promoting the common good."). For a somewhat more skeptical view of Fortescue's understanding of royal and political rule, see Colin Richmond & Margaret Lucille Kekewich, *The Search for Stability, 1461–1483*, *in* THE POLITICS OF FIFTEENTH-CENTURY ENGLAND 43, 64 (1995) ("Fortescue's 'dominium politicum et regale', [sic] taken in context, could be the ploy of a clever and well educated lawyer rather than the ideal of a believer in constitutional checks and balances.").

37. As Professor Lockwood O'Donovan comments: "[T]hese two bases of political authority [the 'royal' and the 'political' in 'royal and political'] stand in tension in Fortescue's thought, being in no way systematically related." LOCKWOOD O'DONOVAN, *supra* note 15, at 53.

of Parliament in addition to the royal prerogatives to achieve their ends.[38]

The accession of James I in 1603 marked a turning point in English constitutional development.[39] James I of England had been James VI of Scotland since he was thirteen months old and had ruled since he was nineteen.[40] James ruled Scotland for eighteen years before becoming king of England.[41] During that time, he waged successful struggles with the Scottish nobility for control of the nation and with Scotland's established Presbyterian Church for government of the church.[42] James was thus predisposed toward a strong, if not absolutist, monarchy. But not until he had been king of England for seven years did James's royal will extend beyond the recognized prerogatives of his predecessors.

Long-standing tradition limited English royal revenue to a few sources: crown lands, feudal dues (including knight-service and wardship), payments for grants of monopolies, and customs duties.[43] Parliamentary consent was required for most other sources of revenue.[44] By 1610, James decided to address his long standing financial concerns and called a Parliament to organize his revenue stream on a sounder (and more lucrative) footing.[45] The Great Contract, as it was known, foundered for various reasons leaving a sense of rancor on both sides and James without any more income.[46] Having had no success with Parliament, James ruled for much of the next ten years without it.

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38. *See* J.P. KENYON, THE CIVIL WARS OF ENGLAND 6 (1988). Further stating:

> England was almost unique in Europe in that her medieval 'estates', [sic] or parliament, had survived into the modern era with its powers and rights not only intact but even increasing .... The Tudors had never challenged Parliament's position, nor had they built up a provincial bureaucracy or a regular army which would have given them the leverage to do so.

Id.

39. *See* G. E. AYLMER, A SHORT HISTORY OF 17TH-CENTURY ENGLAND: 1603–1689, at 11, 18 (1963) (observing that the constitutional conflict is the focus of his look at seventeenth-century England and noting the main chronological divisions of the time covered in his book, with the accession of James I in 1603 as the first critical date).

40. *See id.* at 21.

41. *Id.* (observing that James Stuart was nearly thirty-seven when he became king of England).

42. *See id.* at 22.

43. *See id.* at 61–62.

44. *See id.* at 62–63 (explaining that the most significant non-parliamentary tax that the monarch could impose was for "Ship-Money," but this power existed only in times of war); *infra* text accompanying notes 59–61.

45. AYLMER, *supra* note 39, at 66–67 (observing that after the king's debt doubled in five years, the "Great Contract" was initiated in order to set the king's finances "on a sounder footing").

46. *See* DONALD VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640–1660, at 57 (1970).

> In 1610 there were negotiations between James I and Parliament to end the feudal incidents of knights service by a Great Contract whereby the king would be compensated by revenue from other sources. The Commons con-

Even the popular Elizabeth had never gone more than five years without summoning the *politicum* for advice on the common good.[47] Simultaneously, James pushed the limits of the royal prerogative for sources of additional revenue by increasing customs duties, squeezing wardships for ever more money, and granting additional monopolies.[48] Royal and political rule was sliding toward royal rule by default and design.

Centralization of political and religious authority in the king (or queen) and the monarch's Council had marked all of the Tudors. Yet, each had been careful to gain the consent of the *politicum* every step of the way.[49] Jean Bodin had brought the concept of sovereignty to the fore of political and constitutional thought in 1577 with the publication of *Six livres de la République* (*Six Books of the Commonwealth*).[50] James was certainly well acquainted with Bodin.[51] Bodin asserted that only a fully sovereign monarch could deal with the conflicting claims to power arising from the collapse of the medieval order due to the Reformation. Bodin's rationalism, with his desire to specify the *locus* of sovereignty in the smallest possible logical space, replaced medieval organicism's emphasis on *dominium* grounded in the interlocking web of natural law. By a compact existing from time immemorial, there existed a contract between a king and his subjects by which indivisible sovereignty—for the common good—was vested in the king.[52] Neither Bodin nor James suggested that sovereignty existed apart from either God or the law.[53] But after 1610, the tensions between James and Parliament revealed the ambiguity in Fortescue's thought: If sovereignty were vested in the monarch, who could judge when the monarch failed to exercise that sovereignty for the common good? The royal answer had the virtue of simplicity: "Only God could be judge, naturally, because otherwise a subject or judge would be able to constitute a superior power over the king. The king alone could decide how a contract with his subjects should be kept . . . ."[54]

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sidered the price suggested too high and James thought he would lose his power to influence and control many of his influential subjects.

Id.

47. *See* AYLMER, *supra* note 39, at 68.

48. *See id.* at 62–63.

49. For a description of Elizabeth's use of Parliament and Convocation in religious matters, see KNAPPEN, *supra* note 15, at 270 (explaining that because of Elizabeth's reluctance to reveal her hand, "everything [Archbishop Whitgift did to require wearing of the prescribed vestments] had to be done under the guise of law, without direct appeal to the prerogative").

50. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M.J. Tooley trans., Macmillan 1955) (1576).

51. *See* GEORGE L. MOSSE, THE STRUGGLE FOR SOVEREIGNTY IN ENGLAND 31–33, 61–62 (1950).

52. LOCKWOOD O'DONOVAN, *supra* note 15, at 52–53.

53. *See* MOSSE, *supra* note 51, at 61 ("Contracts were sacred to Bodin under the law of nature. James, too, dwelled on the sacredness of contracts . . . .").

54. *Id.*

Political and royal rule should give way to royal rule. But for the intervention of the common lawyers, then Parliament, and later the Puritans, England's constitutional structure would have moved toward royal absolutism.[55]

Charles I's reign can be briefly described as a continuing effort to rule with Parliament but, when that proved unsatisfactory to Charles, to rule without Parliament. The unsettling results of Charles's first two parliaments led him to adopt personal rule—royal rule—for the next eleven years (1629–1640).[56] The longest previous interval between parliaments in recent times had been nine years early in Henry VIII's reign.[57] The ordinary machinery of government continued to function without Parliament, as it always had. Finances proved again to be the monarch's Achilles' heel. Charles continued to press the traditional sources of royal revenue to the limit but, nonetheless, found himself short of funds.[58] He then turned to a source of revenue grounded in the royal prerogative but not previously used in peacetime: Ship-Money. Professor Aylmer observes that "[t]here were good precedents from the sixteenth century and even from James' [sic] reign for raising this levy from the coastal towns and counties in time of war or obvious national emergency."[59] Yet, Charles imposed the levy on coastal areas in 1634 when England was at peace and ex-

55. *Id.* at 62 ("Contrast James's conclusion [that the king is sovereign over the law] . . . with Coke's dictum that 'The common law hath so admeasured the prerogative of the king, as he cannot take nor prejudice the inheritance of any: and the best inheritance the subject hath, is the law of the realm.'") (footnote omitted). Coke's response was typical of many on the Continent who sought to revive historical custom to stem the advance of rational absolutism. *See, e.g.*, J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1987). Further stating:

> Since there was an increasing tendency to claim sovereignty in the full sense for the king, it was natural that those who sought to defend threatened privileges or liberties should emphasize in return that their rights were rooted in a law which no king could invade . . . . Hotman in *Francogallia* asserted the antiquity of the assembly of the nation; Coke in England that of parliament and the common law; Pietro de Gregorio in Sicily that of baronial privilege and the *parlamento*; François Vranck in the Netherlands that of the sovereign and independent Dutch towns; Erik Sparre in Sweden that of the nobles in their *riksrad*.

Id. at 16. All did not go well for James's efforts to increase royal power. Due to his need for funds to finance wars in Europe, James was forced to call Parliaments into session in his later years where it prevailed in its efforts to address foreign policy (formerly solely a royal prerogative) and succeed in abolishing individual monopolies. *See* Statute of Monopolies Act, 1623, 21 Jam., c. 3 (Eng.).

56. *See* 2 KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY: REFORMATION TO THE PRESENT 819 (1953) [hereinafter LATOURETTE, A HISTORY OF CHRISTIANITY II].

57. *See* AYLMER, *supra* note 39, at 85.

58. *Id.* at 91 ("Even in the middle 1630s the King was still burdened with large debts; he had to go on borrowing in order to make ends meet . . . .").

59. *Id.* at 92.

panded it to the whole nation in 1636 when no war was imminent.[60] The ability of the king to exercise unfettered discretion of what constituted a national emergency found its way to the courts when John Hampden, a wealthy inland landlord, refused to pay the tax. The judgment rendered in the aptly-named *Ship Money Case*[61] by the Exchequer Court (made up of all the barons and judges of the Exchequer, Kings Bench, and Common Pleas) upheld the king's authority to make this determination:[62] the *dominium regale et politicum* had been stretched to the breaking point.

B. *Royal Rule to the Execution of the King*

The maelstrom of the politics of the Long Parliament and the Civil War need not be dwelt upon. Charles was forced to call a Parliament in 1640 to fund a military campaign to subdue a rebellious Scotland.[63] After a fitful start, the resulting "Long Parliament" remained in session for the next thirteen years and step-by-step effected the transfer of sovereignty to itself.[64] The medieval constitutional order finally broke in 1649 with the execution of Charles I for treason.[65] Parliament's efforts were not directed solely toward displacing the monarchy. Parliament acted to remove all centers of *dominium* but its own. Thus, it quickly abolished the royal prerogative courts,[66] the royal conciliar bodies,[67] as well as the Court of High Commission (the Church of England's highest ecclesiastical court) and the Bishops'

60. *Id.* at 92 ("[B]y 1636 the tax had been extended from the coastal areas to the whole country, and it was clearly becoming a regular form of revenue, even though the country was still at peace.").

61. The King v. Hampden, 3 Howell's State Trials 825 (1816).

62. *Id.*

63. Charles attempted to force the staunchly Presbyterian Church of Scotland to adopt the Anglican liturgy, which led to the so-called "Bishops' Wars" in 1637–1639. *See* AYLMER, *supra* note 39, at 106–11; *see also* KENYON, *supra* note 38, at 15–19.

64. For example, Parliament passed the Triennial Act, 1641, 16 Car., c. 1 (Eng.), which required the Parliament be called into session at least once every three years and acts prohibiting the king from dissolving parliament without its consent, and abolishing the levy for Ship Money. *See* Colonel Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 36–38 (1998).

65. *See* AYLMER, *supra* note 39, at 147–48.

> Although the English Republic only lasted just over eleven years, the King's death and the abolition of the monarchy . . . symbolised the outcome, not only of the Civil War, but of the much longer and more far-reaching constitutional conflict . . . . [T]he balance of political power was more decisively affected by this than by any other event in [English] history.").

Id.

66. *See* F. A. INDERWICK, THE INTERREGNUM 180 (London, Sampson Low, Marston, Searle & Rivington Ltd. 1891).

67. *See* 6 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 302 (1927) ("From the purely legal point of view, the most important result of the Great Rebellion had been to reduce to insignificance very many of those courts which had, in the preceding period, been formidable rivals of the common law.").

Courts.[68] The three historic common law courts of King's Bench, Common Pleas, and Exchequer now virtually monopolized judicial power in England.[69]

The trend toward centralization from the Tudors through the end of the monarchy seems inexorable. England outgrew the organic medieval order with its presuppositions of natural political relationships. Sovereignty found a home, but it was not in kingly rule. The *politicum* triumphed over the *regale*. Neither Protestantism in general nor its more self-conscious particularization of Puritanism was necessary to the creation of a modern state in England. After all, Catholic and Lutheran nations experienced the same process.[70] Yet, Protestantism and Puritanism certainly molded the form which England's centralized modern government came to take:[71] Parliament, not the king, was sovereign in England.

C. *England's First Industrial Revolution and the Rise of Capitalism*

Economic changes in England during the Reformation period centered around four issues: land, labor, monopolies, and usury. Solutions to the problems raised by the first two were found in judicial enforcement of private contracts. The courts and Parliament solved the problem of monopolies, a species of "anti-contract," by striking them down and thus elevating contract to its principal place as the means of social organization.[72] Parliament gradually weakened the ancient prohibitions against usury. As an economic historian noted seventy years ago, "[d]uring the height of English mercantilism [under Henry VIII] a movement toward economic liberalism was in progress which for its final success depended in part upon the attitude of the courts and the common law."[73] Henry's dissolution of the monasteries released an enormous amount of under-utilized capital assets into the stream of commerce, which provided the material resources for England's first industrial revolution.[74] Rather than Protestantism

68. INDERWICK, *supra* note 66, at 184.

69. Chancery remained, but its range of activities were reduced. *See id.* at 180; HOLDSWORTH, *supra* note 67, at 302.

70. *See generally* GORSKI, *supra* note 18, at 159–60 (discussing state-formation of the various regimes in the Netherlands, Bohemia, Bavaria, Prussia, and France).

71. *Id.* ("This is not to say that there was a constant conjunction between confession and regime . . . ; obviously, there was not. Rather, it is to say that confessional conflict was a key *mechanism* that influenced the type of regime—constitutionalist versus absolutist—that emerged . . . .").

72. *See* DAVID LITTLE, RELIGION, ORDER, AND LAW: A STUDY IN PRE-REVOLUTIONARY ENGLAND 204–09 (Benjamin Nelson ed., 1969); *see also* AYLMER, *supra* note 39, at 117 ("Several measures were passed against the unconstitutional taxation and other financial abuses of the 1630s . . . there were Acts . . . against monopolies.").

73. Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 ECON. HIST. REV. 30 (1935).

74. MOSSE, *supra* note 51, at 95 ("[T]here were two distinct industrial revolutions in England . . . . The first of these rapid economic changes occurred in the century which began with the dissolution of the monasteries and ended with the outbreak of

per se, "the laicising of landed capital was a vastly more potent factor for change than any support which late Protestant economic theory may have given to an already long-established capitalist ethic."[75]

Even before the dissolution of the monasteries, the reduction in numbers of the old nobility had allowed Henry to raise many to the peerage who did not share their predecessors' willingness to maintain outmoded means of agricultural production.[76] In the previous century, the new class of commercial traders in wool had greatly expanded which, in turn, increased the utility of large scale sheep farming.[77] Not only did more land coming into productive use mark the end of the feudal system of land tenure,[78] it marked the beginning of the shift from status to contract, which Henry Maine noted over a century ago.[79]

The new gentry landlords were faced with at least two means by which they could reorganize their relationships to those who had been feudal tenants. The path not followed was to sell many small plots of land to the peasantry; there was no way a small farmer of feudal origin could have financed cash purchases, and sales would have reduced the gentry's ability to control the use of the land by those who farmed it.[80] Instead, the new owners entered into leases to replace the feudal ten-

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the Civil War."); STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621–1628, at 79 (1979) (noting that Edward Coke reached the same conclusion: "Later in life . . . [Coke] came close to suggesting that defects in the law were also caused by the increasing prosperity of landholders and by increased activity in the land market, which were phenomena that he saw as resulting from the dissolution of the monasteries . . . ."); *see also* HILL, PURITANISM AND REVOLUTION, *supra* note 15, at 198 (discussing the effects of England's first industrial revolution in the century between the Reformation and the Civil War); Francis, *supra* note 17, at 43 ("Coke, and later Barrington, also accentuated the importance of the sixteenth-century dissolution of the monasteries as a factor that added to litigation by bolstering the wealth of laymen.").

75. DICKENS, *supra* note 8, at 335.

76. *See* MYERS, *supra* note 24, at 226–28 (discussing rise of merchant class, intermarriage into nobility, and need for aristocracy to compete economically in early sixteenth century England).

77. *See* TEEVEN, *supra* note 16, at 27 ("Already by the fifteenth century, capitalist clothiers were buying wool and selling abroad what was made by jobbing workers . . . . The brisk demand for wool from clothiers brought a commercialization of land as agricultural land was enclosed for grazing."); *see also* C. H. S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 289–92 (1949) (discussing growth of international trade in England from medieval through early Tudor times).

78. *See* MYERS, *supra* note 24, at 228–35 (discussing the increasing economic competition and efficiency, which "mark[ed] the close of medieval England").

79. HENRY SUMNER MAINE, ANCIENT LAW 165 (New York, Charles Scribner & Co. 1871) ("[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.").

80. Anyone purchasing formerly monastic land would also have become subject to the feudal dues for relief of knight-service, which further reduced its alienability. *See* Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 238–39 (1995) (discussing Henry VIII's revival of virtually forgotten feudal incidents to enhance the royal revenue).

ures or copyholds.[81] Similarly, the increased recognition of copyhold and protection of its alienability by even the common law courts promoted a contractual ordering of social and legal relationships to land.[82] The new gentry moved quickly to employ new and improved agricultural technology as it developed over the next century.[83] Increased agricultural efficiency decreased the landlords' needs for labor. Landlords thus "enclosed" larger and larger portions of their estates, forcing peasant farmers from the land and into the cities.[84] The effects of enclosure were drastic[85] and were still being felt in English society in the 1640s.[86]

Reformation England's questions of labor are closely related to industrial development. Industry began to grow substantially during

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81. *See* VEALL, *supra* note 46, at 55–59.

> Thus in England the decay of the feudal land system was followed by the landlord and tenant relationship, whereas in other countries this decay led to the splitting up of land into numerous freehold interests. Precise, limited, and determinable contracts were substituted for traditional, customary, and indeterminate rights; the land law was changing from status to contract.

Id. at 59; *see also* STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, C. 1550–1640, at 44 (2000) ("[O]n average, customary tenants formed perhaps two-thirds or even more of the land-holding population in the early sixteenth century. By contrast, it has been estimated that two-thirds of the land market was structured by leasehold relations by the mid-seventeenth century.").

82. *See* Reid, *supra* note 80, at 247–49 (discussing the rise of central (prerogative and common law) courts as opposed to earlier merely manorial judicial protection for the copyhold interests of yeoman farmers).

83. *See id.* at 252–61 (discussing at length the lengthy battle over the power of the gentry to enclose common lands culminating in the elimination of common rights and common fields in the eighteenth century).

84. *See id.* at 253. As Charles Reid notes:

> Excitement was particularly aroused at that time [at the end of the fifteenth century] over rural depopulation. It was perceived that villages that had been steadily inhabited for several hundred years were being emptied of their people. The conclusion was quickly drawn that the enclosures of wealthier landholders . . . were responsible.

Id.

85. *See id.* at 253–54. Further stating:

> This novel phenomenon was denounced by the intellectual and religious establishment of early Tudor England [*e.g.*, Thomas More and Hugh Latimer]. . . . Nor were the intellectuals and religious leaders alone in their protests. Popular uprisings against enclosure were also a part of the early Tudor scene. . . . Throughout the sixteenth century, furthermore, peasants enjoyed considerable success bringing actions against enclosers in the royal courts.

Id.

86. *See id.* at 257–58 ("The pro-enclosure arguments were part of a national debate that endured through the 1650s."); *see also* THE LARGER CATECHISM: AGREED UPON BY THE ASSEMBLY OF DIVINES AT WESTMINSTER 63–64 (Dodd & Rumsey 1912) (1867) [hereinafter THE LARGER CATECHISM]. Question and Answer 142 state as follows: "Q. *What are the sins forbidden in the eighth commandment?* A. The sins forbidden in the eighth commandment . . . are . . . unjust enclosures and depopulation . . . ." THE LARGER CATECHISM, *supra* at 63–64.

Elizabeth's reign.[87] Industrial growth continued through the Stuart monarchies both because of the availability of cheap labor from continuing enclosures and because of the flow of wealth from the colonies.[88] Just as contract (in the form of leases) had replaced feudal tenure in the countryside, so, too, contract became the principal tool of control in the newly industrialized urban centers. As Clinton Francis observed, "[g]rowing industry required equipment, materials, and labor, and contract provided the cohesive force need to combine them both to each other and to the marketplace where the manufactured goods were sold."[89]

The early seventeenth century common law's opposition to monopolies is well known.[90] The famous decision in *Bonham's Case*,[91] which has become the basis of the American principle of judicial review, was fundamentally about a monopoly.[92] Grants of monopolies by the monarch or by Parliament limited contractual ordering. Unlike the movement toward greater contractual ordering of relationships between landlords and tenants and between employers and employees that the common law courts merely recognized and enforced, elimination of monopolies required the courts to take an active role. Parliament ultimately resolved the conflict between the courts and the king over the extent of the royal prerogative to grant monopolies.[93]

III. God and Man in Puritanism: Covenant and Life

A. *A Primer on Puritanism*

1. Definition and General Characteristics

The term "Puritan" finds its origin at the time of the Vestarian (or Vestiarian) Controversy in the 1560s.[94] As with many such labels, it

87. *See* Francis, *supra* note 17, at 43 ("Starting in Elizabeth I's reign, industry grew in size and variety. People followed industry to the cities . . . .").

88. *See id.* at 121 ("A dynamic market had replaced custom as the measuring stick of exchanges and the new-found wealth of the colonies contributed to this [early seventeenth-century] wave of speculation."); *see also* Hindle, *supra* note 81, at 39–42 (analyzing growth of and changes in distribution of population in late sixteenth century England); Teeven, *supra* note 16, at 27 (discussing economic effects of 600% inflation in the sixteenth century on the English commercial and industrial growth).

89. Francis, *supra* note 17, at 128.

90. *See, e.g.*, Little, *supra* note 72; Wagner, *supra* note 73.

91. 77 Eng. Rep. 646 (K.B. 1610).

92. *See generally* Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 Harv. L. Rev. 30 (1926) (providing an excellent analysis of this case).

93. *See supra* text accompanying note 72.

94. John Witte, Jr., *Blest Be the Ties That Bind: Covenant and Community in Puritan Thought*, 36 Emory L.J. 579, 579 n.3 (1987) ("The term 'Puritan' . . . was coined during the Vestarian Controversy (1559–1567) . . . ."). The Vestarian Controversy took its name from the opposition of some (known thereafter as Puritans) to the requirement that clergy wear particular vestments while celebrating the liturgy. *See generally* LaTourette, A History of Christianity II, *supra* note 56, at 814 (describing the origin and growth of Puritanism).

seems to have originated as a term of derision.[95] "Puritan" was first used among the majority who supported the Elizabethan Settlement with its mandated clerical garb (vestments).[96] Reacting against the Tudor understanding of the supremacy of the *dominium politicum et regale* in the church, a number of the post-Marian generation of ecclesiastics, thereafter known as Puritans, rejected the power of the civil government to prescribe ecclesiastical rules.[97] Further agreement on a definition of Puritan or Puritanism has escaped historians and theologians.[98] As Christopher Hill notes, "'Puritan' too is an admirable refuge from clarity of thought."[99] In *Defining Puritanism-again?*,[100] Peter Lake describes three definitions that have been widely proposed: some have used Puritanism as shorthand for a movement for "further reformation in the government or liturgy of the church"[101] in England, others have seen it as an intensely zealous promotion of a "subset of a larger body of reformed"[102] doctrines, and, finally, a third proposal has been to jettison the term Puritanism in its entirety.[103] Lake, himself, amalgamates the second and third positions:

> I would wish to see Puritanism as a distinctive style of piety and divinity, . . . as a synthesis made of strands most or many of which taken individually could be found in non-Puritan as well as Puritan contexts, but which taken together formed a distinctively Puritan synthesis or style.[104]

Lake's definition incorporates the two aspects of the Protestant impulse in England that will prove useful to this study: a realization that Puritanism was a lived doctrine and that it differed only in degree from the larger socio-religious milieu in which it was found. Most per-

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95. *See* HILL, SOCIETY AND PURITANISM, *supra* note 6, at 2 ("Like most political nicknames, it was a 'reproachful name' . . . .").

96. *See* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 810–12 (describing the essential features of the Elizabethan Settlement as the Act of Supremacy, the Act of Uniformity, and the promulgation of the Thirty-Nine Articles of Religion).

97. *See* LOCKWOOD O'DONOVAN, *supra* note 15, at 116 ("At issue in the vestiarian controversy was the civil ruler's right to legislate church order either without or against the explicit authorization of Scripture.").

98. *See* Peter Lake, *Defining Puritanism—again?*, *in* PURITANISM: TRANSATLANTIC PERSPECTIVES ON A SEVENTEENTH-CENTURY ANGLO-AMERICAN FAITH 3, 3 (Francis J. Bremer ed., 1993) ("The definition of Puritanism is an issue which has been both addressed and avoided to great profit by many great scholars."); *see also* AYLMER, *supra* note 39, at 55 ("The first difficulty in discussing Puritans and Puritanism is that of definition. Historians do not agree either on who they were or what their movement stood for.").

99. HILL, SOCIETY AND PURITANISM, *supra* note 6, at 1.

100. Lake, *supra* note 98.

101. *Id.*

102. *Id.* at 4.

103. *See id.* at 5.

104. *Id.* at 6.

sons fitting Lake's definition remained in the Church of England.[105] Of these, some were satisfied with the existing Episcopal form of hierarchical church government while others preferred Presbyterianism.[106] A third group of Puritans, known as Independents, sought greater congregational autonomy within the Church of England while, fourthly, a few, at least until the 1640s, wanted complete congregational independence.[107]

Over seventy years ago, Marshall Knappen observed the full-orbed approach to life that characterized Puritanism: "[T]heir morality was of a practical sort which joined head and heart in a relationship of mutual leadership and restraint";[108] morality was all-encompassing. Although the Puritans acknowledged that judgment on earth was never perfect, they believed that final judgment would be.[109] The lives of all who belonged to one of the confessional traditions were marked by a unity of belief and practice that seems exceptional today. Catholics, Lutherans, and the Reformed were all committed to disciplining individual lives and reorganizing society.[110] So, too, "warm religious life" in England in the early seventeenth century was not confined to Puritans; many non-Puritans in the Church of England were equally pious.[111] Nothing like the Enlightenment privatization of religion had occurred in the late sixteenth and early seventeenth centuries.

The roots of the English Reformation can be found nearly two hundred years before the identification of Puritans. During the last decade of his life, John Wyclif (ca. 1330–1384),[112] a teacher at Oxford, developed two theories which were to have significant political and theological impact in the sixteenth century. In the first instance,

105. *See* AYLMER, *supra* note 39, at 54 (noting that most Puritans were still inside the Church of England in 1603).

106. *See id.* at 55–56 (discussing three groups of Puritans: Separatists, Presbyterians, and Episcopalians).

107. *See* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 816–18 (summarizing briefly religious developments in England under the Stuarts); *see also* AYLMER, *supra* note 39, at 55.

108. KNAPPEN, *supra* note 15, at 342.

109. *See id.* at 342–43.

110. BENEDICT, *supra* note 21, at 430. Benedict, a social historian, notes that contemporary Reformation historiography:

> For upward of a generation, historians of Catholicism have emphasized that the devotional practices of the Catholic Reformation encouraged laypeople to pursue a disciplined life of piety whose features shared many elements with those promoted by the English apostles of practical divinity. More recently, prominent German historians have advanced the view that "social disciplining" was an offshoot of the "confessionalization process" and a common concern of all three major post-Reformation confessional families.

Id. (footnote omitted).

111. LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 818 ("Warm religious life was not confined to Puritans and Independents. It was also present among those in the Church of England who held to the Catholic tradition.").

112. LOCKWOOD O'DONOVAN, *supra* note 15, at 29.

Wyclif began with the non-controversial premise that God had plenary civil and ecclesiastical *dominium*.[113] Wyclif argued that God grants an earthly use to political and ecclesiastical authorities only on the condition of faithful exercise.[114] And, most controversially, Wyclif concluded that the earthly use is forfeited if its holder does not faithfully fulfill his obligations:

> Wyclif repeatedly conceives dominion or lordship as a mode of having or possessing earthly goods by a title that confers the right of use and disposal in respect to them. This title is granted by God . . . to the righteous or virtuous man, made deserving by divine grace. Lacking divine grace and approval, the sinner has no true or evangelical possession of temporalities: his "having" is merely "natural," "creaturely," issuing in nothing but abuse.[115]

In the fourteenth century, Wyclif did not turn this argument against the state but against the pope and papal-dominated church which he excoriated for its many abuses.[116] His theory provided theological cover for the English king and parliaments that wished both to avoid increasing papal assessments and to tax the church's property for civil purposes.[117] While matters between church and state ended inconclusively in Wyclif's day, his "program of ecclesiastical reform . . . [provided] the legislative agenda of King Henry VIII and his parliaments."[118] Wyclif's second contribution to the English Reformation was his anticipation of the Protestant (and notably Puritan) doctrine of the epistemic supremacy of the Bible.[119] Wyclif translated the Bible into English and sent out itinerant preachers who stressed the exposition of the biblical text.[120] While after his death, both civil and ecclesiastical authorities suppressed Wyclif's followers, known as Lollards, they continued an underground existence and provided a

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113. *See* 1 KENNETH SCOTT LATOURETTE, A HISTORY OF CHRISTIANITY: REFORMATION TO THE PRESENT 663 (Harper & Row 1975) (1953) [hereinafter LATOURETTE, A HISTORY OF CHRISTIANITY I].

114. *See id.*

115. LOCKWOOD O'DONOVAN, *supra* note 15, at 34–35 (footnotes omitted).

116. *Id.* at 30–31. Further stating:

> Wyclif waged a protracted war on behalf of the English King and secular magnates against the corrupt worldliness of the fourteenth century church: against the secular pomp and power of its "caesarian prelates"; the excessive wealth and complacency of its monastic establishments; the religious, moral, and occasionally criminal indiscipline of its lower clergy.

Id.

117. *See* LATOURETTE, A HISTORY OF CHRISTIANITY I, *supra* note 113; LOCKWOOD O'DONOVAN, *supra* note 15, at 33–34.

118. LOCKWOOD O'DONOVAN, *supra* note 15, at 29.

119. *Id.* at 32 ("For [Wyclif] the Scriptural Word is the actualization in the world of the divine mind, bearing the transcendent universals of all created being. As such, it is the repository of all truth and all law, whether logical, ethical, metaphysical, physical, historical, and so on.").

120. *See* LATOURETTE, A HISTORY OF CHRISTIANITY I, *supra* note 113, at 664–65.

springboard for the reception of Protestant ideas in the 1520s and 1530s.[121]

Further protestantization and subsequent reaction marked the period between Henry VIII's death in 1547 and the Elizabethan Settlement in 1559. Henry VIII's only son, Edward VI, had been reared in a Protestant household, and although he reigned for only six and one-half years, ecclesiastical standards moved significantly toward Reformed doctrine.[122] Mary's efforts to turn England back to Catholicism had no lasting effect except to intensify England's anti-Catholic sentiment and to drive many leading Protestants to strongholds of the Reformed church on the Continent from which they returned after Mary's death imbued with "puritan" ideals.[123]

2. Three Formal Standards

The three Westminster Standards—the *Westminster Confession of Faith*, the *Westminster Larger Catechism*, and the *Westminster Shorter Catechism*—represent the culmination of Puritan doctrine. In June of 1643, during the English Civil War, the Long Parliament[124] called "an Assembly of learned and godly Divines" to propose to Parliament further reforms to the government, liturgy, and doctrine for the Church of England.[125] The Assembly prepared a Confession of Faith by November of 1646; the two catechisms followed.[126] Those summoned to the Assembly represented a wide cross section of English Protestants

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121. *See* DICKENS, *supra* note 8, at 37 (describing the reprinting of many of Wyclif's treatises in the 1530s).

122. *See* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 805–07 (discussing generally the Reformation under Edward VI); WILLIAM C. PLACHER, A HISTORY OF CHRISTIAN THEOLOGY 227 (1983) ("Under his young son Edward VI English theology moved closer to Calvin."). Thomas Cranmer's 1549 *Book of Common Prayer* and the 1553 FORTY-TWO ARTICLES OF RELIGION exemplify the Reformed trend of the Edwardian period of the English Reformation.

123. *See* LOCKWOOD O'DONOVAN, *supra* note 15, at 91–108 (discussing the Marian exiles and rise of Puritanism); *see also* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 808–10 (discussing generally the Catholic reaction under Mary).

124. Charles I initially acquiesced in the calling of the Assembly but issued a proclamation in late June attempting to prohibit the initial meeting. *See* ALEXANDER F. MITCHELL, THE WESTMINSTER ASSEMBLY: ITS HISTORY AND STANDARDS 129–31 (Still Waters Revival Books ed. 1992) (1883).

125. ACTS & ORDS. INTERREGNUM, 180–84 (C.H. Firth & R.S. Rait eds. 1911) (containing the Act of June 12, 1643, entitled: *An Ordinance for the calling of an Assembly of Learned and Godly Divines, to be consulted with by the Parliament, for the setling [sic] of the Government of the Church*).

126. *See* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 821. Further stating:

> The Westminster Assembly, called to advise Parliament on religious questions and composed of clergy and laity, mostly Puritans with a sprinkling of Episcopalians and Independents, and with Scottish commissioners . . . convened in July, 1643 . . . . [I]t drew up what is usually called the Westminster Confession of Faith . . . in November, 1646 . . . . To it the Westminster Assembly added a longer and a shorter catechism . . . .

Id.

and represented the best of biblical and theological scholarship of the day.[127] When Parliament eventually received the Assembly's proposed confession, it took no action other than debate.[128] Scotland's parliament, however, following the recommendation of the General Assembly of the Church of Scotland, approved all three standards in 1649.[129] The Westminster Standards thus have a peculiar status; they were never accepted in their country of origin but have had widespread significance in the parts of the world where Presbyterianism has taken root.[130] For the purposes of this paper, however, the Westminster Standards provide a benchmark of Puritan belief and definition of Puritan practice, which reduces the need to canvass earlier individual Puritan theologians and preachers.[131] Statements of doctrine and their moral implications found in the Westminster Standards will be taken as representative of Puritan belief and practice.

3. Three Core Beliefs

The Westminster Standards are the most extensive confessional standards generated in the Reformation.[132] But as a platform for identifying the connections between Puritanism and contract law, only three core beliefs will be considered: the Puritan standard of authority, the Puritan standard of morality, and the Puritan ethical application.

a. The Puritan Standard of Authority

Puritanism's material principle was the Scriptures.[133] Neither tradition nor reason could stand over biblical revelation for the Puritan; "the appeal to scriptural authority [was] the very life of Puritan-

127. *See generally* MITCHELL, *supra* note 124, at 118–27 (discussing the qualifications of those who served in the Assembly).

128. *See* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 821 ("It was methodically considered and debated in Parliament, was ordered printed, but was never formally authorized by that body.").

129. Scot. Parl. Acts 16 (1649).

130. *See* LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 821 ("All three [of the Westminster Standards] had extensive use in Presbyterian churches both in Great Britain and America."); *see also* MITCHELL, *supra* note 124, at 469–70 ("The Westminster Confession and Catechisms continued to be adhered to in Scotland . . . . And, though cast out in Old England, they were taken in in the New, and in other colonies beyond the Atlantic . . . .").

131. *See* PLACHER, *supra* note 122, at 231.

132. The Second Helvetic Confession of Faith, drafted by Heinrich Bullinger of the Reformed Church of Zurich in 1566, is longer than the Westminster Confession of Faith standing alone but far shorter than the three Westminster Standards collectively. *See* THE SECOND HELVETIC CONFESSION (1566), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 831–909 (New York, Harper & Bros. 1877).

133. *See* THE WESTMINSTER CONFESSION OF FAITH (1647), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 600–06 (New York, Harper & Bros. 1877). The first chapter of the Westminster Confession of Faith is entitled "Of the Holy Scripture." *Id.* at 599.

ism."[134] Contrary to the claims of Perry Miller,[135] Puritans were not beset by an overwhelming existential angst which only revelation could salve. They were not closet rationalists who covered their tracks with mountains of biblical citations.[136] The Puritans really believed that "[t]he whole counsel of God, concerning all things necessary for . . . man's salvation, faith, and life, is either expressly set down in Scripture, or by good and necessary consequence may be deduced from Scripture."[137] Or, as the *Westminster Larger Catechism* succinctly puts it: "The holy scriptures of the old and new testament are the word of God, and the *only* rule of faith and obedience."[138]

b. The Puritan Standard for Morality

The Puritan postulate of biblical authority generated the corollary of freedom of conscience.[139] Mere external compliance with the Scriptures was insufficient; conscience must concur with action.[140] Moreover, if Scripture alone were the only rule of faith and obedience, then neither state nor church could prescribe rules inconsistent with Scripture: "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his Word, or beside it in matters of faith or worship."[141] Yet, Puritans did not understand freedom of conscience to be a license to live according to one's subjective preferences (even preferences backed by money). The liberty countenanced in the Puri-

134. JOHN S. COOLIDGE, THE PAULINE RENAISSANCE IN ENGLAND: PURITANISM AND THE BIBLE 1 (1970) ("Like Richard Hooker writing after him and lesser apologists for Conformity before, [John] Whitgift [Archbishop of Canterbury] gladly acknowledges that the appeal to scriptural authority is the very life of Puritanism.").

135. PERRY MILLER, THE NEW ENGLAND MIND 7 (Beacon Press 1965) (1939) ("We may declare that Puritans universalized their own neurasthenia; they themselves believed that their fears and anxieties came from clear-eyed perception of things as they are."). "Mortals pursue illusions, and success inspires only disgust or despair .... Puritans did not believe that they saw things in these terms merely because they were victims of melancholia, but because such things were there to be seen." *Id.* at 8.

136. *See* COOLIDGE, *supra* note 134, at 2–3 (repudiating Miller's psychologizing of Puritanism's penchant for Biblicism).

137. THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 603.

138. THE LARGER CATECHISM, *supra* note 86, at 1 (emphasis added).

139. For a definition of "conscience," see the leading Puritan theologian of this period, William Ames, in 1 WILLIAM AMES, CONSCIENCE WITH THE POWER AND CASES THEREOF 1 (Theatrum Orbis Terrarum, Ltd. & Walter J. Johnson, Inc. 1975) (1639) [hereinafter AMES, CONSCIENCE] ("The Conscience of man . . . Is a mans judgement [sic] of himselfe, [sic] according to the judgement [sic] of God of him."). For Ames the work of conscience proceed syllogistically: the major premise was the law of God, the minor premise is the facts confronting the moral agent, and "the Conclusion of the relation that ariseth from our fact or state, by reason of that Law; which is either guilt, or Spirituall [sic] Joy." *Id.* at 50.

140. *Id.* at 51–52 ("The power of Conscience is so great, that it maketh an action, which in its owne [sic] nature is indifferent, to be either good or bad: and that which in its owne [sic] nature is good, to be evill [sic] . . . .").

141. THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 644 (footnotes omitted).

tan understanding was a freedom to live according to God's law.[142] Moreover, the Puritan definition of freedom of conscience was expressly limited to matters of faith and worship; it did not include matters of state unrelated to those areas: "[T]hey who, upon pretense of Christian liberty, shall oppose any lawful power, or the lawful exercise of it, whether it be civil or ecclesiastical, resist the ordinance of God."[143]

Liberty of conscience has often been misunderstood as a synonym for individualism.[144] Puritan "individualism" should be understood as the subjection of an individual's conscience to the mandates of God or God's temporal agents. Such submission, however, required principled reasons by which the conscience should be bound.[145] Puritans rejected the concept of implicit faith.[146] Thus, Puritanism conjoined the duty to engage in moral reasoning with obligation to follow the results of that reasoning wherever those results led.

c. *Puritan Promise Keeping*

Puritan ethics were renowned for their precision.[147] Among the obligations demanded by freedom of conscience as understood by the

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142. *Id.* Further stating:

> They who, upon pretense of Christian liberty, do practice any sin, or cherish any lust, do thereby destroy the end of Christian liberty; which is, that, being delivered out of the hands of our enemies, we might serve the Lord without fear, in holiness and righteousness before him, all the days of our life.

Id. (footnote omitted).

143. *Id.* at 645 (footnote omitted); *see also* AMES, CONSCIENCE, *supra* note 139, at 51 ("Hence also it is, that though men be bound in Conscience before God, to obey and keep the just Lawes [sic] of men after a just manner . . . . Yet those Lawes [sic] of men, as they are mens Lawes, [sic] doe [sic] not bind the Conscience.").

144. *See, e.g.*, Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 815 (1911) ("What is peculiar to Anglo-American legal thinking, and above all to American legal thinking, is an ultra-individualism . . . . It was Puritanism which gave that added emphasis to individualist ideas in the formative period of our American legal thought that has served to stamp them upon the science.").

145. *See* KNAPPEN, *supra* note 15, at 346–47. Further stating:

> Almost equally important in the Puritan's makeup was the fine balance he maintained between individualism and the needs of the social order . . . .
>
> This individualism . . . did not necessarily mean the breaking-down of the current social, economic, and political fabric . . . so the Puritan could be an individualist and still oppose usury, champion sumptuary regulations, and insist on the right of the crown, clergy, and upper classes to rule the country. The point was that he insisted that the individual must be given an intelligible reason for these restrictions, rather than accept them by blind faith.

Id.

146. *See* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 644 ("[T]he requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.") (footnotes omitted).

147. *See, e.g.*, J. I. PACKER, A QUEST FOR GODLINESS: THE PURITAN VISION OF THE CHRISTIAN LIFE 114 (1990). Quoting a perhaps apocryphal account:

> Richard Rogers, the Puritan pastor of Wethersfield, Essex, at the turn of the sixteenth century, was riding one day with the local lord of the manor, who,

Puritans was keeping one's side of a bargain. Keeping one's promises was an aspect of freedom of conscience because freedom of conscience meant freedom to obey God's law.[148] Thus, if promise keeping were enjoined by Scripture, not even state authority could lawfully relieve one's obligation to perform. When analyzing the Eighth Commandment,[149] the *Westminster Larger Catechism* puts it this way:

> Q. [141.] *What are the duties required in the eighth commandment?*
> *A.* The duties required in the eighth commandment are, truth, faithfulness, and *justice in contracts and commerce* between man and man; rendering to every one his due; restitution of goods unlawfully detained from the right owners thereof; . . . .
> Q. [142.] *What are the sins forbidden in the eighth commandment?*
> *A.* The sins forbidden in the eighth commandment, besides the neglect of the duties required, are, theft . . . fraudulent dealing . . . injustice and *unfaithfulness in contracts* between man and man, or in matters of trust; oppression, extortion, usury, bribery, vexatious lawsuits, unjust enclosures, and depopulations; engrossing commodities to enhance the price . . . .[150]

Thus, breaches of contract were moral issues for the Puritan, but this is not to say that only breaches were moral issues. The broader topics of justice and faithfulness in contracts were of fundamental ethical concern.[151]

The leading legal scholar of the first half of the seventeenth century, John Selden, held an uncompromising position on the absolute nature of contractual undertakings:

> after twitting him for some time about his 'precisian' ways, asked him what it was that made him so *precise*. 'O sir,' replied Rogers, '*I serve a precise God.*' If there were such a thing as a Puritan crest, this would be its proper motto.

Id.

148. *See* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 644.

149. The Westminster Standards follow the typical Protestant numbering format that identifies the commandment "Thou shalt not steal" as the Eighth.

150. THE LARGER CATECHISM, *supra* note 86, at 62–64 (emphasis added). No other confessional standard of the Reformation period explicitly addresses contracts.

151. *See* THOMAS VINCENT, THE SHORTER CATECHISM OF THE WESTMINSTER ASSEMBLY EXPLAINED AND PROVED FROM SCRIPTURE 194 (The Banner of Truth Trust 1980) (1674). Amplifying the Puritan understanding of the multiple implications of the prohibition of theft, Vincent states:

> The eighth commandment forbiddeth, in reference unto all men, any kind of injustice and unrighteousness, in any of our dealings with them; such as—1. Defrauding others in our buying, when we discommend that which we know to be good, or take an advantage of others' ignorance of the worth of their commodities, or their necessity of selling them, so as to give a great underrate for them . . . . 2. Defrauding others in selling, when we praise that which we sell, and against our consciences say, It is excellent good, though we know it to be stark naught; and when we take an unreasonable price for out commodities . . . .

Id. While Vincent briefly mentions the sin of failure to perform one's contractual undertaking, the burden of his directions concerning commercial transactions goes to process and fairness, not absolute liability. *Id.* at 191.

> We must look to the contract; if that be rightly made, we must stand to it; if we once grant [that] we may recede from contracts upon any inconveniency that may afterwards happen, we shall have no bargain kept . . . . [H]ow to make our contracts is left to ourselves; and as we agree upon the conveyance of this house, or this land, so it must be. If you offer me a hundred pounds for my glove, I tell you what my glove is—a plain glove—pretend no virtue in it—the glove is my own—I profess not to sell gloves, and we agree for an hundred pounds—I do not know why I may not with a safe conscience take it.[152]

Selden cannot, however, be characterized as a Puritan. He generally supported the Parliamentary cause against the king, but Selden's support for an Erastian church government (one in which Parliament would be supreme) over presbyterianism or even episcopacy was unwavering.[153]

In contrast, Puritan theologians recognized even more than the standard sorts of defenses to contract that would have succeeded at common law. William Ames (1567–1633) was one of the early seventeenth century's leading Puritan theologians, even though he was forced to spend much of his adult life in the Netherlands because of his nonconformist views.[154] Ames wrote extensively on a wide range of theological and moral issues[155] which remained influential at the Westminster Assembly a decade after his death.[156] Ames addressed the topic of contracts for over twenty pages in his *Conscience and the Cases Thereof*[157] where he recognized that the moral obligation to perform an obligation did not extend to those who lacked capacity when making a promise;[158] where a promise was obtained by du-

152. Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J.L. & RELIGION 103, 118–19 (1986) (quoting SELDENIANA, OR THE TABLE TALK OF JOHN SELDEN, ESQ. 37–38 (1789)). Selden's qualification as a Puritan can be questioned. *See, e.g.*, ALAN CROMARTIE, SIR MATTHEW HALE 1609–1676: LAW, RELIGION AND NATURAL PHILOSOPHY 40 (1995) ("It is entirely possible that Selden was at heart a moral sceptic . . . ."). Yet Parliament chose him as one of the lay assessors to the Puritan-dominated Westminster Assembly. *See* BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 470–71 (A. W. B. Simpson ed., 1984) [hereinafter BIOGRAPHICAL DICTIONARY]; *supra* text accompanying notes 125–30; *see also* MITCHELL, *supra* note 124, at xiii.

153. *See generally* 17 GEORGE SMITH, THE DICTIONARY OF NATIONAL BIOGRAPHY 1150–62 (Sir Leslie Stephen & Sir Sidney Lee eds., 1921–1922) (containing biography of John Selden (1584–1654)).

154. *See* KEITH L. SPRUNGER, THE LEARNED DOCTOR WILLIAM AMES 27 (1972) ("Silenced at home, Ames in 1610 began an exile in the Netherlands that lasted until his death in 1633.").

155. *See id.* at 263–66 (containing a selected bibliography).

156. *See id.* at 259–60.

157. *See* 4 WILLIAM AMES, CONSCIENCE WITH THE POWER AND CASES THEREOF 227–48 (Theatrum Orbis Terrarum, Ltd. & Walter J. Johnson, Inc. 1975) (1639) (discussing contracts in three chapters).

158. *Id.* at 227 ("Hence Infants, mad men, and prodigals are not fit to make a Contract . . . .").

ress,[159] fraud,[160] or mistake;[161] where the contract was for an illegal purpose[162] or where the contract was for the sale of an ecclesiastical[163] or judicial[164] office. Ames recognized the implied duty of good faith in the performance of contracts[165] and the excuses of impracticabil-

159. *Id.* ("[T]he consent which is wrested by extreame feare, [sic] is not sufficient to a firme [sic] Contract."). Recognizing that the fear sufficient to avoid a contract must have been generated by the promisee, not external circumstances, Ames states:

> That the feare [sic] is inferred to that end onely [sic] that consent might bee [sic] forced. For if it should bee induced for another end, and hee [sic] which is afraid to avoid that evill [sic] should make a contract, that contract will bee of force: as if one being taken by a theife, [sic] should promise a summe [sic] of money to bee freed, [sic] that feare was not the cause, but the occasion onely of the contract.
>
> Secondly, The feare must bee brought on unjustly. For if one out of feare of punishment established by the lawes, [sic] should bargaine [sic] with him, to whom hee hath done an injury, such a bargaine cannot bee disannulled.

Id. at 228.

160. *Id.* ("[T]hat promise which is drawne [sic] out by guile . . . doth not properly make a contract.").

161. *Id.* ("[T]hat promise which is . . . given out of errour [sic] . . . doth not properly make a contract.").

162. *See id.*

> Lawfull [sic] contracts are not properly exercised, but about lawfull things . . . :
>
> . . . Because in every contract, consent is given: but consent to an unlawfull [sic] thing is sinne [sic].
>
> . . . [I]t is not lawfull to promise, what is not lawfull to performe [sic].
>
> . . . [N]o obligation can bee [sic] lawfull which obligeth [sic] to sinne because . . . it is repugnant to the obligation of the Divine law.

Id.

163. *Id.* at 229.

> Contracts of buying, and selling, and those which are of the same nature have no place in some things: not because they are not lawfull [sic] or good in themselves, but because they are so good that they cannot bee [sic] valewed [sic] at a price.
>
> . . . Hence it is a sinne [sic] of Simony, to buy or sell, or any way change a holy and Spirituall, [sic] for a Temporall [sic] . . . .

Id.

164. *Id.* at 230–31 ("And although there is not in every respect a parity, yet there is some similitude, and proportion betwixt things sacred and publique [sic] offices, which have the power of jurisdiction. For the sale of such offices, hath a dishonest corruptnesse, [sic] which thwarts the nature of them.").

165. *Id.* at 231–32.

> The internall forme [sic] of a lawfull [sic] Contract, is upright dealing, by which one doth sincerely intend to oblige himselfe [sic] to the performance, of that which hee [sic] promiseth, and afterwards to performe [sic] it as much, as in him lieth. The reason is, because a Contract includes a promissive consent. Now a promise is a testimony, by which one binds his faith to deale [sic] uprightly with another in the performance of this or that; and therefore the forme doth require internall, [sic] and essentiall [sic] the upright dealing of the Contracter, [sic] to bee [sic] true, and sincere.
>
> . . . Hence that division of Contracts; by which some are said to bee according to upright meaning [and] others to bee according to the strictnesse [sic] of the law, is not accurate, and hath not place either in the Court of Conscience, or before God.

ity[166] and changed circumstances,[167] as well as the defense of failure of a constructive condition (including anticipatory repudiation).[168] While Ames may have been influenced by the civil law tradition, he stands as a noteworthy representative of Puritan thinking on the morality not only of promise-keeping but also on the morality of making and avoiding contracts.[169]

Id. at 231. Ames further understood that good faith was a tool by which contractual obligations could be tempered:

> For upright meaning is required in all Contracts, and because the chiefest [sic] part of the nature of Contracts doth consist in that, the judgement [sic] as farre [sic] as it can appeare [sic], is to bee [sic] given out of that, and according to it. Therefore in all Contracts, wee [sic] should proceed according to right, and good, not the letters, or extreame [sic] rigour [sic] of the law, in which often times the most extreame injury is found.

Id. at 231–32.

166. *Id.* at 232 ("Sometimes not to stand to promises, is not repugnant to honest meaning; to wit, when the promise leaves off to bind: . . . [i]f the thing promised becomes unprofitable, unlawfull, [sic] or impossible.").

167. *Id.*

> Sometimes not to stand to promises, is not repugnant to honest meaning; to wit, when the promise leaves off to bind: . . . . If the state of the things and persons is so changed, that in the judgement [sic] of wisemen, the promiser is thought, that hee [sic] would not have comprehended such an event.

Id.

168. *Id.* ("Sometimes not to stand to promises, is not repugnant to honest meaning; to wit, when the promise leaves off to bind: . . . [i]f hee [sic] which promised on the other side, will not fulfill his promise.").

169. The earlier Puritan theologian William Perkins (who had been one of Ames's teachers) fully embraced the Aristotelian-Medieval concept of equity as a tool for avoiding the rigors of the application of the law.

> According to Perkins, equity, or moderation, is a virtue which is essential for peace in every human society . . . . Public equity has to do with the proper application of the law under particular circumstances.
>
> Public equity includes consideration of two things: the extremity of the law and mitigation of the law. The extremity of the law refers to the strict application of the latter in its literal and most precise sense without any relaxation of the prescribed penalties for "good and convenient" reasons. When there are no mitigating circumstances, strict application of the law is just. When such conditions are present, however, adherence to the letter of the law is "flat injustice."

E. Clinton Gardner, *Justice in the Puritan Covenantal Tradition*, *in* THE ANNUAL OF THE SOCIETY OF CHRISTIAN ETHICS 91, 100–01 (D. M. Yeager et al. eds., 1988). Forty years later, Puritan writer Thomas Vincent made similar and additional points about morality in contracting in VINCENT, *supra* note 151, at 194. Vincent states:

> Q. 4. What doth the eighth commandment forbid in reference unto all men?
>
> A. The eighth commandment forbiddeth, in reference unto all men, any kind of injustice and unrighteousness, in any of our dealings with them; such as—1. Defrauding others in our buying, when we discommend that which we know to be good, or take an advantage of others' ignorance of the worth of their commodities, or their necessity of selling them, so as to give a great under-rate for them . . . . 2. Defrauding others in selling, when we praise that which we sell, and against our consciences say, It is excellent good, though we know it to be stark naught; and when we take an unreasonable price for our commodities . . . .

Id.

B. *Covenant in Puritan Theology*

1. Introduction to Covenant Theology

Of all of their contributions to the development of theological doctrine, the Puritan analysis of covenant stands supreme.[170] The subject of God's covenant with man occupies an entire chapter of the *Westminster Confession of Faith*.[171] "Covenant" in Puritan theology is the term for the all-encompassing relationship(s) between God and humanity. God was not simply the creator and sustainer of all that existed; he also related to his human creatures in a particular, personal, and voluntary way called Covenant.[172] The Puritan emphasis on covenant stands in sharp relief against the other Calvinist-influenced confessional statements which did not give it so prominent a place.[173] Instead of emphasizing covenant as Puritanism's unique theological contribution, some might suggest that the doctrine of predestination was the hallmark of Puritan theology.[174] However, the latter cannot be sustained because predestination (or election) had been a prominent element of Reformed thought long before the Puritans.[175] Yet, the Puritans were to develop in depth the relationship between election and covenant.

The *Westminster Confession of Faith* posits two divine-human covenants. The first was the Covenant of Works whereby Adam as the federal[176] representative of all humanity was promised eternal life

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170. *See* MILLER, *supra* note 135, at 366 ("[B]etween 1600 and 1650, English Puritans were compelled, in order to preserve the truths already known, to add to their theology at least one that hitherto had not been known, or at least not emphasized, the doctrine of the Covenant of Grace."); *see also* Witte, *supra* note 94, at 581 ("In the later sixteenth and seventeenth centuries, Puritan theologians in England and America—in alliance with Continental Protestants—transformed the covenant into one of the cardinal doctrines of theology.").

171. *See* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 616–17.

172. *Id.* at 616. Stating further:

> The distance between God and the creature is so great that although reasonable creatures do owe obedience unto him as their Creator, yet they could never have any fruition of him as their blessedness and reward but by some voluntary condescension on God's part, which he hath been pleased to express by way of covenant.

Id.

173. *See, e.g.*, THE BELGIC CONFESSION (1561), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 383–486 (New York, Harper & Bros. 1877); THE HEIDELBERG CATECHISM OR PALATINATE CATECHISM (1563), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 307–55 (New York, Harper & Bros. 1877); THE THIRTY-NINE ARTICLES OF RELIGION OF THE CHURCH OF ENGLAND (1571), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 486–515 (New York, Harper & Bros. 1877).

174. *See infra* text accompanying notes 183–209.

175. *See, e.g.*, THE BELGIC CONFESSION, *supra* note 173, at 401–02; THE THIRTY-NINE ARTICLES OF RELIGION OF THE CHURCH OF ENGLAND, *supra* note 173, at 497.

176. *See* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 617. Chapter VII.ii of THE WESTMINSTER CONFESSION OF FAITH mandated satisfaction of a condition of "perfect and personal obedience" on Adam's part for the benefit of all

"upon condition of perfect and personal obedience."[177] In other words, the Confession teaches that Adam and all of humanity after him would never have died and would have enjoyed perfect communion with God had Adam not eaten the fruit of the tree of the knowledge of good and evil in the Garden of Eden.[178] The Covenant of Works was thus reminiscent of the typical contractual relationship with which the common lawyers would have been familiar. Second, the *Westminster Confession* identifies the Covenant of Grace which promised sinful humanity salvation from their fallen state by requiring faith in Jesus Christ.[179] The nature of the requirement of faith had proved troublesome. Was faith akin to the work required from Adam in Eden, albeit of a reduced scale? Or was faith merely a condition? To put the question in contemporary terms: Did the Puritans understand the Covenant of Grace as an offer of a unilateral contract (accepted by performance of faith)? Or was the Covenant of Grace a conditional gift? And, if the latter, how (and by whom) was the condition satisfied?

2. The Relationship Between the Covenant of Grace and Predestination

The theological conflicts over the nature of the Covenant of Grace revolved around an axis framed by the question (in early seventeenth century terms): Was the Covenant of Grace bilateral or unilateral?

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humanity. *Id.* Puritan covenant theology is frequently identified as "federal" theology derived from the Latin word for covenant, *foedus*, used in theological writings. *Id.*

177. *Id.*

178. *See, e.g.,* VINCENT, *supra* note 151, at 52. Vincent states:

> Q. 5. What was the promise of the covenant of works which God made with man?
>
> A. The promise of the covenant of works was a promise of *life*; for God's threatening *death* upon man's disobedience (Gen. ii. 17), implieth his promise of life upon man's obedience.
>
> Q. 6. What life was it that God promised to man in the covenant of works?
>
> A. The life that God promised to man in the covenant of works was the continuance of natural and spiritual life, and the donation of eternal life.
>
> Q. 7. Wherein doth natural, spiritual, and eternal life consist?
>
> A. 1. Natural life doth consist in the union of the soul and body. 2. Spiritual life doth consist in the union of God and the soul. 3. Eternal life doth consist in the perfect, immutable, and eternal happiness, both of soul and body, through a perfect likeness unto, and an immediate vision and fruition of God, the chief good.

Id.

179. THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 617. Further stating:

> Man by his fall [into sin] having made himself incapable of life by that covenant [of works], the Lord was pleased to make a second, commonly called the covenant of grace: wherein he freely offered unto sinners life and salvation by Jesus Christ, requiring of them faith in him that they may be saved . . . .

Id. (footnotes omitted).

Or, as restated above, was the Covenant of Grace a unilateral contract or a conditional gift? The doctrine of predestination made a solution to this challenge necessary. On the one hand, the *Westminster Confession* provided for a Covenant of Grace in which faith played a pivotal role.[180] Faith, as understood by the Puritans, was a passive human action (of accepting, receiving, and resting), but it was, nonetheless, a virtue that individuals exercised.[181] On the other hand, the Confession taught that God had predestined a specific number of fallen human beings to enjoy eternal life with him.[182] Thus, if a specific number of human beings were predestined, what was the place of faith? Conversely, if the temporal exercise of faith were the condition of enjoying the benefits of the Covenant of Grace, how was eternal predestination to be understood? Two solutions to this apparent problem have been proposed.

a. The Psychological Answer of Perry Miller

In the mid-twentieth century, Perry Miller proposed a resolution to this conundrum in his classic work, *The New England Mind.*[183] Although Miller's work was the first of a series on the two centuries of development of the topic of his title,[184] by beginning with the Puritans of New England, he was forced to spend a great deal of time on the Puritans of old England.[185] As we shall see, Miller's dialectical approach to the subject of covenant and predestination continues to exercise an enormous influence over subsequent analysis of the issue even when old England alone is the field of concern.

Puritanism for Miller was an example of Augustinian Christianity.[186] Augustinian Christianity, in Miller's view, was not so much characterized by doctrine but by a particular form of piety, one in which God, human sin, and redemption had an existential claim on a

180. *See id.* at 617, 630–31 (devoting a chapter to the discussion of faith).

181. *See id.* at 630–31 ("[T]he principal acts of saving faith are accepting, receiving, and resting upon Christ alone for justification, sanctification, and eternal life, by virtue of the covenant of grace.") (footnotes omitted).

182. *See id.* at 608–09. Stating further:

> III. By the decree of God, for the manifestation of his glory, some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death.
>
> IV. These angels and men, thus predestinated and foreordained, are particularly and unchangeably designed; and their number is so certain and definite that it can not be either increased or diminished.

Id. (footnotes omitted).

183. MILLER, *supra* note 135.

184. *See id.* at vii ("I offer this as the first volume in a projected series upon the intellectual history of New England to extend through the eighteenth and early nineteenth centuries . . . .").

185. *See generally id.*

186. *See id.* at 3–4 (summarizing the parallels between Augustine's and the Puritans' deeply passionate search for security in God).

person's being that challenges one's capacity for empathy in the present age:

> Piety was the inspiration for Puritan heroism and the impetus in the charge of Puritan Ironsides; it also made sharp the edge of Puritan cruelty and justified the Puritan in his persecution of disagreement. It inspired Puritan idealism and encouraged Puritan snobbery. It was something that men either had or had not, it could not be taught or acquired. It was foolishness and fanaticism to their opponents, but to themselves[,] it was life eternal.[187]

Yet, Augustinianism, in general, and Puritanism, in particular, held to some specific doctrines, particularly predestination. Any group, according to Miller, that tries to live so close to such an emotional edge while maintaining the doctrine of election is bound to be torn in two opposing directions. On the one hand, there were those who rejected predestination because it was "devoid of any grounds for moral obligation: what duties could be exacted from ordinary men when everything depended upon"[188] God?[189] Miller characterizes this group as Arminians because they rejected the "stark predestination of early Calvinism" and sought to soften God's decree of election by placing the condition of faith firmly in human hands.[190] On the other hand, there were those who were so certain of their election that they felt no need for any continuing need for discipline to God's law or any place for the ministrations of the church. This group, the Antinomians, Miller describes as possessing "an uncontrolled piety without the indispensable ballast of reason."[191] Such persons "made [God] a vital, all-pervading spirit, mystically indwelling in all men, or at least in the elect, uniting them to Himself, obliterating their individualities."[192] By contrast, from the Puritan point of view, "Arminianism made [God] too rational and too human, altogether too amenable to what man thinks is just and equitable."[193] With what Miller perceived to be threats from the right and the left, Puritan theologians needed a tool to prevail in their continuing efforts to discipline their followers and order the larger society.

Miller asserted that Puritan theologians developed the doctrine of the Covenant of Grace to solve the problem of mediating between the extremes of Arminianism and Antinomianism. In response to the Arminian, Miller asserted that the Puritan Covenant of Grace was "understood [as] just such a contract as was used among men of business, a bond or a mortgage, an agreement between two parties, signed and

187. *Id.* at 5.
188. *Id.* at 367.
189. *Id.*
190. *Id.* at 386.
191. *Id.* at 373.
192. *Id.*
193. *Id.*

sworn to, and binding upon both."[194] While it remained true that God elected some, he did so by offering everyone a deal they could not (or should not) refuse—eternal life in return for mere faith:

> Though grace and faith come entirely from God, yet because they are tendered through natural means and reasonable inducements, which all can grasp . . . men have of themselves the power to turn their backs upon the grace of God . . . . [Thus] no man of ordinary intelligence should continue unconverted, if only on the grounds of self-interest . . . .[195]

By his recapitulation of the Covenant of Grace, Miller attempted to describe what he perceived as the mechanism by which Puritans maintained the sovereignty of God while allowing a place for the human will: "The Covenant was a gift of God, yet it entailed responsibility on Him as well as upon men."[196] The Covenant of Grace was also effective against the Antinomian side because every covenant, as the common law taught,[197] imported duties of discipline and order:

> Therefore [God] fixes upon this scheme [the Covenant of Grace] that there should be on the side of man a voluntary return, a sincere pledge that will have some elements of spontaneity. He made both the Covenants "conditional", [sic] that of Grace no less than that of Works, so that they would be relations founded upon mutual stipulations . . . .[198]

The mutual stipulations on the human side of the Covenant of Grace turned out to be the law of God, what Miller characterized as the Covenant of Works.[199] Thus, the Antinomian, no matter how sure of her election, was not freed from the obligations the expression of which could not help but bring the individual's life into a mode of discipline and a society into good order.

As attractive as Miller's dialectical development of the Covenant of Grace may be, it founders upon closer examination of the original sources.[200] Yet, this paper has engaged in this long recapitulation of Miller's explanation because it still forms the underlying premises of what little legal literature there is that analyzes Puritan contributions

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194. *Id.* at 375.

195. *Id.* at 393.

196. *Id.* at 378.

197. *See id.* at 374 (crediting the common law understanding of covenant with a significant role in the development of the Puritan doctrine of the Covenant of Grace).

198. *Id.* at 382–83.

199. *See id.* at 384.

> In order that men should not presume upon the "Absolute Promises" of the Covenant to give over trying, the federal God, who is exceedingly shrewd, perfected the adroit device of incorporating the Covenant of Works into the Covenant of Grace, not as the condition of salvation but as the rule of righteousness.

Id.

200. *See infra* text accompanying notes 210–34.

to the common law. In his 1987 piece, *Blest Be the Ties That Bind: Covenant and Community in Puritan Thought*,[201] John Witte engages in a lengthy exposition of alleged Puritan "spiritual commercialism," which he asserts came to dominate theological discourse.[202] Witte follows Miller closely when he argues that the Puritans transformed the formerly unilateral Covenant of Grace into a voluntary bilateral contract in which faith was the *quid pro quo* of the blessing of eternal life.[203] Such a reorientation of the earlier Reformers' understanding of the Covenant of Grace would have had, according to Witte, implications for individual social interaction:

> The new covenant theology also provided the cardinal ethical principle of Puritanism that each person was free to choose his act, but once having chosen, was bound to perform that act, regardless of the consequences. This ethical principle was deduced directly from the new understanding of the covenant of grace.[204]

From his understanding of the individual applications of the Puritan doctrine of the Covenant of Grace, Witte extrapolates to Puritan social theory. According to Witte, not only did the Puritans believe that failure to keep one's word was a sin, they "believed that adherence to covenants and agreements was essential to maintain social cohesion and harmony."[205] Miller's understanding of the Covenant of Grace thus formed the basis on which Witte could conclude that "the doctrine of covenant unified the Puritans' concepts of the individual and of the community."[206] Society's very existence depended on promise keeping. From this platform, it was only a short step to read Puritan theology into the common law of contracts, especially the independence of mutual promises. Harold Berman has taken this step in *Law*

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201. Witte, *supra* note 94.

202. *See id.* at 589. Witte states:

> What traditionally had been treated as God's gift of faith and salvation to his predestined became, in Puritan theology, a bargained contract. What traditionally had been understood as God's covenant faithfulness to man became God's contractual obligation to man. This "spiritual commercialism" . . . became a trademark of many brands of Puritan covenant theology in the seventeenth and eighteenth centuries.

Id.

203. *See id.* at 586–87. Witte further states:

> Early Protestant writers—Calvin, Zwingli, and Bullinger—had described the covenant of grace primarily as God's merciful gift to his elect . . . . Man, in his sin, could not demand God's gracious covenant gift or bind God by it once it was conferred. He could simply accept it in gratitude . . . .
>
> Several Puritan writers, by contrast, described the covenant of grace as a bargained contract, voluntarily formed by God and his elect, and absolutely binding on both parties.

Id.

204. *Id.* at 595.

205. *Id.* at 597.

206. *Id.* at 599.

and Revolution II[207] where he construes *Paradine v. Jane*[208] as a distinctively "Puritan" decision.[209] However, to the extent that Miller's thesis about the significance of the doctrine of the Covenant of Grace is called into question, the justification for the conclusions of Witte and Berman on the influence of Puritan covenant theology on contract law is weakened.

b. The Theological Answer of John Von Rohr

Miller's thesis came under attack in 1970 with George Marsden's *Perry Miller's Rehabilitation of the Puritans: A Critique.*[210] Marsden criticized Miller's characterizations of Puritan beliefs and claimed that those mischaracterizations contributed "to a basic distortion of one of the most crucial of Puritan concerns, their doctrine of the covenant."[211] Miller is faulted, among other things, for misconstruing the purpose and nature of the Covenant of Grace in Puritan theology. The purpose for the covenant concept, according to Miller, was to inject human responsibility into a system of absolute Calvinism, rather than to acknowledge a biblical doctrine.[212] The nature of the Covenant of Grace, in Miller's rehabilitation, turned it into a means for people to contribute something to their salvation, which was contrary to the claims of the Puritans themselves.[213]

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207. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 280–81.

208. *See* 82 Eng. Rep. 519 (K.B. 1647) (reporting by Style); 82 Eng. Rep. 897 (K.B. 1647) (reporting by Alden).

209. *See* BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 281; *see also* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 462 (1996) ("The adoption of the doctrine of absolute contractual liability [in *Paradine*] reflected a Puritan belief in the sanctity of covenants as well as a mercantile emphasis on security of bargained transactions.").

210. George M. Marsden, *Perry Miller's Rehabilitation of the Puritans: A Critique*, 39 CHURCH HISTORY 91 (1970).

211. *Id.* at 93 (pointing out that this result was due to a modification of four areas of Puritan belief: Puritan biblicism, doctrinal formulations, emphasis on the place of Christ, and their Calvinism).

212. *See id.* at 99.

> It is of course possible that he is correct in suggesting that the covenant became popular in the sixteenth and seventeenth centuries because of the appeal of contractualism to the spirit of the age and because of its usefulness in explaining man's responsibilities to a sovereign God. The simpler explanation, and the one the Puritans themselves would have given, however, seems far more probable. The covenant doctrine was emphasized primarily because it was discovered to be a central biblical concept. It was emphasized . . . because the Protestant Reformers studied the whole Scripture intensively and demanded that it all be taken seriously . . . .

Id.

213. *Id.* at 100 ("His implication is that New England ministers were informing their congregations that if they tried to fulfill the moral law they would contribute something to their salvation. But this would be the exact opposite of what the Puritans actually said about the covenant of grace."); *see also* Gardner, *supra* note 169, at 91 (faulting Miller because he "interpreted covenantal . . . theology as an attempt to

Michael McGiffert has also challenged Miller's contractualist interpretation of the Puritan doctrine of the Covenant of Grace and instead affirmed that the Covenant was absolute; the conditions of the Covenant were, in the final analysis, satisfied by the gift of God.[214] William Stoever further criticized Miller's presumption of human participation in satisfying the covenant conditions because such a presumption unnecessarily abridged the reality of divine sovereignty in the Covenant. Stoever asserted that a close dialectical relationship characterized covenantal conditionality and divine sovereignty.[215] The real distinction for the Puritans was between merit and grace. The Puritans rejected the former without simultaneously rejecting the reality of human activity.[216]

One of the most sustained attacks on Miller's rehabilitation (or domestication) of the Puritans came in 1986 with the publication of John von Rohr's *The Covenant of Grace in Puritan Thought*.[217] For von Rohr, the Puritan focus on the Covenant of Grace was not a psychological crutch but a theological conclusion,[218] and he notes that a proper evaluation of the doctrine of the Covenant must appreciate its fundamental theological dimension. In other words, Von Rohr rejects an either/or interpretation of the human and divine activities in the Covenant of Grace in favor of a both/and explanation.[219] Von Rohr repeatedly drives home his thesis that the Puritan Covenant of Grace was unilateral and absolute as well as bilateral and conditional.[220]

Von Rohr traces Miller's error to a faulty conception of the contribution of the two Reformed streams of thought about the Covenant, the Genevan and Rhineland, into the Puritan understanding. Whatever differences in emphasis and even tension that existed between the Reformed approaches to the Covenant of Grace, they did

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resolve the antinomy in Calvinist doctrine between determinism and human freedom by making salvation dependent upon good works").

214. *See* JOHN VON ROHR, THE COVENANT OF GRACE IN PURITAN THOUGHT 29 (1986).

215. *See id.* at 29–30.

216. *Id.* at 29–30 ("[T]he doctrine of divine sovereignty is not abridged by an admission of human participation, and Stoever is critical of Miller and others who affirm the necessity of such a conclusion.").

217. *Id.* at 19 (asserting that "Miller's account is seriously in error").

218. *Id.* at 17 ("Miller's fundamental thesis is that the covenant concept was developed by Puritan theologians as a 'device' for rectifying certain deficiencies in the theological system of John Calvin . . . and for gaining the psychological sense of assurance which these changes could bring.").

219. *Id.* ("The covenant of grace was both conditional and absolute."); *id.* at 81–82 (describing exegesis of texts supporting the conclusion that "Puritan theology rejected . . . the 'either/or' and affirmed a 'both/and,' with the connecting link found in the fulfillment of the conditions themselves").

220. Von Rohr variously speaks in terms of a "duality," of being "conjoined," of a "connection" or "reconciliation," and of a "concurrence." *Id.* at 1, 33, 53, 152.

not conflict.[221] The doctrines of divine sovereignty and predestination were the common property of the entire Reformed tradition, including the Rhineland school under Heinrich Bullinger, and were not limited to the Genevan school under John Calvin.[222] Calvin's doctrine of the Covenant was not devoid of conditionality[223] and Bullinger's Covenant had an absolute dimension.[224]

According to Von Rohr, the conditional human and the absolute divine elements could comfortably coexist within Puritan thought because they conceived that "the divine agency worked through the human agency and . . . their working was . . . one of concurrence."[225] The divine element did not abolish or disregard the human but instead enabled and enhanced it.[226] Von Rohr's primary focus is on the need

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221. *See id.* at 32–33 (discussing views of original and secondary sources on subject of alleged antinomy within the Reformed tradition).

222. *Id.* at 2 ("Standing firmly in the continental Reformed tradition, Puritan thinkers spoke unhesitatingly of God's sovereignty, the eternal decrees, and divine predestination.").

223. *See id.* at 19 ("Calvin's theology was not unmindful of the covenant of grace and . . . God's mercy is a committed mercy and calls for a committed response.").

224. *See id.* at 31. Von Rohr states:

> The Rhineland [*i.e.*, Bullinger] reformers were predestinarians, and their contribution to Puritan thought thus included a theology of divine as well as human act . . . . [T]o portray the nature of their influence as leading simply to a bilateralism is to reduce predestination for Puritanism itself to mere theory and to ignore the divine agency in the process of salvation which a doctrine of election entails. Such sterilizing of the predestination conviction, however, was hardly a part of either Puritan thought or religious consciousness.

Id.; *see also id.* at 193. Stating further:

> Thus the covenant of grace for Bullinger was a conditional covenant . . . . And yet, though this element of conditionality was central, the covenant was not understood by Bullinger in terms reminiscent of the "pact" of late medieval nominalism with its semi-Pelagian optimism and its tendency toward a purely legalistic *quid pro quo*. For Bullinger the conditional covenant resided within the context of the Reformation doctrine of . . . single predestination, God's election of some for salvation.

Id.

225. *Id.* at 152.

226. *Id.* at 114–15 ("[P]redestination does not abolish human action, but enhances it, for the divine and the human must go together in fulfillment of covenant conditions."); *see also id.* at 152. Stating further:

> On the whole . . . when God's doing was emphasized . . . God's actions are in no way pictured as disregardful of the human subjects, with their capacities and characteristics of personal life, through whom these actions occur. If one emphasis is that "God works in us," a second immediately follows: "God works by us."

Id. The need for both actors resides in the Puritan strong belief in human depravity and human inability. *See id.* at 82. Stating further:

> This need for God's absolute help in the fulfilling of covenant conditions is due to the impotence for good which characterizes humanity's fallen state . . . . Thus the doctrine of depravity made impact here upon Puritan covenant understanding. To affirm unaided capacity for faith and repentance would be horrendous heresy, the theological folly variously designated Pelagian, Papist, or Arminian.

to uphold the absolute along with the conditional in the face of the tendency of Miller (and many following after him) to perceive the latter while remaining insensitive to the former.[227]

Finally, in a more recent discussion of decretal and covenant theology, Jan van Vliet has also challenged the tendency of much of modern scholarship to follow Miller's presumption of a conflict between a purely conditional Covenant of Grace and unconditional predestination.[228] He observes that "Calvin discovered no discernable opposition, inherent contradiction, or even tension between [the two doctrines of predestination and covenant]."[229] William Ames, one of the most influential Puritan divines in early federal theology,[230] accepted a coexistence of both an absolute divine decree and a conditional divine-human covenant.[231] A result of Miller's "reading in" an unnecessary conflict within Puritan thought has been a tendency to evaluate Puritan doctrine, particularly in its advanced representation in the Westminster Standards, as the triumph of the decrees of predestination (absolute) over the covenant (conditional) where, in fact, no battle was fought.[232] Van Vliet concludes with a warning against reading "doctrinal incongruity and antipathy" as the trademarks of the development of the Reformed confessional tradition.[233] The trend of

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Id.; *see also* Gardner, *supra* note 169, at 93 ("Since fallen humanity is unable to initiate faith, God freely bestows saving grace upon the elect . . . . Apart from grace, humanity is unable either to believe or to obey the law.").

227. *See* VON ROHR, *supra* note 214. Stating further:

> Some . . . tendencies in Miller's analysis have subsequently been carried to more extreme form in other, less thorough, presentations of Puritan covenant thought. Such popularizations of his views have mainly lifted up the theme of the covenant conditions and the obligation for their fulfillment, painting upon Puritanism an Arminian coloration of the type it so rigorously opposed . . . . Ralph Barton Perry declared, "Through the covenant theology the New England Puritans were possessed of the more congenial creed that God helps those who help themselves." Thus the Miller legacy has in these instances lost all sense of the continuing Calvinism in Puritan covenant thought.

Id. at 21–22 (footnote omitted).

228. *See* Jan van Vliet, *Decretal Theology and the Development of Covenant Thought: An Assessment of Cornelis Graafland's Thesis with a Particular View to Federal Architects William Ames and Johannes Cocceius*, 63 WESTMINSTER THEOLOGICAL J. 393 (2001).

229. *Id.* at 394.

230. *Id.* ("[W]e have chosen to examine the contributions of William Ames and Johannes Cocceius because these two individuals, more than any other theologians in the history of the development of Reformed orthodoxy, have been responsible for the construction of the early architecture of what we now designate the federal theology.").

231. *Id.* at 418 ("Cocceius formalized something that already existed earlier in William Ames's teaching, the comfortable coexistence of decree and covenant . . . .").

232. *Id.* at 398 ("[S]uch representation of the [Westminster] Divines' position [as the victory of predestination over covenant theology] serves to unfairly overshadow the *Confession*'s generally acknowledged superb teaching on covenant theology.").

233. *Id.* at 420. Van Vliet further states:

modern Puritan scholarship thus undercuts the tendency of Perry Miller and his modern disciples to create a division within Puritanism and then absolutize one pole or the other. The Puritan understanding of the relationship between God and humanity was not commercial or contractarian. While human covenantal obligations were real, the divine initiative was the foundation of the Covenant and provided the platform on which the benefits of Covenant obedience could be enjoyed.

C. *Discipline in Puritan Living*

In *The Disciplinary Revolution: Calvinism and the Rise of the State in Early Modern Europe*,[234] Philip Gorski argues that each of the three confessional strands of European Christianity—Lutheran, Reformed, and Catholic—were engaged in "disciplinary revolutions."[235] Of the three confessional traditions, Gorski observes that the discipline of the Reformed or Calvinistic strand was more intensive[236] and its effects deeper.[237] England became one of the most orderly and powerful early modern states due to the depth of the impact of its Puritan Reformed discipline.[238] Three facets of Reformed discipline contributed to Puritanism's impact on English society: self-discipline, church discipline, and public discipline.[239] While self-discipline and

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> [S]cholars of Reformed orthodoxy must be disabused of the specious notion that doctrinal incongruity and antipathy represent the trademark . . . of the development of the Reformed confessional tradition. Such an ill-conceived postulate betrays the revisionist capabilities of "decretal theology" and, as such, should be considered an assault on well-established Reformed historiography, particularly through the period of Reformed orthodoxy. It does a great disservice to the legacy of those individuals who contributed to the development of a system, it is a contrived interpretation untrue to historical fact, and it is consequently a concept whose legitimacy must be challenged.

Id.

234. GORSKI, *supra* note 18.

235. *Id.* at xvii (stating that disciplining practices can be observed in Calvinist, Catholic, and Lutheran contexts).

236. *See id.* at xi ("[S]ocial-disciplining was a great deal more intensive in the Calvinist parts of Europe than in Lutheran and Catholic regions."); *id.* at xvii ("[T]he social-disciplining process went further and faster in the Calvinist polities . . . ."); *see also* BENEDICT, *supra* note 21, at 486. Benedict states:

> Comparing the Reformed to the other two major post-Reformation church families, however, it would appear that the Reformed churches had the most vigorous disciplinary systems . . . . They exercised a more continuous oversight of church members' behavior than did the visitation systems of most Lutheran and Catholic churches—or the church courts of England . . . .

BENEDICT, *supra* note 21, at 486.

237. GORSKI, *supra* note 18, at x ("My argument . . . is that the Reformation unleashed a profound and far-reaching process of disciplining—a disciplinary revolution . . . and that the effects of this revolution were deepest and most dramatic in the Calvinist parts of Europe.").

238. *Id.* at xvii (noting that England was among the most orderly and powerful early modern states because it experienced a Calvinist disciplinary revolution).

239. *Id.* at 20–21.

church discipline were of primary importance to the Puritans for their religious significance, these disciplines are also important for their historical implications for society, the law, and the state. This importance is only heightened by the inseparability of religion from society and the state, especially in the context of an established church.[240]

1. Internalization

The Puritan understanding of discipline, like all its Reformed siblings, was zealous to emphasize that the goal of all discipline was conformity to scriptural law.[241] The most important type of discipline was spiritual, and spiritual growth was manifested by an inward obedience—a voluntary submission of an individual's desires to God's moral law.[242] Because inward obedience was not immediate, its cultivation required various practices.[243] This ideal of self-discipline was aimed at the heart, and produced a change in the moral character of many of its advocates.[244] Not simply outward conformity but inner virtue was Puritanism's ultimate concern.[245]

The goal of internal discipline explains the informal and nonjudicial practices of discipline employed by the Puritans. Perceived wide-

240. *Id.* at 3 (cautioning against "treating religion and politics as fundamentally different things . . . . For at perhaps no other time in European history were religion and politics more tightly intertwined than in the two centuries following the Reformation.").

241. *See id.* at 20 ("[T]he Calvinists . . . gave particular emphasis to the conformity of the church—and indeed of the entire political community—with scriptural law.").

242. *Id.* ("Spiritual growth, Calvin believed, was manifested in the attainment of 'voluntary' and 'inward' obedience, a natural harmony between morality and desire.") (footnote omitted).

243. *Id.* ("For the individual believer discipline was . . . a practical [problem], and Calvinists invented a variety of techniques for achieving it: regular Bible reading, daily journals, moral log books, and rigid control over time. Thus, Calvinism propagated new ethics and practices of self-discipline.") (footnote omitted); *see also* HILL, SOCIETY AND PURITANISM, *supra* note 6, at 204 (observing that Puritan preachers adjured their public to engage in daily scrutiny of their own conduct).

244. *See, e.g.*, BENEDICT, *supra* note 21, at 429 ("The theology of Zwingli, Bullinger, and Calvin all accorded greater attention to personal sanctification than Luther's."); *id.* at 488 (observing evidence of the successful inward nature of this self-discipline in the late seventeenth century in church members: "*spontaneously* confessing sexual misconduct to the consistory [local church governing council] testifies that the pressure of church discipline helped to inculcate a new moral sensibility") (emphasis added); HILL, SOCIETY AND PURITANISM, *supra* note 6, at 186–87; LOUIS B. WRIGHT, MIDDLE-CLASS CULTURE IN ELIZABETHAN ENGLAND 49 (1958) (noting that one of the benefits of grammar schools was the inculcation of good morals).

245. BENEDICT, *supra* note 21, at 429–30. Benedict states:

> Within the . . . Church of England, practical divines championed a style of personal piety that sought to foster a far more single-minded, systematic pursuit of virtue . . . . [T]he great[est] accomplishment of the Reformed churches was to have completed Luther's reformation of doctrine with a reformation of life . . . . [T]he Reformed cause . . . awakened high hopes of both individual and collective moral transformation.

Id.

spread moral laxity and ignorance required extensive outside control (external discipline to make up for the lack of internal discipline) and education to make self-control possible.[246] The incompatibility of ignorance with self-control explains the Puritan practice of catechizing church members,[247] as well as why admonition was the first (and in many cases the only necessary[248]) level of institutional church discipline. Even other believers who had no formal authority over the actions of their brethren were obliged to use moral suasion to affect the needed self-discipline in their neighbors.[249]

2. A Mark of the True Church

The subject of ecclesiastical discipline in Puritan thought and practice encompasses both its centrality and its methodology. The importance of church discipline is evidenced by its status as one of the indispensable signs or marks by which a true church could be differentiated from a false pretender[250] by at least some segments of the Reformed church.[251] For those who asserted that discipline was a mark

246. *See* HILL, SOCIETY AND PURITANISM, *supra* note 6, at 211 ("The preachers were in general agreement about ignorance of Christian duties among the masses, and the consequent need for rigorous control and re-education.").

247. Walter Travers, *The Book of Discipline 1587*, *reprinted in* THE REFORMATION OF THE CHURCH 178, 183–85 (1987) ("*Of the Catechism*[:] Let the Catechism be taught in every church . . . . *Of Schools*[:] Let children be instructed in Schools, both in other learning, and especially in the catechism, that they may repeat it by heart, and understand it . . . ."). *See generally* RICHARD BAXTER, THE REFORMED PASTOR 172–256 (William Brown ed., The Banner of Truth Trust 1974) (1656) (expounding at length on the need for, and methods useful to, pastoral catechizing of the entire congregation).

248. BENEDICT, *supra* note 21, at 461 (explaining that initial discipline of admonition from a pastor or ruling elder, which was heeded, would in most cases end the disciplinary process; in one case, only one-half of the issues dealt with by an elder in home visits were sent along to the consistory).

249. *See id.* at 489 (describing believers as feeling "a measure of responsibility for each other's behavior"); GORSKI, *supra* note 18, at 21. Stating further:

> Only by remaining blameless and above all reproach could the church fulfill its testimonial function. Consequently, each individual was not only made responsible for his or her own conduct but was charged to keep a watchful eye over other members of the congregation and to remonstrate with those who strayed from the path of righteousness. In sum, the Reformed Church made each individual responsible not only for their own conduct but for the purity of the church as a whole. Each watched each, and all watched all.

GORSKI, *supra* note 18, at 21.

250. *See, e.g.*, JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 4.1.9 (John T. McNeill ed., Ford Lewis Battles trans., The Westminster Press 1960) (1559) [hereinafter CALVIN, INSTITUTES] ("Hence the form of the Church appears and stands forth conspicuous to our view."); FRANCIS TURRETIN, 3 INSTITUTES OF ELENCTIC THEOLOGY 86 (James T. Dennison, Jr. ed., George Musgrave Giger trans., P & R Publ'g 1997) (1685) ("[I]t is of great value to know [the church's] true marks that we may be able to distinguish the true fold of Christ from the dens of wolves . . . .").

251. *See, e.g.*, FIRST SCOTS CONFESSION OF FAITH (1560), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 461–62 (New York, Harper & Bros. 1877) ("The notes therefore of the trew Kirk of God we beleeve, confesse, and avow to be,

of the church, its omission invalidated any church's claim to be a true church.

Not every segment of the Reformed tradition considered discipline to be a mark of the church.[252] However, this difference is only of nominal importance because even where it was not technically understood as a mark essential to the *existence* of a church, it was, nonetheless, held to be indispensable to the *health* of a church.[253] Discipline was "necessary for all times,"[254] and the Puritans earnestly sought after it.[255] Discipline was so important that communication between

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first, the trew preaching of the Worde of God . . . . Secundly, the right administration of the Sacraments . . . . Last, Ecclesiastical discipline uprightlie ministered, as Goddis Worde prescribes, whereby vice is repressed, and vertew nurished.") (footnotes omitted); THE BELGIC CONFESSION, *supra* note 173, at 419 ("The marks by which the true Church is known are these: If the pure doctrine of the gospel is preached therein; if she maintains the pure administration of the sacraments as instituted by Christ; if church discipline is exercised in punishing of sin . . . ."); THE IRISH ARTICLES OF RELIGION (1615), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 538 (New York, Harper & Bros. 1877) ("But particular and visible Churches . . . be many in number: wherein the more or less sincerely, according to Christ's institution, the Word of God is taught, the Sacraments are administered, and the authority of the Keys is used . . . .").

252. *See, e.g.*, CALVIN, INSTITUTES, *supra* note 250, at 4.1.9 ("Hence the form of the Church appears and stands forth conspicuous to our view. Wherever we see the word of God sincerely preached . . . we see the sacraments administered according to the institution of Christ, there we cannot have any doubt that the Church of God has some existence . . . ."); THE FRENCH CONFESSION OF FAITH (1559), *reprinted in* 3 PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 375–76 (New York, Harper & Bros. 1877) (listing only the Word of God and Sacraments as marks of the church); THE THIRTY-NINE ARTICLES OF THE CHURCH OF ENGLAND, *supra* note 173, at 503 (listing only the Word and Sacraments); THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 658, 667–68. THE WESTMINSTER CONFESSION OF FAITH does not actually list the marks of the church, but comes close by referring to those things which make a church more or less pure, listing only the doctrine of the gospel and the administration of ordinances, and discussing church discipline, although it is not described as a mark of the church. THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 658, 667–68.

253. *See* THE FRENCH CONFESSION OF FAITH, *supra* note 252, at 375 (stating, in the chapter preceding the list of the marks of the church, the Church is "the company of the faithful *who agree to follow the Word, . . . who advance in it all their lives.*") (emphasis added); *see also* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 658, 671–73 (explaining the importance of doctrine and ordinances for the purity of the church also say that the doctrine is to be taught "*and embraced*" and listing the reasons making discipline necessary—all of which are of the utmost importance to the health of a church) (emphasis added).

254. Travers, *supra* note 247, at 178.

255. *See* BAXTER, *supra* note 247, at 164, 166 ("What hath been more talked of, and prayed for, and contended about in England, for many years past, than discipline? . . . Discipline is not a needless thing to the Church."). Calvin also saw discipline as essential for the life of the church because it was essential to establish order, without which no church can long endure. *See* CALVIN, INSTITUTES, *supra* note 250, at 4.12.1. Further stating:

> If no society, nay, no house even a moderate family, can be kept in right state without discipline, much more necessary is it in the church, so discipline is, as it were, its sinews . . . [lack of discipline contributes to] the complete devastation of the Church . . . . Discipline, therefore, is a kind of curb

congregations was encouraged to yield mutual help in discipline.[256] The Puritan goal was not merely to establish churches but to make them strong and vital; for this reason, Puritans were greatly concerned with fostering discipline.

With the health of the church at stake, the Puritans were very concerned about ensuring that proper methods of discipline were employed. This concern led to a reconsideration of church offices.[257] Puritanism introduced the office of ruling elder to England.[258] Ruling elders were men selected by and from the people, primarily to supervise the morals and administer ecclesiastical discipline.[259] These ruling elders were to join with the local parish pastors in supervising the flock.[260] Both were to engage in regular visits to the members of their

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to restrain and tame those who war against the doctrine of Christ, or it is a kind of stimulus by which the indifferent are aroused . . . .

Id.; *see also id.* at 4.12.4. Stating further:

> [W]e begin better to perceive how the spiritual jurisdiction of the Church . . . is at once the best help to sound doctrine, the best foundation of order, and the best bond of unity . . . . Those, I say, who trust that churches can long stand without this bond of discipline are mistaken, unless, indeed, we can with impunity dispense with a help which the Lord foresaw would be necessary . . . .")

Id.; *see also* JOHN CALVIN, THE NECESSITY OF REFORMING THE CHURCH 118 (Protestant Heritage Press 1995) (1543) ("If it is thought proper to compare the two [Protestant and Roman discipline], we are confident that our disorder . . . will be found at all events somewhat more orderly than the kind of order in which they glory.").

256. Travers, *supra* note 247, at 179 ("Particular churches ought to yield mutual help one to another, for which cause they are to communicate amongst themselves. The end of this communicating together is, that all things in them may be so directed both in regard of doctrine and also of discipline . . . .").

257. BENEDICT, *supra* note 21, 431. Benedict states:

> For church reformers of all stripes in early modern Europe, the transformation of lay religious life began with the reformation of the parish ministry, the church's agents in every locality. For most of those within the Reformed tradition, a critical element of any reformation of the ministry in turn involved remodeling church offices . . . .

Id.

258. AYLMER, *supra* note 39, at 56 (noting that it was the Presbyterian wing of Puritanism that wanted to introduce "a system of church government by *presbyters* [ministers] and elders") (emphasis added).

259. Travers, *supra* note 247, at 179 ("Besides there are also elders, which watch over the life and behaviour of every man . . . ."); *see also* ACTS & ORDS. INTERREGNUM, *supra* note 125, at 749–54 and 833–38 (containing Acts of August 19, 1645 and March 14, 1646, "An Ordinance for Keeping of Scandalous persons from the Sacrament of the Lord's Supper . . . .").

260. BENEDICT, *supra* note 21, at 460 ("The consistory [local ruling body of pastors and ruling elders] was the essential agency for effecting the communal moral regeneration that appeared so attractive to so many amid the initial excitement of the Reformation."); *see also* Travers, *supra* note 247, at 179 ("[Common counsel of the eldership was to direct the churches corporate affairs, and] [t]hen also such as pertain to particular persons. First, to all the members of that church . . . that the wicked may be corrected with ecclesiastical censures . . . .").

congregations and to investigate the ongoing life and conduct of every member.[261]

The Puritans focused on implementing appropriate church officers to administer discipline. The Puritans argued that the government of the church was distinct from the state in the exercise of discipline, thus allowing the consistories to function separately (though not autonomously) from the civil rulers.[262] This gave rise to the significant provision of the *Westminster Confession* that "The Lord Jesus, as king and head of his Church, hath therein appointed a government in the hand of church officers, distinct from the civil magistrate."[263] In addition, the Puritans maintained that all clergy were equal and thus that all ministers together with the ruling elders should engage in ecclesiastical discipline.[264] These three reforms (strengthening the office of ruling elder, establishing church government as distinct from the state, and empowering all clergy to engage in discipline) created a powerful mechanism at the local level to enforce church discipline on entire congregations with the help of leaders drawn from the local congregations.

3. Implications for Society, the Law, and the State

To the Puritan mind, "the axle of discipline" was not only necessary for the individual and the church, but was also the basis for "[t]he flourishing and decaying of all civil societies."[265] Whether it was an individual, a family, a church, or a society, discipline was necessary in

261. *See* BAXTER, *supra* note 247, at 164 (lamenting how few ministers in England actually know the people within their charge); Travers, *supra* note 247, at 186 ("*Of Elders*[:] Let the elders know every particular house and person of the church, that they may inform the minister of the condition of every one . . . ."); *see also* ACTS & ORDS. INTERREGNUM, *supra* note 125, at 789–97 (containing the Act of August 19, 1645, "Ordinance regulating the Election of Elders").

262. It was this issue which caused the Divines at the Westminster Assembly to "respectfully" send a letter to Parliament requesting it to change a declaration that officers empowered by Parliament would participate in cases of church discipline regarding indictable offenses. The Divines even went so far as to indicate in their petition that they would not submit to the objectionable declaration! *See* MITCHELL, *supra* note 124, at 297–300. In any event, Parliament made it clear that ecclesiastical jurisdiction did not extend to cases of breach of contract. *See also* ACTS & ORDS. INTERREGNUM, *supra* note 125, at 1207 (containing the Act of August 29, 1648, entitled "An Ordinance for The Form of Church Government to be used in the Church of England and Ireland . . . ."). Further Stating: "The Presbytery or Eldership shall not have cognizance of any thing wherein any matter of Payment, Contract or Demand is concerned, or of any matter of Conveyance, Title, Interest, or Property in Lands or Goods." *Id.*

263. THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 667.

264. *The Form of Presbyterial Church-Government, reprinted in* THE REFORMATION OF THE CHURCH 209–14 (1987) (noting the power of a minister to rule over the flock, and specifying that those commonly called "elders" are to join with the minister in the government of the church).

265. HILL, SOCIETY AND PURITANISM, *supra* note 6, at 188 (quoting John Milton); *see also* GORSKI, *supra* note 18, at 31 (quoting John Milton).

order to promote order; where order was desired, discipline could not be far behind.[266] Reformational Calvinists also wanted a disciplined society as well as disciplined individuals and churches.[267] As a result, society was increasingly disciplined, and the state's hand in that process was greatly strengthened.[268] The connection between religious discipline and the state and larger society was a product of the interconnection of the two, of the increased social religiously driven discipline, and of the eventual state takeover of much of the infrastructure for social control.

The relationship between Puritan religious discipline and its effects on society and the state must be seen against the backdrop of the close interrelationship that existed between church and state.[269] In many social matters, the "cooperation between the religious and civil authorities was generally tight."[270] The ethos of the day was one where the entire social life was to be Christianized; godliness was to be imposed on the world to create a Christian polity.[271] The original version of the *Westminster Confession* provided for an established church.[272] Therefore, the goal was to have authority rest in (presumably) self-disciplined, godly magistrates.[273] There was no area of social

266. CALVIN, INSTITUTES, *supra* note 250, at 4.12.1 (explaining the need for discipline in the church by establishing that the church as a society is no different than any other society and that the need for discipline in the church was common to the family and the state); HILL, SOCIETY AND PURITANISM, *supra* note 6, at 189 (indicating that Milton's support for "presbyterian discipline in 1641–42 arose from his sense of the need for tight organization and solidarity among those who wished to remove disorder").

267. GORSKI, *supra* note 18, at 27 ("The Calvinists . . . were not content with a disciplined church; they wanted a disciplined society, as well.").

268. *See id.* at 38 (noting the increase in state discipline potential arising from the Reformation).

269. *See supra* text accompanying note 262.

270. GORSKI, *supra* note 18, at 19.

271. *See* GORSKI, *supra* note 18, at 27–28 ("[Radical Calvinists, including those of the English Revolution] aspired to the political 'domination of the religious virtuosos belonging to the church' and to the 'imposition of godly law upon the world.'") (footnote omitted); HILL, SOCIETY AND PURITANISM, *supra* note 6, at 186 ("The puritan movement . . . is always groping towards a form of organization which will fulfil [sic] the functions of a political party, to remake society as God wished to see it.").

272. *See* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 653. Stating further:

> The civil magistrate . . . hath authority, and it is his duty to take order, that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed.

Id. (footnotes omitted).

273. *See* GORSKI, *supra* note 18, at 21 (reflecting on Calvin's view of the duties of the godly magistrate); HILL, SOCIETY AND PURITANISM, *supra* note 6, at 203 ("Calvinist fallen man can only be reduced to civil subordination (failing regeneration) by an imposed discipline."). Further stating:

> Natural man cannot be left to himself, . . . he must be subordinated to a new discipline and leadership, to the control of the regenerate. . . . Only the en-

life that could not be influenced by both church and state. The key difference was that the religious impetus for this discipline affected society in a bottom-up manner,[274] which may explain its greater impact on society.[275]

The Puritan process of strengthening the church through the rigorous use of discipline had the indirect effect of enhancing state power because it created new means to enforce discipline.[276] The network of practices, institutions, and mechanisms created and utilized for religious governance significantly increased the possibilities for social control.[277] These networks created the infrastructure that made possible the exercise of wider and deeper political power and dominion.[278] Even without such an infrastructure of networks of control, states had previously attempted such discipline; however, they had lacked the capacity to implement it.[279] Puritan churches, through the work of local pastors and ruling elders, were able to bring about a level of social control which many monarchs longed for but which had been beyond their grasp. States have had the head but not always the arms and legs necessary to successfully, or even sufficiently, direct their people.[280]

> lightened elect are capable of fighting against the sins and corruption of the mass of humanity. Hence it is the divine will that they should be in a position of power over the unregenerate many . . . . Yet God remained a Taskmaster, even for those who would not discipline themselves. An external discipline was needed to help [the undisciplined] . . . .

HILL, SOCIETY AND PURITANISM, *supra* note 6, at 204–05; *accord* LITTLE, *supra* note 72, at 67.

274. GORSKI, *supra* note 18, at 2, 19 (suggesting a bottom-up reading of early state formation as opposed to a top-down and highlighting the bottom-up nature of discipline observed in the confessionalization paradigm).

275. *See id.* at 33 (observing that bottom-up discipline tends to have greater impact on a society).

276. *Id.* at 18 ("Church-building also enhanced state power indirectly by establishing new mechanisms of moral regulation and social control.").

277. *Id.* at xv ("By refining and diffusing a panoply of disciplinary techniques and strategies, it is argued, Calvin and his followers helped create an infrastructure of religious governance and social control that served as a model for the rest of Europe—and the world.").

278. *Id.* at xvi (comparing the disciplinary revolution to the industrial revolution—both transformed the means of production and indicating that the power of surveillance made political power and domination truly possible).

279. *Id.* at 18. Stating further:

> Of course, there was nothing new about attempts to impose social discipline on the populace; urban magistrates and territorial rulers had been attempting to alter the behavior of their subjects . . . through a plethora of legislation . . . . But they generally lacked the administrative capacities to enforce these rules. It was here that the church proved [most] crucial.

Id. (footnote omitted).

280. *Id.* at 22 ("[A] great deal of attention has been devoted [in state theory] to the nerve centers of the state—the fiscal and administrative apparatus—very little has been paid to its torso and limbs—the networks of practices and institutions that it uses to embrace and guide the population.") (footnote omitted).

At least three specific areas of society were targeted for reform: education, poor relief, and general morals. Education's disciplinary value was as real to society at large as it was to the church. Popular education that was accessible to the poor could produce both religious and social benefits such as literacy,[281] as well as inculcating good morals.[282] Poor relief became an early form of both welfare and workfare with a distinction drawn between the able bodied and the truly needy.[283] Those who were able were directed to work.[284] General morals, especially marriage and sex but also issues such as drunkenness and gambling, came to the attention of the church. Marriages were recorded,[285] and reconciliation was sought in cases of marital discord.[286] Illicit sexual relations such as adultery, concubinage, and premarital sex were all subject to church discipline.[287] Drinking and gambling were also vices which consistories tried to stamp out.[288] In all of these ways, discipline overflowed beyond the church to the population as a whole.[289]

Significantly, while the infrastructure was laid down by the church in order to facilitate its disciplining of society, it paved the way for the state to utilize the same highways in order to establish its own control. How did such a change take place? First, state involvement in religion increased the reach of the law and helped breed disciplined subjects with the state as the disciplining body.[290] The state was enabled to go where only the church might have gone before. Second, and more

281. BENEDICT, *supra* note 21, at 543 (noting that Calvinism contributed significantly to the spread of literacy due to its desire to see life lived in strict accordance with God's word).

282. WRIGHT, *supra* note 244, at 49 ("[T]he general feeling that the grammar schools inculcated good morals exercised a powerful influence in their favor.").

283. GORSKI, *supra* note 18, at 18–19 (stating that desanctifying poverty allowed discrimination between the deserving poor and the able-bodied poor, "providing aid to the former and setting the latter to work"). Stating further:

> [O]ne of the mechanisms through which [Calvinists] sought to achieve this new society was poor-relief. It was the Calvinists . . . who first did away with "received forms of charity" and replaced them with a rational system of poor-relief . . . and it was they, too, who first used the poor law as an instrument of labor discipline.

Id. at 27 (footnote omitted).

284. *Id.* at 19.

285. *Id.*

286. BENEDICT, *supra* note 21, at 541 (noting that disciplinary boards dedicated their time to "reconciling quarreling spouses and neighbors").

287. *Id.* at 477 (observing that such vices preoccupied many disciplinary bodies).

288. *Id.*

289. GORSKI, *supra* note 18, at 22 ("The new schools and workhouses, not surprisingly, employed the same mechanisms of moral surveillance and social control as the Calvinist consistories. Indeed, they may be seen as an attempt to extend the discipline of the Reformed Church to the population as a whole.") (footnote omitted).

290. BENEDICT, *supra* note 21, at 430 ("The splintering of Western Christendom into rival creeds caused territorial rulers to feel compelled to take the care of religion under their wing . . . . In doing so, they increased the reach of their law-making power and bred dutiful, disciplined subjects.").

importantly, there was a gradual takeover whereby civil government supplanted the ecclesiastical at the reigns of discipline.[291] In the long run, the original symbiotic relationship proved more beneficial to the state than to the church.[292] The camel of the state first entered the tent of the church in order to protect it, and later it displaced its original occupants. Therefore, Puritan Calvinistic religious discipline had dramatic social implications that both indirectly and directly enhanced the state's social control capabilities.

IV. INDEBITATUS ASSUMPSIT, CONSIDERATION, AND CONDITIONS

A. *History of Analysis*

Roscoe Pound was the first American legal scholar to devote any attention to the relationship of Puritanism to the common law of contracts.[293] Pound asserted that the liberty of contract was simply a deduction from Puritanism's teaching that human beings were free moral agents.[294] However, the Puritans did not teach that people were free moral agents in Pound's libertarian sense of the term.[295] The Puritan understanding of liberty was the freedom to obey God's law, not freedom of the unconstrained will.[296] Neither did the Puritans believe in an unfettered liberty of contract.[297] Puritans were consistently champions of usury laws and continued to oppose enclosing common lands even after the issue had become politically passé.[298]

In the last fifty years, two eminent legal historians have taken up the challenge to understand Puritanism on its own terms and to identify connections between Puritan doctrines and the common law of

291. GORSKI, *supra* note 18, at 19 ("[The sources and dimensions of state-formation were] the bottom-up creation of new strategies and mechanisms of discipline and governance and their gradual instrumentalization and absorption by political elites.").

292. *Id.* ("In the long run, however, this symbiosis proved more beneficial for one party than the other; ultimately, the state monopolized control over the new infrastructures of power . . . .").

293. *See* Pound, *supra* note 144, at 820 ("[I]t [alleged Puritan individualism] has given us the conception of liberty of contract, which is the bane of all labor legislation, the rooted objection to all power of equitable application of rules to concrete cases . . . .").

294. *Id.* at 819:

> A fundamental proposition from which the Puritan proceeded was the doctrine that man was a free moral agent with power to choose what he would do and a responsibility coincident with that power . . . . [E]very one [sic] must assume and abide the consequences of the choice he was free to make . . . . [L]iberty of contract was a further necessary deduction.

Id.

295. *See supra* text accompanying notes 210–33 for discussion of predestination and covenant.

296. *See supra* text accompanying notes 243–45 for discussion of the Puritan understanding of discipline.

297. *See supra* note 145 and text accompanying notes 158–68 for a list of Puritan restrictions on freedom of contract.

298. *See* THE LARGER CATECHISM, *supra* note 86, at 63–64.

contracts. After preparing his dissertation and then his book, *Puritans, Lawyers, and Politics*,[299] John Eusden could only conclude that "evidence of Puritan influence on common law and vice versa did not materialize."[300] At most Eusden opined that "the relationship of Puritanism and common law was one of ideological parallelism."[301] In contrast, in *Law and Revolution II*,[302] Harold Berman argues that the Puritan aspect of the English Reformation was the historical cause for the momentous changes in English public and private law noted above.[303] With respect to private law, Berman goes so far as to assert that it was the "collectivist Calvinist doctrines of covenant and covenanted communities" which lay at the root of capitalism in England.[304]

Berman forms his argument for a connection between Puritanism and the common law of contracts in two areas: procedural and substantive. First, "the action of special assumpsit was transformed into an action for breach of contract . . . ."[305] By cultivating the growth of indebitatus assumpsit, the common law courts created a tool to address a range of voluntary agreements instead of what had previously been scattered among a number of writs.[306] The common law made this change because "the underlying theory of liability shifted from breach of promise to breach of a bargain," in other words, from moral wrong to unrequited expectation.[307] Second was the rationalization of the common law rules of contract by which the courts constructed a coherent law of contracts (rather than a variety of writ-based remedies). This rationalization, in turn, occurred in two particular substantive legal doctrines.[308] The common law courts not only expanded the

299. EUSDEN, *supra* note 17.

300. *Id.* at viii.

301. *Id.*

302. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 340–41.

303. *See id.* at 340–41.

304. *Id.* at 27. Berman further states: "Much more important than the doctrine of predestination, or, indeed, of the famous Protestant work ethic, was the Calvinist theology of covenant." *Id.* at 348.

305. Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 601 (1984) [hereinafter Berman, *Law and Belief*].

306. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 337–38 ("The early English common law . . . had only limited remedies for contractual disputes, resolving them chiefly through the common law actions of debt, detinue, account, deceit, covenant, and trespass on the case . . . . Trespass on the case came closest to a contract action when it became applicable in 'assumpsit . . . .'").

307. *Id.* at 339. Although Berman does not specify a precise time at which this change occurred, he notes in the preceding paragraph that it was "[e]specially after 1660 . . . [that] the common law courts gradually adopted a great many of the remedies and rules that had been elaborated in the previous hundred years by the prerogative courts and by Chancery." *Id.*

308.

> Efforts to rationalize the English common law, as well as to secure property and contract rights, were connected with the Puritan emphasis on order and discipline . . . . Developments in the law of contract . . . were also connected

reach of old writs but also changed the doctrine of consideration to bring more agreements within their scope: "The older conception that the 'consideration' underlying the contract is its purpose or motive or justification . . . gave way in the latter seventeenth century to a conception of consideration as the price paid by the promisee for the promise of the promisor."[309] The courts in the mid-seventeenth century also "established that a bargained exchange was binding and actionable on breach, regardless of the absence of fault."[310] Strict liability in contract was, according to Berman, the creation of *Paradine v. Jane*.[311]

Yet, Eusden saw none of this. How can two such serious historians come to such different conclusions? And, more importantly, is either correct? This paper will analyze the growth of indebitatus assumpsit, the modification of consideration, and independence of promissory conditions to see if evidence of Puritan doctrine can be found. The discussion will be brief because each of these topics already has been mined extensively. Even if no theological connection can be detected, the question of the relationship of Puritan social practice to changes in the common law of contracts must be considered.

B. *Indebitatus Assumpsit*

The origins of the tort-like writ of trespass extend to the late twelfth century, nearly to the beginnings of the common law itself.[312] Originally, assumpsit (roughly, "he has undertaken"),[313] a specific use of trespass, dealt with actions of deceit.[314] Even though a typical case of deceit or fraud hardly seems to meet trespass's requirement of *vi et armis et contra pacem regis* (with force and arms and against the king's peace), over the next two centuries, the royal courts were, nonetheless, anxious to extend their jurisdiction at the expense of the local courts.[315] In 1442, there was a "jump in judicial reasoning" when royal courts permitted an action for nonperformance of a contract to

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with the Calvinist emphasis on voluntary action, the act of will, in the service of God, together with God's faithfulness in response.

Berman, *Law and Belief*, *supra* note 305, at 607.

309. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 339–40.

310. *See* Berman, *Law and Belief*, *supra* note 305, at 603.

311. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 340 ("In Paradine v. Jane [sic], the court enunciated a broad principle of strict contractual liability.").

312. TEEVEN, *supra* note 16, at 13 ("The beginning of the writ of trespass is in the latter part of the twelfth century, but its genesis is hazy . . . ."); *see* PLUCKNETT, *supra* note 16, at 366–67 (discussing early use of trespass to vindicate contract claims).

313. *See* SIMPSON, A HISTORY OF CONTRACT, *supra* note 16, at 215–18 (lengthy discussion of semantic domain of "assumpsit").

314. *See* PLUCKNETT, *supra* note 16, at 637.

315. *See* TEEVEN, *supra* note 16, at 15, 31 (analyzing reasons for growth of royal courts' claims to actions that did not breach the king's peace); *see also* SIMPSON, A HISTORY OF CONTRACT, *supra* note 16, at 203 (discussing growing opposition in royal courts to sham allegations of violence and substitution in its place of special pleading of the defendant's wrong).

proceed as an assumpsit when the defendant had disabled himself from performing.[316] Now, the plaintiff need allege only that the defendant's act was against the king's peace; no longer did the courts require an allegation of violence.[317] Slightly more than half a century later, Common Pleas in *Orwell v. Mortoft* extended assumpsit another step to include nonperformance even without disablement.[318] Yet, the court still required something more than an informal promise to permit an assumpsit: the plaintiff must have previously paid money to the defendant.[319]

The next step in the expansion of the common law's capacity to handle contract claims brings one to the eve of the English Reformation. The King's Bench had lost a great deal of their caseload in the first third of the sixteenth century and was anxious to expand its jurisdiction by "extend[ing] the notion of trespass to include breaches of contract and even failures to pay debts."[320] This extension of jurisdiction was troublesome because the common law courts had long held that no two writs would lie for the same facts.[321] Yet assumpsit for breach of promise, at least where the plaintiff had prepaid for the defendant's prospective performance, seemed identical to the old writ of debt.[322] A writ for debt would properly lie where the defendant had received something—a *quid pro quo*—from the plaintiff.[323] The judges of the King's Bench discerned two differences between an action to recover payment for an unperformed obligation lying in debt (over which they had no jurisdiction)[324] and an action in assumpsit arising out of the same obligation. First was the existence of the promise, the undertaking, itself. Unlike debt, assumpsit required the

316. *See* TEEVEN, *supra* note 16, at 32–33 (describing the facts, reasoning, and conclusion in *Doige's Case*).

317. *See* SIMPSON, A HISTORY OF CONTRACT, *supra* note 16, at 203.

318. Anonymous, Y.B. Mich. 20 Hen. VII, f. 8, pl. 18 (1505), *reprinted in* FIFOOT, *supra* note 77, at 351–53.

319. TEEVEN, *supra* note 16, at 34 ("This requirement of the payment of money was the formality [Chief Justice of the Common Pleas] Frowyk required in place of the sealed deed [of a covenant]."); *see* also Nota, Y.B. Mich. 21 Hen. VII, f. 41, pl. 66 (1506), *reprinted in* FIFOOT, *supra* note 77, at 353 (noting requirement of prepayment by the plaintiff).

320. J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 32 (1971) (discussing the decline of the King's Bench and judicial response).

321. *See* TEEVEN, *supra* note 16, at 38 ("Assumpsit could not be brought if there was an older formed writ in the Register covering a given transaction.").

322. *See* PLUCKNETT, *supra* note 16, at 633 ("The oldest and most important [form of action for contracts] was the action of debt . . . .").

323. *Id.* at 634.

324. *See id.* at 644 ("*Assumpsit*, being a form of trespass, could be brought either in the King's Bench or Common Pleas: debt, on the other hand, could only be brought in the Common Pleas."); *see also* TEEVEN, *supra* note 16, at 34 (noting that Common Pleas resisted the expansion of assumpsit by the King's Bench because debt "was their jurisdiction exclusively").

added element of deceit, evidenced by a broken promise.[325] Whether the defendant actually made such a promise was of little importance; the writ would be granted if the plaintiff alleged it, and the King's Bench would leave it to the nisi prius judge and jury at the assizes to sort out the truth.[326] Second was the expanded range of damages available in assumpsit. The plaintiff in debt could obtain only what had been paid to the defendant[327] or the amount to which the parties had agreed in a bond.[328] In assumpsit, however, the plaintiff could, in addition, recover consequential damages.[329] The King's Bench had made clear a plaintiff's ability to recoup consequential damages in assumpsit by no later than 1532.[330] By applying assumpsit, which had begun as a remedy for personal wrongs, to breach of contract, an injury that had long been perceived as an injury to property, the King's Bench created the opportunity for a broader vindication of the expectation interest. By releasing the expectation interest from the confines of the *quid pro quo* or the penal bond, assumpsit, at least theoretically, put the expectation interest into play in a way that debt had not; perhaps the injured party could obtain consequential damages. The risk of excessive consequential damages later addressed in *Hadley v. Baxendale*[331] was opened. Three hundred years later the common law

325. *See* David Ibbetson, *Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count*, 41 CAMBRIDGE L.J. 142, 148 (1982) [hereinafter Ibbetson, *Assumpsit and Debt*] ("It could be argued that assumpsit was founded on the defendant's breach of promise . . . ; the former [assumpsit] looked to the defendant's wrong, while the latter [debt] looked to the plaintiff's right."); *see also* FIFOOT, *supra* note 77, at 338–39 (discussing evolution of assumpsit); A. W. B. Simpson, *The Place of Slade's Case in the History of Contract*, 74 L.Q. REV. 381 (1958) [hereinafter Simpson, *The Place of Slade's Case*] ("The pleading device employed in 1505 to distinguish the cause of action in case from that in debt was that of describing the act of which the plaintiff complained as a conversion . . . and to allege that the defendant had undertaken (*super se assumpsit*) to deliver . . . .").

326. *See* Francis, *supra* note 17, at 57 ("When the parties had joined issue on a question of fact through the natural course of the pleading, the date would be set for trial and the matter would then be decided by the jury at nisi prius . . . ."); *see also* PLUCKNETT, *supra* note 16, at 644–45 ("The King's Bench could therefore not resist the temptation to use *indebitatus assumpsit* as an equivalent to debt. This was easily done by holding that where a debt existed, a subsequent *assumpsit* would be presumed in law, and need not be proved as a fact."); TEEVEN, *supra* note 16, at 38 ("After it was established that the separate promise in the new *indebitatus assumpsit* form avoided the objection of overlap with Debt, the King's Bench eroded the sanctity of the Register further by not requiring the subsequent promise to be proved.").

327. *See* PLUCKNETT, *supra* note 16, at 643:

328. *See* Francis, *supra* note 17, at 91.

329. *See* Ibbetson, *Assumpsit and Debt*, *supra* note 325, at 148 (discussing relationship of consequential damages to claims in assumpsit).

330. *See* TEEVEN, *supra* note 16, at 37 ("[T]he plaintiff successfully distinguished [in *Pickering v. Thurgoode*] the damages suffered by emphasizing that the loss suffered by the breach of the undertaking was not just for the value of the [undelivered] malt but for the damages of paying a higher price elsewhere.").

331. 156 Eng. Rep. 145 (Ex. 1854).

courts were forced to decide how the door they had opened in the early sixteenth century should be closed.

The final step by which the common law came to provide a general contracts remedy is found in the recognition of indebitatus assumpsit as a standardized writ. According to Theodore Plucknett, the first example of the use of a writ with this phrase occurred in 1542.[332] Kevin Teeven pushes the first use back to 1530 but agrees that it became a standardized form in the King's Bench by the 1540s.[333] Indebitatus assumpsit roughly translates into "having become indebted he has undertaken [to pay]." The significance of indebitatus assumpsit lies in the courts' routine recognitions of the writ, which enhanced its utility and thus the frequency of its use.[334] The convenience of indebitatus assumpsit, at least in the King's Bench, culminated in 1573 in *Edwards v. Burre*[335] when that court held that an assumpsit would be presumed in every case where the plaintiff proved debt.[336] The needs of the growing commercial economy were vindicated.[337]

The rise of assumpsit as a tool of informal contract enforcement pre-dated Puritanism.[338] Berman's assertion that "the underlying presuppositions of contractual liability . . . remained basically the

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332. *See* PLUCKNETT, *supra* note 16, at 644 ("[W]e find a new variety of assumpsit appearing in the middle of the sixteenth century called *indebitatus assumpsit* . . . . The earliest example seems to be in 1542 . . . .").

333. *See* TEEVEN, *supra* note 16, at 38 (discussing origins and spread of use of count of indebitatus assumpsit); *see also* Ibbetson, *Assumpsit and Debt*, *supra* note 325, at 142 (noting great increase in use of indebitatus assumpsit in the 1540s); Simpson, *The Place of Slade's Case*, *supra* note 325, at 385 (noting that Common Pleas did not recognize indebitatus assumpsit until 1573).

334. *See* TEEVEN, *supra* note 16, at 35–36 (analyzing growth in frequency of use of assumpsit over course of sixteenth century); *see also* FIFOOT, *supra* note 77, at 368 (discussing the simplicity of pleading indebitatus assumpsit as a factor in its increasing use); Francis, *supra* note 17, at 58 (noting that assumpsit had replaced debt as the primary contract tool by the early seventeenth century).

335. Edwards v. Burre, 123 Eng. Rep. 310 (K.B. 1573).

336. *See* SIMPSON, A HISTORY OF CONTRACT, *supra* note 16, at 492.

> The court of King's Bench, being sympathetic to the use of assumpsit, adopted the doctrine that, where there was a debt contract and the debt was still owing, the law would imply a promise to pay the debt. Every contract executory imports or implies an assumpsit . . . . In *Edwards v. Burre* (1573) this is very clearly put by Wray[,] C.J.

Id.; *see also* Stone v. Withepoole, 74 Eng. Rep. 924 (K.B. 1588) (quoting Coke for the defendant executor who successfully pleaded *nihil debet* on the ground that the testator had been a minor when he contracted the underlying debt: "The consideration is the ground of every action on the case, and it ought [to] be either a charge to the plaintiff or a benefit to the defendant."); Pulmants Case, 74 Eng. Rep. 686 (K.B. 1584).

337. The decision in *Slade's Case*, 76 Eng. Rep. 1072 (K.B. 1602), simply confirmed the legitimacy of what the King's Bench had been doing with assumpsit for the past twenty years. *See generally* Simpson, *The Place of Slade's Case*, *supra* note 325, at 392.

338. To be sure, the influence of Calvinism on English Protestantism reaches back further than 1560. *See supra* text accompanying note 122. Although the influence of the Calvinistic tradition of the Reformation can be traced to the late 1540s, there is no

same, in the sixteenth and early seventeenth centuries, as they had been in the earlier period"[339] cannot be substantiated. Well before the turn of the seventeenth century, the common law courts had made the turn from delict to contract.[340] Puritanism cannot account for the lengthy development of assumpsit as a tool to protect the expectation interest. Rather, the common law's writ system and traditional adherence to the forms of action in the Registry delayed the change from reliance to expectation. The rapidly developing market-based economy provided the impetus for the change. While Henry's dissolution of the monasteries and the disciplinary revolution of the Protestant Reformation contributed to the expansion of a commercial society, Puritanism was neither an antecedent nor a concurrent factor in the rise of indebitatus assumpsit.

C. *Consideration*

For hundreds of years prior to the rise of indebitatus assumpsit, lawyers had used the term consideration "in the merely the general sense of reason or motive."[341] Similar to the civilian notion of *causa*, consideration, thus understood, could have opened the door to enforcement of a wide variety of promises when coupled with the expansion of assumpsit. In fact, widespread promissory enforcement lay at the heart of ecclesiastical jurisdiction espoused by the Doctor of Divinity in Christopher St. German's *Doctor and Student*.[342] St. German's student of the common law, however, was quick to point out that the common law had never recognized such a wide-ranging liability of breach of promise.[343] Instead, by St. German's day, the common law recognized promissory liability in cases of debt, covenant, and, only

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evidence that Calvinism in general or Puritanism in particular had any influence on common lawyers before the seventeenth century.

339. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 338.

340. *See* FIFOOT, *supra* note 77, at 339 ("By the middle of the sixteenth century the modern conception of contract had in essence been formulated.").

341. *Id.* at 396.

342. CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT, Dial. II, c. 24 (1530), *reprinted in* 91 Selden Society 230, 300–14 (T. F. T. Plucknett & J. L. Barton eds., 1974).

343. *Id.* at 228–32. Stating further:

> Student) Fyrst it is to be vnderstande that . . . in the lawes of Englande what dyuersyty is bytwene a contracte/ a promyse/ a gyfte/ a lone/ a bargeyne/ a couenant/ or suche other/ for the intente of the lawe ys to haue the effecte of the mater argued and not the termes/ and a nude contracte is where a man maketh a bargayne or a sale of his goodes or landes without any recompence appointed for yt. As yf I saye to a nother I sell the all my lande or all my goodes & nothynge is assigned that the other shall gyue or paye for yt/ that ys a nude contracte/ and as I take yt: it ys voyde in the lawe and conscience . . . and I thynke no accyon lyeth in those cases thoughe they be not perfourmed.
>
> . . .
>
> Yf he to whome the promyse ys made: haue a charge by reason of the promyse . . . than in that case he shall haue an accyon for that thing that was promised . . . . As yf a man saye to an other (heele suche a poore man of hys

recently, assumpsit.[344] Consideration in debt and covenant were straightforward. There was liability in debt if the plaintiff alleged and proved either that the defendant had given a bond and then failed to satisfy one of its conditions or that pursuant to agreement, the plaintiff had prepaid the price or delivered goods (the *quid pro quo*) to the defendant who had failed to perform the remaining obligation.[345] If a written undertaking under seal existed, then the writ of covenant would lie.[346]

The common law courts faced a difficult question with the accelerated use of assumpsit for enforcement of informal contracts: What could be the consideration for the promise which, standing alone, was an unenforceable *nudum pactum*? If the courts admitted the underlying bargain was the consideration, then how could they avoid the risk of duplication with the writ of debt? The first step of the solution was to recognize an independent reliance interest that enforcement of the assumpsit would protect; reliance on the defendant's promise caused

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> dyssease/ or make suche an hyghewaye/ and I shall gyue the thus moche/ and yf he do yt I thynke an accyon lyeth at the comon lawe.
>
> . . .
>
> Doctour) But what hold they yf the promyse be made for a thing past/ as I promyse the .xl. pounde for that thou hast buylded me such a house/ lyeth an accyon there.
>
> Student) They say nay . . . .
>
> Doctour) And yf a man promyse to gyue a nother .xl. li. in recompense for suche a trespass that he hath done hym/ lyeth an accyon there.
>
> Student) I suppose naye/ and the cause ys that suche promises be noo perfyte contractes/ for a contracte is properly where a man for his money shall haue by assente of the other partye certayne goods or some other profyte at the tyme of the contracte or after/ but if the thynge be promised for a cause that ys past . . . then yt ys rather an accorde . . . .

Id.

344. Chancery and the ecclesiastical courts had already enforced many promises that did not fit one of the common law writs:

> A century before Assumpsit became contractual, Chancery had given relief by the enforcement of informal promises to individuals . . . . The clerical Chancellors generally followed canon law principles and procedures and applied the civilian notion that if there was a *causa* . . . then it ought to be enforced . . . .
>
> . . . .
>
> Statistics also show an increase in royal court Assumpsit work because of a transfer of ecclesiastical *fidei laesio* business from the church courts to the common law courts during the anti-clerical first half of the sixteenth century . . . . *Fidei laesio* was a church court action for the enforcement of a sworn promise.

TEEVEN, *supra* note 16, at 34, 36.

345. *See* FIFOOT, *supra* note 77, at 229 ("Debt lay only where the plaintiff could depend upon a formality or could prove a substantial benefit conferred normally upon the defendant himself . . . .").

346. *Id.* at 257 (discussing the rule settled by the thirteenth century that covenant would lie only if there was a writing under seal).

damages to the plaintiff.[347] Yet, this solution only pushed back the question and added an additional step: What damages could the plaintiff suffer by virtue of reliance on the promise to pay that were not identical with the underlying debt? Consequential damages presented one distinction[348] while unique interests such as continued possession of land presented another[349] and forbearance on account of the promise a third difference from debt.[350]

During the earliest stages of the expansion of the reach of assumpsit, courts found consideration even for promises for which there were no consequential damages, unique interest, or concurrent bargain such as forbearance. Thus, one finds the King's Bench permitting assumpsit to lie in cases where the only consideration was past (*i.e.*, the debt)[351] and at least in some cases where the consideration was love and affection,[352] both of which would have fit under civil law *causa*.[353] As the sixteenth century progressed, consideration in assumpsit quickly came to be applied in most situations only where there had been a bargain.[354] And even where the courts found consideration

347. *See* TEEVEN, *supra* note 16, at 39 ("One important source of consideration was in the context of liability based on a reliance remedy—the plaintiff could recover if he relied on the defendant's promise to his loss.").

348. *See supra* text accompanying notes 329–331.

349. *See, e.g.*, Lady Shandois v. Simson, 78 Eng. Rep. 1104 (K.B. 1602) (explaining that a request by the defendant to embroider a gown belonging to a third party is a sufficient consideration for her promise to the plaintiff to pay for it); Sherwood v. Woodward, 78 Eng. Rep. 935 (K.B. 1599) (allowing assumpsit to enforce defendant's liability as surety); Mountford v. Catesby, 73 Eng. Rep. 741 (K.B. 1573) (stating assumpsit allowed to enforce a landlord's promise of quiet enjoyment).

350. *See, e.g.*, Whorwood v. Gybbons, 75 Eng. Rep. 986 (K.B. 1587) (finding consideration for a promise to pay after a short delay following the rendering of an account); *see also* Stone v. Withepoole, 74 Eng. Rep. 924 (K.B. 1588); Gill v. Harewood, 74 Eng. Rep. 57 (K.B. 1587).

351. *See, e.g.*, Reynolds v. Pinhowe, 78 Eng. Rep. 669 (K.B. 1595) (stating "pre-existing duty rule" not observed where the plaintiff's voluntary payment of £ 4 (of a £ 5 debt) without further suit by defendant was held to be a sufficient benefit to constitute consideration for defendant's promise of satisfaction).

352. *See, e.g.*, Sharington v. Strotton, 75 Eng. Rep. 454 (K.B. 1565) (stating that love and affection are sufficient consideration for a deed). *But see* Hunt v. Bate, 73 Eng. Rep. 605 (K.B. 1568) (noting that no consideration existed even for promise to repay a friend for mainprizing defendant's employee).

353. In civilian terms *causa* was the reason or motive for the promise, without which the promise was unenforceable. Common law Assumpsit declarations sometimes included the term *causa* by 1540, though the meaning of *causa* in the common law may have included aspects of both motive and recompense. Furthermore, the *causa* in some of the early decisions may have been the plaintiff's reliance . . . . [Another] important influence from Chancery related to *causa* was the requirement of equitable consideration to raise a use . . . .

TEEVEN, *supra* note 16, at 40; *see also* Salmond, *supra* note 16, at 173–76 (discussing at length how equity first used consideration in its contract cases in the sense of *causa*—including valuable consideration, natural affection, legal obligation, and moral obligation—and how the common law retained this concept as assumpsit expanded).

354. *See, e.g.*, Hodge v. Vavisour, 81 Eng. Rep. 188 (K.B. 1616) (finding a tacit consideration implied for a subsequent promise to pay a pre-existing obligation for

outside of today's understanding of a bargain, they noted the existence of a continuing benefit to the defendant or a third party whom the plaintiff benefited at the defendant's request.[355] The pressure for expansion of assumpsit came from material causes and legal theory only followed; thus, by the turn of the seventeenth century, contract law, as currently understood, was expressed in the courts' understanding of assumpsit.[356] Yet it should not be assumed that moral considerations were irrelevant to the search for consideration. As Teeven notes, "there were moral underpinnings for the doctrine of consideration based on the ancient truths that bargains should bind both parties

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the purchase of goods); Nichols v. Raynbred, 80 Eng. Rep. 238 (K.B. 1612) (finding that a "promise for promise" was consideration for each); Docket v. Voyel, 78 Eng. Rep. 1110 (K.B. 1602) (finding no consideration when defendant's promise to lend £ 30 followed the plaintiff's earlier loan of £ 30); Barker v. Halifax, 78 Eng. Rep. 974 (K.B. 1600) (finding no consideration for defendant's promise to repay plaintiff £ 60 that plaintiff had lent to a third party at defendant's request); Wichals v. Johns, 78 Eng. Rep. 938 (K.B. 1599) (finding mutual promises are consideration for each other); Jeremy v. Goochman, 78 Eng. Rep. 683 (K.B. 1595) (finding no consideration when defendant's promise to pay followed the sale of plaintiff's twenty sheep); Greenleaf v. Barker, 78 Eng. Rep. 449 (K.B. 1590) (finding that plaintiff's immediate payment of pre-existing debt was not a sufficient consideration for plaintiff's simultaneous promise to assign a bond); Strangborough v. Warner, 74 Eng. Rep. 686 (K.B. 1589) ("[A] promise against a promise will maintain an action upon the case, as in consideration that you do give to me [£ 10] on such a day, I promise to give you [£ 10] such a day after."); Kirby v. Eccles, 74 Eng. Rep. 171 (K.B. 1589) (finding that a promise to return hogs after fattening was consideration for promise to pay for fattening services). *But see* Marsh v. Kavenford, 78 Eng. Rep. 319 (K.B. 1587) (finding a father's natural affection for his daughter and his concern for her advancement is sufficient cause for a subsequent promise to pay her husband £ 100), *reported sub nom.* Marsh v. Rainsford, 74 Eng. Rep. 400 (1588) (noting that father initially requested plaintiff to marry his daughter but promised to pay only after marriage had taken place); Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 103 (2000) ("In many assumpsit cases of that period, courts either fictionalized the consideration requirement or dropped it altogether. The courts' willingness to make these two moves shows that consideration was not at its inception a hard and fast requirement for recovery in assumpsit or contract.").

355. *See, e.g.*, Riggs v. Bullingham, 78 Eng. Rep. 949 (K.B. 1599) (finding plaintiff's grant of an advowson to the defendant many years earlier at the defendant's request is a continuing consideration for a later promise to pay by the defendant); Pearle v. Edwards, 74 Eng. Rep. 95 (K.B. 1588) (finding continuing occupation of leased premises was sufficient consideration for landlord's subsequent promise to hold tenant harmless from claims of third parties); Sydenham v. Worlington, 78 Eng. Rep. 20 (K.B. 1585) (finding that to maintain assumpsit it was necessary only that "there be any moving cause or consideration precedent, for which cause or consideration the promise was made" and thus there was consideration for a promise to repay one who had acted as a surety at the defendant's request).

356. *See* PLUCKNETT, *supra* note 16, at 650 ("[F]rom the seventeenth century onwards the law relating to *assumpsit* is the law of contract, and, historically speaking, that consideration which makes a contract enforceable was principally the conditions which were necessary to maintain an action of *assumpsit*. This was indeed the situation by 1602 . . . ."); *see also* Ibbetson, *Assumpsit and Debt*, *supra* note 325, at 152–61 (arguing that modern understanding of contract as bargain was in place by the 1580s); Ricks, *supra* note 354, at 106 ("The bargain requirement in this rough form was established when courts rejected past consideration in 1568.").

and that the promisor should be held to promises relied on."[357] These moral underpinnings, however, were not distinctly Puritan or even Protestant.

The history of the doctrine of consideration, if anything, demonstrates an inverse relationship to a Puritan emphasis on the sanctity of promise. On the one hand, common law consideration and civil law *causa* were very similar around 1540 but diverged by century's end resulting in fewer, not more, enforceable promises. On the other hand, once the courts had defined the parameters of consideration, they addressed little overt concern for its adequacy until 1675 in *James v. Morgan*.[358] Conversely, the *Westminster Larger Catechism* emphasized the importance of promise keeping in general[359] while Puritan theologian William Ames took pains to justify a wide variety of defenses against enforcement of all promises.[360] The morality of enforcing bargains and even mere promises where the promisee suffered injury cannot be correlated to Puritanism. Little direct association exists between consideration as a technique of enforcing only commercial bargains and Puritan doctrine, covenantal or otherwise. The common law courts had been moving in this direction during Henry's day and certainly well before Puritans appeared on the scene.[361]

D. *Mutuality and Independence*

The decision in *Paradine v. Jane*[362] seems most likely to bear a positive correlation to the areas of potential Puritan influence on the common law of contracts. The King's Bench decided the case in 1647, well after the rise of Puritanism and only shortly after the doctrinal formulations of the Westminster Standards.[363] In *Paradine*,[364] the plaintiff landlord brought an action in debt against his tenant, who had not paid rent for three years (roughly 1643–1646).[365] The defendant entered a special plea[366] alleging that he had been out of possession for virtually the entire time at issue because "Prince, Rupert an alien, and

357. TEEVEN, *supra* note 16, at 44.

358. James v. Morgan, 83 Eng. Rep. 323 (K.B. 1663) (reporting first common law case applying doctrine of unconscionability).

359. *See* THE LARGER CATECHISM, *supra* note 86, at 62.

360. *See supra* text accompanying notes 157–68.

361. *See supra* text accompanying notes 312–19.

362. *See* 82 Eng. Rep. 519 (K.B. 1647) (reporting by Style); 82 Eng. Rep. 897 (K.B. 1647) (reporting by Alden). For a detailed analysis of *Paradine*, see D.J. Ibbetson, *Fault and Absolute Liability in Pre-Modern Contract Law*, 18 J. LEGAL HIST. 1 (1997) [hereinafter Ibbetson, *Fault and Absolute Liability*].

363. LATOURETTE, A HISTORY OF CHRISTIANITY II, *supra* note 56, at 821 (observing that the Assembly completed the Confession in November 1646); *see also* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 598 (showing the cover page of the first publication of the Confession in 1647).

364. Paradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

365. *Id.*

366. *Id.* A special plea to an action in debt was uncommon. In most cases the defendant was required to plead *nihil debet*. *See, e.g.*, Lady Shandois v. Simson, 78

an enemy of the King"[367] had invaded the land, driven away the defendant's cattle, and expelled him from the land.[368] The plaintiff demurred to this plea, and the defendant presented a number of arguments from natural law, the law of reason, civil law, canon law, and even "moral authors"[369] for why the court should allow it.[370]

Chief Justice Rolle found against the defendant on all points and held what has come to be known as the foundation of absolute liability in contract that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[371] The default rule was absolute liability, and except for an act of God and perhaps breaches induced by the promisee, the promisor must address any exculpatory events in the contract; the court was not willing to employ any generous construction in aid of the tenant. Harold Berman attributes this decision to the influence of Puritanism and its ideology of the bargain.[372] In fact, not surprisingly, Rolle was following English legal scholar John Selden and ignoring Puritan theologian William Ames.[373] Moreover, other factors such as the common law's historical treatment of conditions and defenses as well as the desire for centralized judicial administration must also be considered in evaluating the influence of Puritanism on the law of contracts.

Eng. Rep. 1104 (K.B. 1602); *see also* Francis, *supra* note 17, at 59 n.113 (citing Lady Shandois, 78 Eng. Rep. 1104).

367. *Paradine*, 82 Eng. Rep. at 519.

368. *Id.*; *see* C. H. Firth, *The Journal of Prince Rupert's Marches*, 13 ENG. HIST. REV. 729 (1898). In fact, Prince Rupert (1619–1682) was a son of King Charles's sister by her marriage to Frederick V, the Protestant Elector of the Palatinate. Rupert was the commander of the King's cavalry through much of the Civil War and saw nothing but success from 1642–1644. After the fall of the King's last stronghold at Oxford in 1646, Rupert left England. *See* Firth, *supra*, at 740–41. *See generally* KENYON, *supra* note 38, at 154 (describing the King's problems with Rupert).

369. *Paradine*, 82 Eng. Rep. at 520.

370. *Id.*

> Also by the law of reason it seems the defendant in our case ought not to be charged with the rent, because he could not enjoy that that was let to him, and it was no fault of his own that be [sic] could not, and the civil-law, and the canon-law, and moral authors do confirm this . . . .

Id.

371. Paradine v. Jane, 82 Eng. Rep. 897, 897 (K.B. 1647) (reporting by Alden at 26–27). Style's report does not contain this language although he quotes Rolle to the effect that "if the tenant for years covenant to pay rent, though the lands let him be surrounded with water, yet he is chargeable with the rent, much more here." Paradine v. Jane, 82 Eng. Rep. 519, 520 (K.B. 1647) (reporting by Style at 49). The expression "if he may" as reported in Alden is reminiscent of Breverton's Case, 73 Eng. Rep. 67, 72 (K.B. 1537), which was probably intended to preserve a defense of physical impossibility due to an act of God.

372. *See* BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 340–41; Berman, *Law and Belief*, *supra* note 304, at 603–07.

373. *See supra* text accompanying notes 152–169.

1. Substantive Origins of Absolute Liability

The holding in *Paradine*[374] articulated a rule of absolute liability in contract. Yet, the common law courts for many years had reached virtually the same conclusion in other cases.[375] One of the earliest cases dealing with the defense of supervening impossibility was an anonymous report in 1537 where the court excused the defendant's nonperformance of a lease covenant to "sustain" the banks of a river which had collapsed due to a flood because the flood was an "act of God, which cannot be resisted."[376] Yet, the tenant remained liable to perform the second part of the lease covenant to "repair" the banks that had collapsed "in convenient time, because of his own covenant."[377] In other words, an act of God would relieve from liability for breach of a covenant to maintain an impossible state of affairs but would not be a defense to an obligation to perform a service simply because the act of God rendered performance more burdensome. Thus, in 1544, the King's Bench indicated that the rent due from a tenant for land and sheep should be apportioned when all the sheep died, apparently of natural causes.[378] In 1566, the court in *Arundell v. Combe*[379] held that the death of the obligor before the date for performance of a conditional bond was a good defense.[380] Yet, nearly twenty years later, the King's Bench held that the sinking of a ship loaded with apples by a "great and violent tempest"[381] was no defense to an action in assumpsit for breach of a promise to carry the apples from Greenwich to London.[382] Even such an act of God was no de-

374. Paradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

375. *See* ST. GERMAN, *supra* note 342, at 184–87 (describing a regime of virtually absolute liability of the life tenant to the reversioner for waste committed by a third party). Rolle even picks up the following reasoning in *Paradine*:

> As yf a man take landes for terme of lyfe and byndeth hym selfe by oblygacyon that he shall leue the lande in as good case as he founde it/ yf the houses be after blowen downe with tempest or dystroyed with straunge enemyes . . . he shall forfeyte his oblygacyon in lawe and conscience by cause it is his owne acte to bynde hym to it . . . .

Id. at 185.

376. Breverton's Case, 73 Eng. Rep. 67, 73 (K.B. 1537). Style's report of *Paradine* has Chief Justice Rolle citing this case.

377. *Id.*

378. Richards le Taverner's Case, 73 Eng. Rep. 123 (K.B. 1544). The report states that the facts of the case were read for the leading attorneys of the day whose opinions were split although most favored no apportionment. When it was later read for four of the justices of the King's Bench, they concluded that "the rent should be apportioned, because there is no default in the lessee." *Id.* at 124. While no judgment was noted, the conclusion is consistent with Breverton's Case, 73 Eng. Rep. 67 (K.B. 1537).

379. 73 Eng. Rep. 581 (K.B. 1566).

380. *Id.*

381. Taylors Case, 74 Eng. Rep. 708, 709 (K.B. 1583).

382. *Id.* at 708–09 (summarizing the contract only as one in which "the defendant promised to carry certain apples for the plaintiff . . . to London," and construing their summary of the promise to exclude excuse by even an act of God).

fense because, according to the court, "the plaintiff had subjected, [sic] himself to all adventures."[383] On the other hand, the defense of "act of God" was applied to a situation where death prevented an obligor from performing one of two alternatives in *Tropp v. Hedingfield*,[384] thus saving the bond. Finishing out the sixteenth century in *Laughter's Case*,[385] the King's Bench (or at least Edward Coke in his report) rationalized the law in a case where one of two alternative conditions for the forfeiture of a bond became impossible by an act of God: "[W]here a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part . . . ."[386] Finally, in 1624, in *Williams v. Hide*,[387] the plaintiff brought an action in assumpsit against a gratuitous bailee for the return of a horse which had died while in the defendant's custody.[388] The defendant pleaded that the horse had died of disease, not the bailee's negligence, to which the plaintiff demurred.[389] The court held that the defendant's plea was good, reasoning that an act of God, at least where it rendered performance physically impossible, was as good a defense in assumpsit as in debt.[390]

By the time of *Paradine*,[391] with perhaps one exception, the law seemed clear that only a supervening physical impossibility in the form of an act of God would constitute a defense to actions brought in debt or assumpsit. Payment of rent by a dispossessed tenant was clearly not physically impossible, yet a contrary holding in *Paradine*[392] remained open. Three decades earlier Coke, as Chief Justice of Common Pleas, had concluded that the standard terms describing the rental obligation for leased land, *reddendo inde* or *reservando inde* ("to be paid from that source" or "to be reserved from that source"), contained a constructive condition to the effect that the rent due under a lease was presumed by the parties to be taken from the profits of the land; thus, if the lessee could not have any profits, he would not be liable.[393] Such a construction of the lease in *Paradine* [394] would

383. *Id.* at 709.

384. 78 Eng. Rep. 532, 532 (K.B. 1592).

385. 77 Eng. Rep. 82 (K.B. 1595); Eaton v. Laughter, 78 Eng. Rep. 643 (K.B. 1595).

386. Laughter's Case, 77 Eng. Rep. at 82–83.

387. Williams v. Hide, 81 Eng. Rep. 1214 (K.B. 1628).

388. *Id.*

389. *Id.*

390. *See* SIMPSON, A HISTORY OF CONTRACT, *supra* note 16, at 529–30 (noting the court's conclusion that "an assumpsit is a covenant by words, and a covenant an assumpsit by deed so that it was irrational to apply a different law to formal and informal contracts."). *But see* Arundell v. Combe, 73 Eng. Rep. 581 (K.B. 1566).

391. Paradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

392. *Id.*

393. *See* Clun's Case, 77 Eng. Rep. 1117, 1118–19 (K.B. 1613). Stating further:

have excused the tenant;[395] therefore, more than simple extension of precedent must have been at work.

2. Procedural Reasons for Absolute Liability

The range of defenses available to defendants in contractual matters had diminished over the course of the century preceding *Paradine*.[396] Before assumpsit had become available to plaintiffs in contracts cases in the sixteenth century, the only substantive issue in an action for debt was whether the obligation existed; the defendant's fault was immaterial.[397] Conversely, in the early centuries of assumpsit, the issue was "whether the defendant had in fact wrongfully breached the obligation" to the plaintiff.[398] Contractual liability was, therefore, "strict" in the sense that the defendant's negligence was no defense, although acts of God and third parties (particularly the plaintiff) might succeed. The defendant's fault was at issue in assumpsit cases through the concept of fault.[399] When assumpsit and particularly indebitatus assumpsit invaded the realm formerly and solely occupied by debt, the courts were faced with a choice: Should the debt-based regime of strict liability or the tort-like presuppositions of assumpsit be applied to contract cases heard under a delictual writ? By 1573, *Mountford v. Catesby*[400] provided the definitive answer. In many ways, *Mountford*[401] was the opposite of *Paradine*:[402] A tenant brought an action in assumpsit against his landlord for breach of the covenant in the lease providing for quiet enjoyment of the leasehold.[403] The Common Pleas denied the landlord's motion in arrest of judgment and held even the entry by a person against whom the tenant could bring an independent action

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> The third reason was, because the rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee: for these words *reddendo inde*, or *reservando inde*, is as much as to sa[y], that the lessee shall pay so much of the issues and profits at such days to the lessor . . . .

Id.

394. *Paradine*, 82 Eng. Rep. at 519.

395. *See id.* at 520. Unfortunately, neither report of Paradine quotes from the lease so its actual terms remain unknown. However, the tenant's counsel cited Clun's Case, 77 Eng. Rep. at 1117, and Rolle did not distinguish it on its facts. Rolle simply passed over the invitation for a favorable construction.

396. *Paradine*, 82 Eng. Rep. at 519.

397. *See* Ibbetson, *Fault and Absolute Liability*, *supra* note 362, at 4–6 (describing fourteenth and fifteenth century understandings of "contract" and "tort").

398. *Id.* at 6.

399. *See id.* at 2.

400. 73 Eng. Rep. 741 (K.B. 1573).

401. *Id.*

402. *See* Paradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

403. *See Mountford*, 73 Eng. Rep. at 741 (stating that the lease expressly provided that the tenant would "during the term [be] without eviction and interruption of any person"; furthermore, the facts pleaded (and presumably found by the jury) were that the father of the landlord had entered the premises and interrupted the plaintiff's enjoyment).

for trespass breached the defendant's "express assumption" of quiet enjoyment.[404] Regardless of the defendant's fault and independent of any other rights of the plaintiff, breach of a specific undertaking was actionable in assumpsit.[405]

Clinton Francis provides an extensive explanation of the reasons for the emphasis of the common law courts on strict interpretation of contractual conditions. Francis observes three facts about sixteenth and seventeenth century judicial administration. First,

> In the second half of the sixteenth century, the common law courts faced a substantial increase in the volume of litigation. Between 1560 and 1580 litigation increased more than fourfold in the King's Bench and as much as tenfold in the Common Pleas, and by 1606 both courts had nearly doubled the 1580 figures. After 1606, volume continued to grow steadily.[406]

Second, notwithstanding the massive increase in the caseload of the royal courts, the benches of Common Pleas and King's Bench remained at five judges each.[407] Last, the nisi prius system of local jury trials over which one of the royal judges presided when not sitting en banc at Westminster was proving unworkable:

> The tremendous growth in common law litigation overloaded nisi prius calendars. Increased difficulty in empanelling juries compounded the problem. In addition, the jurors' low level of comprehension and the notoriously corrupt practices at nisi prius gave jury trials a reputation as the weakest link in the common law system. . . .
>
> . . . .
>
> "[A]t this period few *nisi prius* hearings detained the court for more than twenty minutes."[408]

These facts forced the courts to adopt a form of case administration that, on the one hand, permitted the courts to maintain a centralized (and profitable)[409] monopoly over the judicial system while, on the other hand, permitted the tightly controlled delegation of fact-finding and decision-making to the local jury.[410] The courts implemented

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404. *Id.*

405. *See* Ibbetson, *Fault and Absolute Liability*, *supra* note 362, at 16 ("Whatever the position in the absence of an express term, if such a term did exist the courts would interpret it strictly and give effect to its literal meaning.").

406. Francis, *supra* note 17, at 41–42.

407. *Id.* at 50 (pointing out that increasing the number of judges on the bench would not have expedited case administration because they sat en banc).

408. *Id.* at 63–64 (quoting J. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558–1714, at 137–38 (1972)).

409. *Id.* at 44–47 (discussing vested economic interests of the judges in maintaining control over cases "for which litigants were prepared to pay, and pay dearly").

410. *See id.* at 56. Francis states:

> By confining litigation to a single issue, the procedural rules guiding the form of the issue operated against the implementation of standards and against any scheme for adjusting competing damage claims. The substantive

their strategy by limiting the trial to a single issue of fact and by developing a substantive law of conditions that simplified the jury's work.[411] The movement to strict and then absolute liability in debt and then indebitatus assumpsit cases is consistent with the courts' efforts to delegate and control:

> [I]n cases involving oral contracts the terms of the agreement[s] were outside the court's cognizance . . . . [T]he early seventeenth-century courts . . . retreated by encouraging the use of a notion of mutual promises and independency. The old rule of dependency was thus replaced by what amounted to a general rule of independency.[412]

Seen in this light, the decision in *Paradine*[413] to treat the covenant to pay rent as unaltered by the actions of a third party (other than God)[414] is consistent with the long standing administrative practice of the common law courts. The desire of the King's Bench to avoid conducting unnecessary nisi prius trials during the unstable period of the Civil War could also have been a factor. While the court could have preserved its delegation-control strategy by allowing counsel to form a single issue of fact on the question of whether Prince Rupert's occupation caused a failure of the constructive condition that the tenant has received profits from the land,[415] both substantive precedent and judicial convenience favored the outcome of absolute liability in *Paradine*.[416] Yet, the proximity of the decision to the results of the Westminster Assembly and the theological leanings of the judge mean that the possibility of an alternate conclusion should not be ignored.

3. The Role of Rolle

Not surprisingly, the Civil War severely disrupted the administration of justice in England. For four years, there were no nisi prius trials because no judges of Common Pleas or the King's Bench were able to travel to the assizes.[417] As the parliamentary cause prevailed,

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> law rules controlling the content of pleading . . . produced a law of conditions that worked a simple all-or-nothing loss allocation between the parties.

Id.

411. *Id.*

412. *Id.* at 60.

413. Paradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

414. *See id.* at 520.

415. *See supra* text accompanying note 393.

416. *Paradine*, 82 Eng. Rep. at 519. The technique of simultaneous judicial delegation and control in the face of burgeoning litigation was also at work in *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854). *See* RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 93–95 (1978) (discussing inability of fifteen judges in 1854 to review the massive number of decisions of newly created County Courts and implementation of the technique of "crystallized delineation of [jury] instructions" to maintain control).

417. *See* INDERWICK, *supra* note 66, at 153 ("From the autumn of 1642 to the autumn of 1646 no judges went the circuits . . . .").

in 1646 Parliament appointed some judges, including Henry Rolle (ca. 1589-1656), whose decision was reported in *Paradine*.[418] Only in 1648 did Parliament appoint a full roster of judges to the three common law courts, and it made Rolle Chief Justice of the King's Bench.[419] Given the remaining political uncertainty of the time, Rolle insisted that the Rump Parliament[420] declare that the new judges were to follow the "fundamental laws" of England under the new civil administration before opening court.[421]

Henry Rolle was born in to a substantial family in Devonshire and admitted to the bar in 1618 after studying several years at Exeter College, Oxford and entering the Inner Temple in 1609.[422] He became a serjeant in 1640.[423] Rolle served as a member of parliament during the last three parliaments of James I and the first three of Charles.[424] He supported the parliamentary party in its opposition to the expansion of the royal prerogative.[425] Although Rolle refused a seat in the Long Parliament,[426] he consistently supported the parliamentary cause during the 1640s.[427] In 1643, Rolle subscribed to the Solemn League and Covenant[428] by which he undertook to cause "the reformation of religion" in England according to "the example of the best

418. *Paradine*, 82 Eng. Rep. at 519; *see also* INDERWICK, *supra* note 66, at 153–54 ("In the autumn of 1646, some judges were appointed by Parliament and some went their circuits; amongst other, Justice Rolle . . . .").

419. INDERWICK, *supra* note 66, at 154 ("In the autumn of 1648, more Judges were appointed. Rolle was made Chief Justice of the King's Bench . . . .").

420. The so-called "Rump Parliament" was the roughly 250 members of the 1642 elected Long Parliament who remained after the army's expulsion in 1648 of those who did not support abolition of the monarchy. *See generally* DAVID UNDERDOWN, PRIDE'S PURGE: POLITICS IN THE PURITAN REVOLUTION (1971).

421. *See* INDERWICK, *supra* note 66, at 156 ("The chiefs with their puisnes refused to go into Court and open Hilary Term until the House had duly read and passed a declaration settled by themselves that the fundamental laws of the country should be continued . . . .").

422. *See* BIOGRAPHICAL DICTIONARY, *supra* note 152, at 450–51.

423. *Id.*

424. *Id.*

425. *Id.*; *see also* G. A. Harrison, *Innovation and Precedent: A Procedural Reappraisal of the 1625 Parliament*, 102 ENG. HIST. REV. 31, 49 (1987).

426. 2 LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 78 (Jersey City, Fred D. Linn & Co. 1881).

427. *See* SMITH, *supra* note 153, at 162 ("On the outbreak of the civil war [Rolle] adhered to the parliament, contributed 100*l*. . . to the defence fund, and took the covenant.").

428. *Id.* Parliament adopted the Solemn League and Covenant in 1643 to obtain Scottish assistance against the King in the Civil War. *See* Acts & Ords. Interregnum, *supra* note 125, at 175–76 (containing the Act of June 9, 1643, which notes "[t]he Covenant to be taken by the whole Kingdom"). Individual subscription was enjoined on all citizens of England and was a prerequisite for office service in the parliamentary cause. *See* Acts & Ords. Interregnum, *supra* note 125, at 298 (containing the Act of September 20, 1643, "Declaration, That no one shall have any Command under the Parliament, till he has taken the Covenant"); *id.* at 376–78 (containing the Act of February 5, 1644, "An Ordinance, enjoyning [sic] the taking of the late Solemn League and Covenant, throughout the Kingdom of England and Dominion of

reformed Churches."[429] According to nineteenth century historian John Campbell, Rolle "conscientiously approved of the reforms introduced both into the church and the state."[430] In 1648, Rolle agreed to serve on the first Council of State of the Commonwealth to which the Rump Parliament had "confided the entire executive authority."[431] Yet, in 1649, he refused to serve on the High Court of Justice that tried and convicted Charles I of treason.[432] Rolle's commitment to the common law as received never wavered. F.A. Inderwick credits Rolle with preserving the common law in the face of republican and even revolutionary demands for change:

> [I]t is, I think, mainly to Chief Justice Rolle and the good influence he exercised over Cromwell . . . that we owe the preservation of our old laws which some persons . . . were only too anxious to erase from our Statute Book as relics of feudalism and barbarity.[433]

Inderwick also highlights Rolle's Puritan sympathies when he writes that Rolle "from his earliest days to his latest, was a firm and consistent member of the Puritan party."[434]

Rolle's Puritan theological convictions, coupled with his support of the common law, not only led him to oppose law reform but ultimately brought about his resignation as Chief Justice of the Upper Bench (as the King's Bench was known during the Protectorate).[435] Rolle was captured and briefly held by royalist insurrectionists during

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Wales."). The Solemn League and Covenant provided for the establishment of Reformed doctrine and a presbyterian form of church government. *Id.* at 175.

429. ACTS & ORDS. INTERREGNUM, *supra* note 125 (containing The Solemn League and Covenant).

430. *See* CAMPBELL, *supra* note 426, at 78.

431. Perez Zagorin, *The Social Interpretation of the English Revolution*, 19 J. ECON. HIST. 376, 383–84 (1959); *see also* CAMPBELL, *supra* note 426, at 81 (discussing Rolle's service in the Council of State).

432. *See* William L. Sachse, *England's "Black Tribunal": An Analysis of the Regicide Court*, 12 J. BRIT. STUD. 69, 71 (1973) (stating that an earlier act of Parliament had provided for the three presiding chief judges of the common law courts (Henry Rolle (King's Bench), Oliver St. John (Common Pleas), and John Wilde (Exchequer)) to sit on the special court to try the King, however, "the three jurists were in complete agreement as to the illegality of the project, and made it clear that they would have nothing to do with it"); *see also* CAMPBELL, *supra* note 426, at 80 ("Rolle had long been kept ignorant of the determination to bring the King to an open trial. Highly disapproving of this proceeding, he refused not only to preside at it, but to allow his name to be introduced into the ordinance for creating the High Court of Justice.").

433. INDERWICK, *supra* note 66, at 161. For a more nuanced view of the failure of the efforts for law reform during the Commonwealth and Protectorate, see VEALL, *supra* note 46, Mary Cottrell, *Interregnum Law Reform: The Hale Commission of 1652*, 83 ENG. HIST. REV. 689 (1968), Barbara Shapiro, *Codification of the Laws in Seventeenth Century England*, 1974 WIS. L. REV. 428, 455, and Barbara Shapiro, *Law Reform in Seventeenth Century England*, 19 AM. J. OF LEGAL HIST. 280 (1975).

434. INDERWICK, *supra* note 66, at 161–62.

435. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2126 (1985) ("'The upper bench,' what the Court of King's Bench was called between the execution of Charles I (1649) and the restoration of Charles II (1660) . . . .").

Penruddock's Uprising at the Salisbury Assizes on March 12, 1655.[436] Despite Cromwell's order to try the insurgents himself, Rolle refused.[437] Rolle next came into conflict with Cromwell over the imposition of taxes without parliamentary authorization[438] and finally resigned after receiving abuse and threats from Cromwell personally.[439]

Rolle's apparent commitment to Puritan doctrine and social practice, coupled with the political uncertainties of his day, help explain the path he chose in *Paradine*.[440] On the one hand, the trend toward absolute liability in all types of contract cases was already well established; yet, Rolle could have construed a condition to relieve Jane of his obligation to pay during the occupation of the land. Rolle would have remained consistent with the use of conditions to speed resolution of contract cases either way, although use of express rather than a constructive condition was simpler. On the other hand, the ongoing Civil War would only have accelerated the pressures toward centralized judicial administration and toward reliance on express rather than constructive terms. The discipline of enforced promise keeping that was consistent with the Puritan doctrine of "perfect and personal obedience" associated with the Covenant of Works was reproduced at the judicial level.[441] The mercy associated with the Covenant of Grace was not. Either approach would have been consistent with precedent and the needs of administration. And while either would have been consistent with Puritan teaching exemplified by the Westminster Standards, *Paradine* [442] was out of accord with William Ames's conclusions about the requirements of Christian conscience.[443] The uncertain political situation of *Paradine* [444] and perhaps the uncompromising position taken by John Selden[445] are the keys to the choice made by Rolle. Rolle's decision in *Paradine*[446] can best be understood as exemplifying the need for strict enforcement of all obligations—religious, civil, and

436. *See* Unton Crocke, *Cromwell and the Insurrection of 1655* (pt. 2), 4 ENG. HIST. REV. 313, 325–26 (1889) (discussing seizure of Salisbury during uprising).

437. *See* BIOGRAPHICAL DICTIONARY, *supra* note 152, at 450; CAMPBELL, *supra* note 426, at 88 (quoting Rolle to the effect that "he was unfit to give judgment in this case, wherein he might be considered a party concerned").

438. *See* Cony's Case, 5 Howell's State Trials 935, 936–37 (1816).

439. *See* CAMPBELL, *supra* note 426, at 89 (discussing confrontation with Cromwell over Cony's Case, concluding that Rolle "thought it very necessary for his own dignity that he should withdraw").

440. Paradine v. Jane, 82 Eng. Rep. 519 (K.B. 1647).

441. *See* THE WESTMINSTER CONFESSION OF FAITH, *supra* note 133, at 617.

442. *Paradine*, 82 Eng. Rep. at 519–20.

443. *See supra* text accompanying notes 157–168.

444. *Paradine*, 82 Eng. Rep. at 519–20.

445. *See supra* text accompanying note 152.

446. *Paradine*, 82 Eng. Rep. at 519–20.

economic—during a time of systemic cultural and political uncertainty.[447]

V. CONCLUSION

The argument for a strong influence of Puritanism and the English Revolution on the law of contracts appears overextended. While there can be no question that the common law of contracts underwent significant development over the century preceding the execution of Charles I and while one can hardly question that there *was* an English Revolution[448] and while the congruence between aspects of Puritan theology and the development of the common law of contracts cannot be ignored, it is, nonetheless, the case that the changes in the law of contracts were neither sufficiently swift nor comprehensive nor rooted in the distinctiveness of Puritan theology to be considered "Revolutionary." The series of changes to the common law of contracts from the early rise of assumpsit and extending even to the doctrine of absolute liability were deeply grounded in the English common law, free markets, and the modality of contractual social ordering. Capitalism generally and contracts specifically were consistent with the Puritan self-understanding as the elect who were free to keep God's law, but neither was so associated with Puritanism as to represent a causal relationship in either direction.

However, a generalized or weak relationship between the English Reformation, capitalism, and contracting appears warranted. Religious changes from Henry's Act of Supremacy, to the dissolution of the monasteries, to the Elizabethan Settlement, to Laudian uniformity,

447. This is not to say that Jane had no recourse. He could have brought an independent action against Paradine for breach of any warranty of quiet enjoyment. *See* Mountford v. Catesby, 73 Eng. Rep. 741 (K.B. 1573); *see also* Thorps Case, 82 Eng. Rep. 418 (K.B. 1639) ("[I]f there were a breach upon the part of the defendant, it is sufficient [for the plaintiff to allege breach without also alleging that the plaintiff was prepared to perform his promise], and if there was a breach on the plaintiffs [sic] part, the defendant ought to bring his action fo[r] it."). The court further noted that their rejection of what today would be called the doctrine of constructive conditions would not apply where the defendant's promise was "conditional." Presumably they meant *expressly* conditional.

448. BERMAN, LAW AND REVOLUTION, II, *supra* note 17, at 3 (positing the existence of a series of six "Great Revolutions" (of which the culmination of the protestant reformation in England is one) as the explanatory paradigm for Western history). A "Revolution" (with an upper-case "R") is "a fundamental change, a rapid change, a violent change, a lasting change, in the political and social system of a society, involving a fundamental change in the people themselves—in their attitudes, in their character, in their belief system." *Id.* To constitute a "Revolution," cultural change must be (relatively) swift and comprehensive. Wars and even civil wars are commonplace and thereby do not qualify as Revolutions even when they result in a change of government. The culmination of the English reformation qualifies as a Revolution because, according to Berman, the changes it caused were certainly violent and permanently reached the whole of English society, extending to its substantive private law including the law of contracts. *See id.* at 3, 337–41.

and to the Civil War were inextricably intertwined with continuing judicial recognition of a need for a generalized form of contractual remedy. Concomitant social changes represented by urbanization, commercialization, and industrialization as well as political dynamics from the Tudor-Stuart expansion of the prerogative to parliamentary-Puritan reaction to the execution of Charles I cannot be understood without reference to the conflicts within and between a protestantized majority and a Puritan minority in England.