The Career of Puritan Jurisprudence

RICHARD J. ROSS

Scholars have long asked to what extent there was a distinctive Puritan jurisprudence in seventeenth-century Massachusetts.[1] Puritan jurisprudence is a shorthand that refers to those elements of seventeenth-century Massachusetts's laws and institutions designed or selected because of the early colony's religious commitments. Among the fundamentals of Puritan

1. Here are a few representative examples. Barbara A. Black examines how Massachusetts leaders integrated Scripture with the colonial charter, their own ordinances, and English law in "Aspects of Puritan Jurisprudence: Comment on the Puritan Revolution and English Law," *Valparaiso University Law Review* 18 (1984): 651–64. In "Record-Keeping and Other Troublemaking: Thomas Lechford and Law Reform in Colonial Massachusetts," *Law and History Review* 23 (2005): 235–77, Angela Fernandez argues that attorney Thomas Lechford was a critic of the colony's "Puritan jurisprudence," which favored discretionary, atechnical, equitable justice dispensed by magistrates wielding inquisitorial powers in face-to-face settings. Cornelia Hughes Dayton discusses under the rubric of "Puritan jurisprudence" the various strategies adopted by the neighboring colony of New Haven to "uphold a God-fearing society through the courts." Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639–1789* (Chapel Hill: University of North Carolina Press, 1995), 8–10, 24–34 (quotation on p. 8) (see generally her index entry for Puritan jurisprudence). John G. McClendon examines the tensions of early Massachusetts Biblicism in "Puritan Jurisprudence: Progress and Inconsistency," *Antithesis* 1 (1990) [Reformed Christian online journal].

Richard J. Ross is Professor of Law and History, University of Illinois at Urbana-Champaign <Rjross@law.uiuc.edu>. For comments and advice, the author would like to thank: Charles Cohen, Jacqueline Ross, David Tanenhaus, three anonymous referees for *Law and History Review,* and participants at panels and workshops at the Newberry Seminar in Early American History, the North American Conference of British Studies, the University of Wisconsin Law School, and the Millersville University conference on "John Winthrop's Worlds: England and New England, 1588–1649." The University of Illinois College of Law's Ross and Helen Workman Research Grant and the Thomas M. Mengler Faculty Scholar Fellowship provided invaluable funding during the completion of this article. The spelling in historical sources has been modernized.

Law and History Review Summer 2008, Vol. 26, No. 2

jurisprudence were the integrated and determined use of legal and ecclesiastical institutions to foster a godly community, the importance of the Bible as a touchstone for the legitimacy of rules, and a constitutional order restricting colony-wide voting and political office to regenerate members of covenanted churches. Some historians speak of "Puritan justice" or "Puritan legal culture" rather than "Puritan jurisprudence." Differing in detail and emphasis, these formulations point to a core idea animating much writing about early Massachusetts: that the colony lived by a legal order distinctive by the standards of contemporary England and her North American and Caribbean colonies and strongly shaped by Puritan religious commitments and social thought.[2]

To be sure, many scholars would question the extent of Puritan jurisprudence. Early Massachusetts colonists did not unreservedly pursue godly discipline, a goal contested in meaning and sometimes resented. Historians have uncovered significant ideological disagreement and have found settlers in port and frontier towns who were rougher and more materialistic, self-assertive, and prone to strife than the Puritan ideal.[3] The research of legal historians has revealed that the "Puritan" elements of the colony's jurisprudence stand out amid much law—really, most—that was not. The colonists took the vast bulk of their substantive law, civil and criminal procedure, and methods of punishment from their English manors and boroughs and the practices of justices of the peace. Puritan social thought created at best an elective affinity toward the wide range of legal reforms enacted in early Massachusetts—from codification to the elimination of primogeniture and feudal incidents to the provision of decentralized tribunals (available in each town and county) dispensing prompt and relatively nontechnical justice. All of these were staples of English Jacobean law

2. While I will use "Puritan jurisprudence" throughout this article, what is important is the core idea rather than the phrase. "Puritan justice" or "Puritan legal culture" would serve as well. The classic modern formulation of the core idea is George L. Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960). A prominent recent illustration is William E. Nelson, "The Utopian Legal Order of the Massachusetts Bay Colony, 1630–1686," *American Journal of Legal History* 47 (2005): 183–230. For an example in a popular textbook, see James A. Henretta, David Brody, and Lynn Dumenil, *America: A Concise History,* 2nd ed. (Boston: Beford/St. Martin's, 2002), 53–54.

3. See, e.g., Christine Leigh Heyrman, *Commerce and Culture: The Maritime Communities of Colonial Massachusetts, 1690–1750* (New York: Norton, 1984), 29–51; Stephen Innes, *Labor in a New Land: Economy and Society in Seventeenth-Century Springfield* (Princeton: Princeton University Press, 1983), xvii–xix, 124–49; Darrett B. Rutman, *Winthrop's Boston: A Portrait of a Puritan Town, 1630–1649* (1965; New York: Norton, 1972); Darrett B. Rutman, *American Puritanism* (New York: Norton, 1977); Stephen Foster, *The Long Argument: English Puritanism and the Shaping of New England Culture, 1570–1700* (Chapel Hill: University of North Carolina Press, 1991).

reformers.[4] Yet if measured not against the unfulfilled dreams of committed Massachusetts Puritans or stereotypes of a Bible Commonwealth, but against the standards of contemporary England and her Chesapeake and Caribbean colonies, early Massachusetts does stand out as a place where government, churches, and local notables cooperated fervently to suppress sin and encourage a more fully Christianized society. Measured by the norms of the English Atlantic, the law of early Massachusetts contains significant "Puritan" elements and scholars commonly use "Puritan jurisprudence" or cognate phrases to describe this reality.

There is something of a mystery here, or at least a tale to be told, since the concept of Puritan jurisprudence has not always been accepted—most strikingly, by the Puritans themselves. The ministers and magistrates of early Massachusetts did not assume that they lived under a distinctive jurisprudence that could be termed "Puritan." The development and elaboration of the concept occurred through a long, complex process extending from the middle seventeenth through twentieth centuries. Given contemporary opinion, how and why did the concept arise among later observers? What intellectual and political commitments encouraged interpreters to speak of Puritan jurisprudence? What needs did it serve?

The heart of this article explores the gradual acceptance between the seventeenth and nineteenth centuries of two presuppositions underlying the concept: first, that early Massachusetts had a legal order sufficiently distinctive to be styled a "jurisprudence"; and, second, that Puritan theology and social thought served as the "central characteristic" or "essence" of this jurisprudence. The mature synthesis of Puritan jurisprudence that crystallized in the twentieth century rested upon these assumptions. The story of how these presuppositions became widely accepted winds through the colonists' confrontation with the newly assertive English empire in the late seventeenth century; the efforts of Enlightenment "philosophical" historians to explain the "genius" of New England's settlers and of early national historians to chart the causes of the American Revolution; the thrusts and parries of sectional rivalries in nineteenth-century America; and the twentieth-century marriage of holistic cultural history with nuts-and-bolts "internalist" legal history.

The central ambition of this essay is to explain how and why many

4. Leading examples of this literature include Barbara Black, "Puritan Jurisprudence"; George L. Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960); Mark DeWolfe Howe, "The Sources and Nature of Law in Colonial Massachusetts," in *Law and Authority in Colonial America,* ed. George Billias (1965; New York: Dover Publications, 1970), 1–16; Rutman, *American Puritanism*; and G. B. Warden, "Law Reform in England and New England, 1620 to 1660," *William and Mary Quarterly* 35 (1978): 668–90.

scholars came to rely on a concept that the Puritans did not use. To clarify my ambitions, let me make clear what I am not setting out to do. I will not weigh in on the elusive meaning of "Puritanism" (variously a program, a sensibility, and a style of piety). Nor will I explore how legal historians might benefit from adopting religious historians' evolving understanding of Puritanism as an intensification of broadly shared English Protestant beliefs rather than a distinctive theology and social ethic.[5] Nor will I measure the extent to which Puritan commitments *in fact* shaped the law of early Massachusetts—that has been done often and well. Nor am I offering a conventional historiographical critique of the strengths and weaknesses of Puritan jurisprudence as an interpretive construct by pointing out what it reveals and obscures. An article could well be written assessing how the concept has lent the early Massachusetts legal order a dramatic (and somewhat misleading) unity and has placed certain of its features in the foreground while relegating others to the background. But my essay is not that one. Instead, I want to explore the slow and complicated process, unfolding over three centuries, by which observers came to speak of a Puritan jurisprudence in a way familiar to us and alien to the Puritans. At the center of this story are the political and intellectual pressures that influenced later understandings of the Puritans' legal order.

I. The First Presupposition: Early Massachusetts Had a Corporate Legal Identity That Supported a "Jurisprudence"

In order to invoke the concept of Puritan jurisprudence, one must tacitly accept that the early Massachusetts legal order was *distinctive* enough to be credited with a "jurisprudence." Seventeenth-century Englishmen took for granted that, within the overarching umbrella of the laws of England, rules and institutions differed somewhat among localities. Some measure of diversity did not by itself make for a "jurisprudence." Despite the rules

5. Charles L. Cohen, "Puritanism," in *Encyclopedia of the North American Colonies,* ed. Jacob Ernest Cooke et al. (New York: Maxwell Macmillan International, 1993), 3:578–81; Patrick Collinson, "Concerning the Name Puritan," *Journal of Ecclesiastical History* 31 (1980): 485–86; Collinson, *English Puritanism* (London: The Historical Association, 1983), 19, 28–29, 34–35; Stephen Foster, *The Long Argument: English Puritanism and the Shaping of New England Culture, 1570–1700* (Chapel Hill: University of North Carolina Press, 1991), 9; Peter Lake, "Defining Puritanism—Again?" in *Puritanism: Transatlantic Perspectives on a Seventeenth-Century Anglo-American Faith,* ed. Francis J. Bremer (Boston: Massachusetts Historical Society, 1993), 3–29; Margo Todd, *Christian Humanism and the Puritan Social Order* (Cambridge: Cambridge University Press, 1987), 14; David Underdown, *Fire from Heaven: Life in an English Town in the Seventeenth Century* (New Haven: Yale University Press, 1992), 20–22.

of inheritance particular to Kent (gavelkind), historians do not speak of a Kentish jurisprudence. The multiplicity of manorial customs and urban ordinances do not invite talk of a Groton jurisprudence or a Bristol jurisprudence. Something more is needed. Historians who attribute to Massachusetts a "jurisprudence" are tacitly making a point about magnitude. They are assuming that the colony exceeded, in extent and significance, the range of diversity expected among English localities. First, Massachusetts differed from English counties, manors, and municipal corporations not just in doctrinal or institutional details, but in the fundamental structure and legitimation of its legal order (e.g,. voting rights restricted to church members, the dominant role of a corps of godly magistrates in all areas of government and adjudication, and so forth). Second, the peculiar customs and institutions of most English localities were remnants from different moments of history—accretions lacking an inner order or unity that grounded an identity. By contrast, Massachusetts's unique features emerged from a self-conscious program of reform whose leading ideas (such as the godly society, covenant, and calling) animated most aspects of the polity. Finally, Massachusetts's legal inventiveness proceeded with relatively little oversight by the Crown and the national institutions of English law (in contrast to localities in the mother country such as Kent, Groton, and Bristol).

The concept of Puritan jurisprudence also requires one to accept a second presupposition: that Puritan theology and social thought played the leading role in creating the colony's distinctive legal order (or served as its "central characteristic," or "essence"). The first presupposition (a distinctive jurisprudence) does not necessarily entail the second. Some of the distinguishing features of Massachusetts law have been traced to the regional origins of the immigrants, its status as a "colony," its demographic and socioeconomic profile, its small scale in the early years (face-to-face social relations), and the absence of interest groups that shaped England's constitution and law (such as the royal court, the legal profession, the Church of England, and the nobility). To call the jurisprudence of early Massachusetts "Puritan" is to make a judgment about the causal priority of religion over other factors.

The two presuppositions inherent in the concept of Puritan jurisprudence have not struck observers as obviously true. Among those who did not use the concept were the first generation of Massachusetts Puritans. To begin with, they downplayed the distinctiveness of the colony's legal order. The first Massachusetts charter forbid the colony from creating a legal order "repugnant" to the laws of England. It was accused of doing just that by hostile Crown administrators and by persecuted Quakers and Baptists and propertied non-congregationalists excluded from political power within the colony. These otherwise dissimilar groups pointed to the colony's restric-

tion of the franchise to church members, Biblicism, religious intolerance, and disregard of the laws of England in order to style early Massachusetts law as "new invented" and repugnant. They hoped that English administrators would put pressure on the colony to adhere to English standards. In this climate, Massachusetts leaders minimized the nature and significance of their differences from English legal norms in statements aimed at English policymakers. The laws of no land but England "have civilized us," claimed Taunton minister William Hooke.[6] The General Court assured the Commissioners for Foreign Plantations in 1646 that the colony tried to "frame our government and administration to the fundamental rules" of England, "so far as the different condition of this place and people, and the best light we have from the word of God, will allow."[7] The colony's agent in London, Edward Winslow, echoed the sentiment in print, telling English readers that Massachusetts came "as near the laws of England as may be, which we understand as near as our conditions will permit."[8] In 1646, a committee of the General Court produced a "Declaration" purporting to show congruence between early Massachusetts law and English common law (including Magna Carta). By so doing, it hoped to demonstrate that "our polity and fundamentals are framed according to the laws of England, and according to the charter."[9]

The colony's assurances about their legal order rang somewhat hollow because, when speaking among themselves rather than to metropolitan audiences, Massachusetts leaders temporized over whether the laws of England bound the colony in a meaningful sense. The General Court, for example, went so far as to declare in 1646 that "our allegiance binds us not to the laws of England any longer than while we live in England, for the laws of the Parliament of England reach no further, nor do the king's writs. . . ."[10] In that same year, they issued the Declaration of 1646, which historians led by Richard Morris have styled a particularly disingenuous performance.[11] While accepting this interpretation, I want to draw attention

6. William Hooke, *New England's Tears for Old England's Fears* (London, 1641), 16.

7. The colony's petition to the Commissioners is in *Winthrop's Journal: "History of New England," 1630–1649,* ed. James Kendall Hosmer (New York: Charles Scribner's Sons, 1908), 2:310 [1646].

8. Edward Winslow, *New England's Salamander* (London, 1647), 11. Edward Johnson claimed that the laws of England applied in Massachusetts "so far as the people and place can be capable." Johnson, *Good News from New England* (1648; Delmar, N.Y.: Scholars' Facsimiles & Reprints, 1974), 205.

9. "Declaration of 1646," in Thomas Hutchinson, ed., *Collection of Original Papers Relative to the History of the Colony of Massachusetts-Bay* (Boston, 1865), 1:223–47 (quotation on p. 236).

10. *Winthrop's Journal,* 2:301 [1646].

11. Richard B. Morris, "Massachusetts and the Common Law: The Declaration of 1646,"

to the document's forensic strategy. The Declaration sought to maximize the amount and forms of variation allowable to a jurisdiction before it passed outside the capacious umbrella of the laws of England and became repugnant. The Declaration argued that, in England, hundreds of years of history demonstrated how legal rules could change and change again "without hazarding or weakening the foundation [of the common law]." The common law was not only variable over time, but limited in scope. It did not infuse all institutions of English justice, as one could see in matrimonial and maritime law; in the gavelkind of Kent; in the ordinances of London and other municipal corporations; and in the royal courts of Chancery, Requests, and Exchequer. If these institutions could apply discretion, civil law, and local customs rather than the "certain rules" of the common law, why would not a similarly variegated system be appropriate for Massachusetts? The Declaration made an argument that would recur throughout the first charter period.[12] England expected laws to vary over time, by place, and by function so long as they were not inconsistent with a deeper, ill-defined "foundation" or "basis" of the common law. To be sure, Massachusetts had restricted voting to church members, made adultery an offense worthy of the death penalty, and done other novel things. But these *ad hoc* differences did not push the colony beyond the wide range of permissible variation allowed under the laws of England. Colonial spokesman assured the English authorities that Massachusetts had no more created a distinctive jurisprudence than had Kent or London. Indeed, were not the "laws of gavelkind" in Kent "more repugnant to the common laws of England than any of ours?"[13]

The colony's policy made sense in the political and religious climate that the first generation of settlers experienced. By the 1680s, though, Massachusetts faced a new series of challenges: the loss of the first charter, the shock of Andros' Dominion of New England, and the struggle to secure and favorably interpret the second charter. To preserve political and religious arrangements that had grown up under the first charter, Massachusetts agent Increase Mather appealed to King James II and, later, King William III

---

in *Essays in the History of Early American Law,* ed. David Flaherty (Chapel Hill: University of North Carolina Press, 1969), 135–46. See also Samuel Eliot Morison, *Builders of the Bay Colony,* rev. ed. (Boston: Houghton Mifflin, 1964), 253–54.

12. "Declaration of 1646," in Hutchinson, *Papers,* 1:227, 238–39. The distinction between (permissible) variation and (impermissible) repugnancy was a staple of Anglo-American constitutional argument. See generally Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950); Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004).

13. "Declaration of 1646," in Hutchinson, *Papers,* 1:238.

to preserve the colony's "ancient" civil and ecclesiastical polity. Mather took advantage of James II's proclamation of October 1688 that restored the ancient constitution and liberties of London and numerous other cities and reversed the post-Restoration campaign of *quo warranto* proceedings against town and borough charters. Though James II had not referred to colonial charters, Mather tried to tie the fortunes of Massachusetts to those of the English municipal corporations. The victory of King William in the Glorious Revolution only increased the promise of this strategy.[14] For Mather's argument to make sense, colonial spokesmen needed to turn Massachusetts's charter, laws and customs, and historical traditions into a "constitution" that would serve as the foundation for a set of "ancient liberties." In so doing, they broke with the first generation of settlers by speaking openly about the distinctiveness of their legal order.

To invoke an ancient constitution, a community must assume that it has a constitution in the present. How did the leaders of Massachusetts come to speak of one? A "constitution" implies a set of governing arrangements that are *patterned* (since coherence and longevity distinguish a constitution from a set of short-term, variable policies lacking a unifying order); and that are *distinctive* (to differentiate one constitution from another). The first generation of magistrates, ministers, and local notables understood that their charter, laws, and customs, intertwined with God's Word, together "constituted" power and, in that basic sense, was a constitution. But they seldom referred to all of this as a patterned "constitution"—as a configuration.

The colony's leaders grew increasingly comfortable with the idea that they had an discernible constitution in the three decades after the Restoration (1660), when they developed a sharper appreciation that they lived under a patterned legal-political order. The Restoration triggered efforts by both Charles II's administrators and the Massachusetts General Court to describe the relationship of Crown and colony in way favorable to themselves.[15] These discussions and maneuvers aimed at fixing the colony's privileges

14. Philip S. Haffenden, "The Crown and the Colonial Charters, 1675–1688: Part I," *William and Mary Quarterly* 15 (1958): 297–311; ibid., "Part II," 452–66; Jennifer Levin, *The Charter Controversy in the City of London, 1660–1688, and Its Consequences* (London, 1969), 93, 98–99; Richard R. Johnson, *Adjustment to Empire: The New England Colonies, 1675–1715* (Leicester: Leicester University Press, 1981), 29, 52. For examples of Massachusetts colonists' proliferating references in the late 1680s and 1690s to their constitution's antiquity, see James S. Hart and Richard J. Ross, "The Ancient Constitution in the Old World and the New," in *The World of John Winthrop: Essays on England and New England, 1588–1649,* ed. Francis J. Bremer and Lynn A. Botelho (Boston: Massachusetts Historical Society, 2005), 269–70.

15. An early inkling of this process appeared within a year of the Restoration when the General Court took the unusual step of asking a committee to report back on the colony's "liberties" and "duties of allegiance" as established by "our patent, laws, privileges, and duty to his majesty." *Records of the Governor and Company of Massachusetts Bay in New England,* ed. Nathaniel B. Shurtleff (Boston, 1854), 4.2:24–26.

and place in the empire encouraged both sides to group Massachusetts's various institutions, customs and laws into a "constitution," a category that could be negotiated about and defined. In 1664, Charles II dispatched royal commissioners to Massachusetts with instructions to "thoroughly inform yourselves of the whole frame and the constitution of government there, both civil and ecclesiastical."[16] The colony sent missives to the commissioners explaining the "frame of our constitution" with an eye toward protecting customary liberties, such as the right to hear judicial appeals without Crown intervention.[17] This process of reciprocal definition of the colony's constitution did not abate, but accelerated, with the departure of the commissioners. In the 1670s and early 1680s, imperial administrators and Crown servants posted in Massachusetts, particularly Edward Randolph, likened the Massachusetts constitution to the frame of a "free state," one distinguished by religious sectarianism, violations of the Navigation Acts, and disempowerment of colonists well-affected to the Crown. Massachusetts's ministers and General Court rallied to the defense of their threatened polity. John Oxenbridge and Thomas Shepard preached in support of the liberties established in the "early days of settlement" and passed down intact through the generations, the "first and best constitution and complexion of this colony."[18] The colony's agents in London complained, with justice, that Randolph planned the "total subversion of that constitution."[19] When the agents returned home with the charter still intact (for the time being), the General Court, relieved, celebrated the "continuance of our present constitution."[20] Events between 1683 and 1692—royal abrogation of the first

16. Ibid., 194 [May 1665].

17. Ibid., 202, 220, 222 [May 1665]. When the commissioners exercised the power, granted by the Crown, to decide judicial cases, the colony protested the subversion of the appellate process "established by our constitution." Ibid., 196 [May 1665].

18. John Oxenbridge, *New England Freemen Warned and Warmed* (Boston, 1673), 28–29; Thomas Shepard, *Eye Salve, Or Watchword from our Lord Jesus Christ unto His Church . . . To Take Heed of Apostasy* (Cambridge, 1673), 22. Ministers referring to the structure of church and state spoke of the colony's ecclesiastical and civil constitutions. See, e.g., Elders' Advice to the General Court (1672), in Hutchinson, *Papers,* 2:167; William Hubbard, *The Happiness of a People in the Wisdom of their Rulers Directing* (Boston, 1676), 50.

19. Letter from Randolph to King Charles II (17 November 1676), in *Edward Randolph, Including His Letters and Official Papers . . . 1676–1703,* ed. Robert N. Toppan and Alfred T. Goodrick (New York, 1967), 2:261; Letter from Randolph to Earl of Clarendon (14 June 1682), in ibid., 3:157; Letter from Randolph to Archbishop of Canterbury (7 July 1686), in ibid., 4:88; Massachusetts Agents' Protest against Randolph's Appointment as Collector (1677?), in ibid., 6:76.

20. General Court to Earl of Sunderland, Secretary of State (May 1680), in *Massachusetts Records,* 5:271. By the 1670s and 1680s, both colonists and Crown administrators routinely spoke of the colony's "constitution." For additional examples, see, e.g., Letter from Charles II to Massachusetts (20 September 1680), in Hutchinson, *Papers,* 2:262–63; Address of the General Court to Charles II (March 1683), *Massachusetts Records,* 5:387.

charter, consolidation of Massachusetts into a Dominion of New England, and negotiations over the shape and operation of a second charter—raised the stakes further by implicating not this or that law, but the overall structure of Massachusetts governance. Massachusetts's overthrow of the Dominion of New England after learning of England's Glorious Revolution inspired a rush of pamphlets condemning the Dominion as an arbitrary constitution or, alternatively, praising it as a liberation from the tyrannical constitution of the saints.[21] By 1690, both colonists and imperial administrators had grown used to viewing Massachusetts's laws, privileges, and governing practices as parts of an integrated whole—as elements of a constitution that might be defended, improved, or replaced.

When the Crown imposed a new charter in 1691, Massachusetts leaders and spokesmen did not stop trying to define the nature of the constitution that had grown up under the first charter. Following the lead of Increase and Cotton Mather, colonists worked to depict that constitution as "ancient" in order to preserve as much of it as possible. These efforts deepened the colony's developing corporate legal identity. Having first grown used to the idea that they had a constitution, the colonists increasingly spoke of its longevity, a feature that helped distinguish a genuine constitution from the sundry fluctuating ordinances generated and as easily discarded by municipal corporations and local jurisdictions. Referring to their political-legal order as "ancient" not only solidified its claim to being a real constitution, but also emphasized its prescriptive quality. This was a useful thing when the Crown had abrogated one charter and imposed a second. To the extent that the political-legal practices of the first charter period could claim the shelter of prescription, they did not appear as elements or appendages of the first charter—reducible to it, and presumed to expire as it died.[22] They could potentially live on, having been generated by the colonists themselves rather than granted by the Crown (as was the first charter). Colonists in the late seventeenth and early eighteenth century appealed to the constitution of the first charter period as a protest ideal when calling for the protection or restoration of ancient customs and privileges. There is also some evidence that institutions under the second charter on occasion tried to establish the range of their powers by reference to the practices of the first charter period. In 1692, for example, Massachusetts passed a statute continuing the "practice

21. Compare Anonymous, *The Humble Address of the Publicans of New England* (London, 1691), in *The Andros Tracts,* ed. William Henry Whitmore (New York: Burt Franklin, 1968), 2:256; and John Palmer, *An Impartial Account of the State of New England; Or, the Late Government There Vindicated* (London, 1690), in ibid., 1:42.

22. Debates over the implications of the 1683 *quo warranto* proceedings against the charter of London acclimated the colonists to the distinction between charter rights and a broader category of prescriptive customs and privileges. See Hart and Ross, "Ancient Constitution," 275–76.

and custom" of towns choosing selectmen "for the ordering and managing [of] . . . prudential affairs."[23] Defining the nature and elements of the constitution of the first charter period and understanding its jurisprudence remained politically advantageous well after the charter had been abolished. By 1700, then, Massachusetts leaders had grown comfortable with the notion that their policy possessed a constitution, a patterned and distinctive legal order. They had generated the first presupposition that later observers would work into the concept of "Puritan jurisprudence."

Two sets of questions suggest themselves at this point. First, did Massachusetts leaders come to slowly accept after 1660 that they were living under a distinctive jurisprudence, or did they already believe this in the first generation of settlement (1630–c.1660)? Perhaps their resistance to the idea before 1660 was tactical, a political pose adopted to placate suspicious English authorities. This interpretation anachronistically reads back into the first generation their descendants' consciousness that they lived under a patterned and distinct constitution. Colonists before 1660 did not readily speak of the constitution of the state as a shorthand for the overall framework of government. They knew what the word "constitution" meant and their leading ministers such as John Cotton, Richard Mather, and Thomas Hooker analyzed, in print, the constitution of their churches.[24] But when discussing law and government, they commonly used "constitutions" in the plural, employing the term narrowly in the fashion of canon and civil lawyers to denote specific written decrees or regulations. In 1645, for example, Winthrop explained that "civil or federal" liberty drew support not only from God's moral law, but from "politic covenants and constitutions, amongst men themselves."[25] Indeed, their preference for speaking of par-

23. "An Act for Regulating of Townships," in Abner Goodell and Ellis Ames, eds., *Acts and Resolves of the Province of the Massachusetts Bay* (Boston, 1869), 1:65.

24. See, e.g., John Cotton, *The True Constitution of a Particular Visible Church Proved by Scripture* (London, 1642); Richard Mather, *Church Government and Church Covenant Discussed, In an Answer of the Elders of the Several Churches of New England to Two and Thirty Questions Sent Over to Them by Divers Ministers in England* (London, 1643), 82; Thomas Hooker, *A Survey of the Sum of Church Discipline* (London, 1648), 11–34.

25. *Winthrop's Journal,* 2:239 [1645]. Winthrop also noted that the General Court enjoyed the power to "make laws and constitutions" to govern the colony. Winthrop, "Discourse on Arbitrary Government," in *Winthrop Papers: Volume IV, 1638–44,* ed. Allyn Bailey Forbes (Boston, 1944), 4:470 [1644]. The Body of Liberties granted the freemen of each town the "power to make such by-laws and constitutions as may concern the welfare of their town, . . ." Liberty #66, Body of Liberties (1641), reprinted in Edwin Powers, *Crime and Punishment in Early Massachusetts, 1620–1692* (Boston: Beacon Press, 1966), 540. See generally Gerald Stourzh, "Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century," in *Conceptual Change and the Constitution,* ed. Terence Ball and J. G. A. Pocock (Lawrence: University Press of Kansas, 1988), 35–54, esp. 43; Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005),

ticular "constitutions" rather than an overall Massachusetts "constitution" suggests something deeper: how constitutional argument could focus on specific disputes with scant reference to how each one implicated the overall legal order. The first generation engaged in a wide range of disputes that we would term "constitutional." Some involved the balance of power within the polity—most notably, a series of conflicts between the magistrates and the deputies over such issues as codification, judicial discretion in criminal sentencing, and the magistrates' insistence that the actions of the General Court required a majority of both the magistrates and the deputies voting separately rather than a majority of both groups combined (the "negative voice" controversy).[26] The colony also struggled to define its relationship to the English empire through disagreements about the reach of the laws of England, religious toleration, and the propriety of judicial appeals to the Privy Council.[27] Participants in these disputes variously appealed to the charter, the colony's laws, its customs and practices of government, and the word of God.[28] Missing in these discussions—or, more precisely, inchoate by the standards of the 1680s and 1690s—was the sense that the colony's assorted sources of law fit together as a configuration, a distinct constitution, which could be invoked, defined, and talked about as a coherent whole.

The first generation's tendency to engage in particularistic constitutional arguments rather than a global analysis of the "constitution" led them to appreciate the divergence of specific laws from English norms rather than the distinctiveness of their legal order as a totality. They acutely understood that their godly ambitions led them to adopt constitutional principles unusual by English standards—for instance, the restriction of the colony-wide franchise to church members, the heavy Scriptural imprint on the capital laws, and the magistrate's responsibility to punish those who violated the first as well as the second table of the Decalogue. Wary of charges of repugnancy, they portrayed their innovations as merely *ad hoc* rules and practices lacking the

---

32–36. Winthrop also used "constitution" in a second sense to refer to the action of making or establishing a polity. The 1629 Massachusetts Charter, Winthrop observed, contained the "words of constitution of this body politic." Winthrop, "Arbitrary Government," in Winthrop, *Family Papers,* 4:469 [1644].

26. *Winthrop's Journal,* 1:133–34 [1634]; 1:151 [1635]; 2:50–52 [1641]; 2:64–66 [1642]; 2:116–21 [1643]; 2:164 [1644]; 2:211–8 [1644]; 2:240–42 [1645]; Thomas Hooker, Letter to John Winthrop (c. Dec. 1638), Winthrop, *Family Papers,* 4:81–82.

27. *Winthrop's Journal,* 2:186 [1644]; 2:290–305 [1646]; 2:312 [1646].

28. Among the many examples that might be cited, consider: John Cotton's analysis of whether deputies had "constant" (rather than "occasional") power of judicature in *Winthrop's Journal,* 2:211–13 [1644]; John Winthrop, "Arbitrary Government," in Winthrop, *Family Papers,* 4:468–82 [1644].

structure and inner consistency necessary to form an alternative legal order whose "basis" or "foundation" differed from that of the laws of England. Although this position was politically advantageous, was it merely tactical? Where is the evidence that, in private, Massachusetts leaders thought that they had created a patterned and distinctive legal order rather than a jurisdiction with certain singular rules in the fashion of the City of London or the County of Kent? They demonstrated little awareness that the bulk of their regulations—the quotidian rules of contract, property, trade, procedure, and so forth that occupies the heart of a legal system—created a New England Way in law.

Indeed, their treatment of the New England Way in religion provides an instructive counterpoint. Colonial spokesmen repeatedly discussed how their church order related to English, Scottish, French, Dutch, and Swiss models; not so with their legal order. Deploying Aristotelian terminology, they analyzed the formal, material, efficient, and final causes of their church constitution; not so with their legal order. Thomas Hooker found in the church covenant the formal cause that collected the "scattered" saints and provided a "constitution and being to the visible church." The formal cause (covenant) gave a gathered church a unity, an animating "soul," and a framework for "rules of government."[29] It distinguished the gathered churches from other forms of ecclesiastical organization. Contemporary Englishmen outside of Massachusetts readily used the Aristotelian four causes to analyze constitutions, polities, and legal traditions as well as ecclesiastical governance. The Parliament of 1610, for example, heard Thomas Hedley identify the material, formal, and final causes of the common law.[30] Massachusetts leaders occasionally observed that the charter gave the colony its "form, and being, in disposing a certain number of persons into a body politic."[31] Yet such stray sentences, sprinkled through writings devoted to particular controversies, do not measure up to the ministers' lengthy and intricate consideration of the form, material, and purposes of gathered congregations. It is not surprising that the ministers who provided most of the intellectual leaders of first generation Massachusetts lavished attention on the constitution of the church rather than the state. What is significant, for our purposes, is the lack of corresponding efforts to think systematically about the overall pattern of the legal order—its material and form, or its relation to foreign systems (aside from the specific challenge of denying repugnancy to the laws of England).

29. Hooker, *Survey,* 45–47.

30. Thomas Hedley, Speech of June 28, 1610, in *Proceedings in Parliament 1610,* ed. Elizabeth Reed Foster (New Haven, 1966), 2:170–76. Hedley told his listeners that he would not consider the fourth of the Aristotelian causes, the efficient cause.

31. John Winthrop, "Arbitrary Government," in Winthrop, *Family Papers,* 4: 468 [1644].

To be sure, the first generation, by arguing over which political model best described the colony, did create a foundation for those who after 1660 came to appreciate Massachusetts's distinct constitution. The English Civil War complicated Massachusetts's relationship to the metropolis and thereby energized ongoing debates about the colony's legal status. At various times, magistrates, deputies, ministers, and local notables styled Massachusetts a "free state" (though the colony never went so far officially).[32] Government officials often followed the charter in depicting the colony as a "corporation."[33] So did dissidents such as Dr. Robert Child and Reverend Peter Hobart, though with a different agenda. They wished to emphasize the limited authority of a corporation and its dependence on English law.[34] John Winthrop countered this strategy by distinguishing in 1646 between "corporations within England and corporations of but not within England," such as Massachusetts, which stood "above the rank of an ordinary corporation." If a resident of London "should say before the mayor and aldermen, . . . you are but a corporation, this would be taken as a contempt."[35] Some ministers and members of the General Court tried to think outside of the categories of "free state" and "corporation" by describing Massachusetts as a colony released "from appeals in cases of judicature, yet not in point of state."[36] On this view, the colony owed England "allegiance and subjection," yet enjoyed "absolute power of government." Massachusetts stood in relation to England as Normandy, Gascoyne, and Burgundy did to the Crown of France, or the Hanse towns in Germany did to the Empire.[37] Colonists typically embraced one or another of these political models in order to suggest that Massachusetts enjoyed, or lacked, a certain set of powers—say, the right to forbid judicial appeals to England or to restrict the franchise to church members. These debates about models encouraged colonists to think about the legal and

32. See, e.g., *Winthrop's Journal,* 2:186 [1644]; William Pychon, Letter to John Winthrop, 9 March 1646/7, Winthrop, *Family Papers,* 5:135 (arguing against those who think Massachusetts is a free state). For an account more strongly emphasizing the centrality of "free state" conceptions, see Michael P. Winship, "Godly Republicanism and the Origins of the Massachusetts Polity," *William and Mary Quarterly* 63 (2006): 448–50.

33. John Winthrop, "A Reply in Further Defense of an Order of Court Made in May, 1637," Winthrop, *Family Papers,* 3:465; David T. Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629–1692* (Chapel Hill: University of North Carolina Press, 1979), 22–26. The Massachusetts Charter of 1629 made the "Governor and Company of the Massachusetts Bay" a "body corporate." Massachusetts Charter, in *Massachusetts Records,* 1:10.

34. See, e.g., *Winthrop's Journal,* 2:265–66 [1646]; Robert Child, "Remonstrance," in Hutchinson, *Papers,* 1:219.

35. *Winthrop's Journal,* 2:304 [1646].

36. Ibid., 186 [1644].

37. Ibid., 290–91, 294 [1646].

political system as a totality, if at a high level of generality. Yet efforts to select the right model and deduce powers from it did not lead colonists to explain how the charter, the colony's laws and customs, and the word of God fit together into a patterned and distinct jurisprudence. This way of thinking emerged slowly between 1660 and 1690 as the colony wrestled with the demands and accusations of the English empire. In response, settlers increasingly came to understand their legal order as a configuration, a constitution, which might be explained, defended, and, later, honored as "ancient."

A second set of questions emerge from considering the extent to which the colony's corporate identities in law and religion developed similarly or differently. In what ways were these processes intertwined, analogous, or disparate? At first glance, corporate identities in religion and law, marked by some measure of fidelity to "ancient" traditions, appear to develop in parallel. Religious historians have argued that the first generation of settlers viewed themselves not as New Englanders, but as a company of advanced Reformed Protestants seeking a refuge for pure worship and a godly society. Massachusetts provided that refuge, but otherwise had no particular qualities and advantages. The second and third generations, in Robert Middlekauf's telling phrase, "invented New England."[38] They began to emphasize the region's special role in God's kingdom and spoke with filiopietistic reverence of the virtues of the church order that their fathers had established. Their disputes over toleration and church membership sent them for guidance not only to the Bible, but to the (ambiguous and contestable) principles of the founders of the New England Way.[39] At this high level of generality, a corporate tradition in religion and law appeared to develop by moving through roughly analogous stages. The colony's first generation tried to rebut accusations of sectarianism in religion and repugnancy in law by downplaying distinctiveness. Toward this end, they emphasized affinities with advanced Reformed Protestants in Europe and with local jurisdictions living diversely under the capacious rubric of the laws of England. The second and third generations, by contrast, came to acknowledge and even celebrate the New England Way in religion and Massachusetts's distinctive constitution.[40]

38. Robert Middlekauff, *The Mathers: Three Generations of Puritan Intellectuals, 1596–1728* (New York: Oxford University Press, 1971), 98.

39. Middlekauf, *Mathers,* 34, 96–100; Perry Miller, *The New England Mind: From Colony to Province* (Cambridge: Harvard University Press, 1953), 135, 184; David M. Scobey, "Revising the Errand: New England's Ways and the Puritan Sense of the Past," *William and Mary Quarterly* 41 (1984): 3–31.

40. By the middle seventeenth century, the General Court sometimes referred to the colony's legal order with language suggesting invention. The preface to the 1660 printed edition of the Massachusetts legal code, the *Laws and Liberties,* contained a sentence not present in

Yet this seemingly similar trajectory masks differences in the formation of legal and religious corporate identities. To begin with, the emergence of the New England Way in religion enhanced the settlers' identification with the region at the partial expense of their association with the ongoing trans-European effort by the godly to achieve further reformation. Emphasizing the choices that *Massachusetts* made in seeking a pure church and godly society suggested, by implication, that the New England Way was at least somewhat different than the way of Geneva, Zurich, Holland, and the Huguenots. There was, tacitly, a partial dissociation from a larger transnational category (the fellowship of advanced Reformed churches).[41] The establishment of a corporate legal order, by contrast, did not involve dissociation but a kind of coalescence. The first generation of colonists applied a variety of sources of law (including the charter, Scripture, English practices, and local customs and ordinances) and worked to establish the hierarchies and spheres of application among them. The second and third generations came to understand these cobbled together, unstable elements as part of a structured whole—as a constitution. This process did not involve a dissociation from the laws of England (however much the colony tried to keep imperial regulation to a minimum). Massachusetts adhered to its status as a jurisdiction under the umbrella of the laws of England and, indeed, began referring to itself as a "jurisdiction" rather than as the more grandiose "commonwealth," with its intimations of semi-independence.[42]

---

the original 1648 edition: "Laws are the people's birthright, and law makers the parents of the country. *Laws and Liberties* (1648), reproduced in *The Laws and Liberties of Massachusetts, 1641–1691,* compiled with an introd. by John D. Cushing (Wilmington, Del.: Scholarly Resources, 1976), 1:7. The General Court here assumed not only that Massachusetts was a country, but one constituted by laws. Lawmakers, the parents, have created (and are creating) this new country.

41. I use the phrase "partial dissociation" to make only a relative claim. Relative to the 1630s and 1640s, Massachusetts leaders spoke more of their regional religious identity and thereby tacitly set themselves off, if only somewhat, from a transnational Protestant affiliation. My claim is not inconsistent with evidence of New Englanders' continuing communications with, and fundraising and prayers for, English nonconformists and Continental Reformed churches. Francis J. Bremer, *Congregational Communion: Clerical Friendship in the Anglo-American Puritan Community, 1610–1692* (Boston: Northeastern University Press, 1994), 65–71, 164–65, 231. My claim also does not conflict with the observation that after the Glorious Revolution, New Englanders' military conflicts with Catholic powers and relief at a secure Protestant succession heightened attachment to an international "Protestant interest." Thomas S. Kidd, *The Protestant Interest: New England after Puritanism* (New Haven: Yale University Press, 2004).

42. On the General Court's substitution of "jurisdiction" for "commonwealth," see *Massachusetts Records,* 5:198, 339 [October 1678; March 1681/82]. Increase Mather emphasized how "commonwealth" had been "obliterated" from the colony's laws in *New England Vindicated from the Unjust Aspersions Cast on the Former Government There* (London, 1689?), in *Andros Tracts,* 2:123.

The colony's development of customary-prescriptive notions of authority (a precondition for ancient constitutionalist arguments) made its legal discourse more closely resemble that of English cities, counties, and boroughs in 1680 than was the case in 1640. If Massachusetts's religious order emerged by emphasizing the indigenous at the expense of the transnational (a process of partial dissociation), the colony formed its corporate legal order by coming to see its various sources of law as elements of a constitution (a process of coalescence). The colony's corporate identities in law and religion emerged over the same decades, but not in the same way.

A second difference between the formation of the colony's legal and religious orders involved their respective uses of "tradition." When colonists invoked tradition to legitimate the New England Way in religion, they held up the first generation as a model of piety and proper church order whose arrangements enjoyed normative force in the present.[43] Creative engagement with the honored legacy of the founding generation helped form a consciousness of a distinctive, valuable New England Way. The colony's legal order articulated a different understanding of tradition. It did afford the first generation a position of respect. But it did not treat the founders' jury-rigged legal system as a repository of original wisdom and integrity that could be invoked to identify and condemn present corruptions and whose principles should guide current practice absent powerful justifications. Rather, Massachusetts understood its indigenous legal tradition as akin to evolving custom, where the second and third generations built on the work of the first generation rather than valorized them as a founding moment of purity.

The colony's corporate identity in law and religion, then, did not come into being through identical processes.[44] Still, it is plausible to suppose some measure of mutual reinforcement between the emergence of corporate sensibilities in religion and law. The invention of the New England Way

43. The Bible and age of the apostles constituted the "primitive" days that Puritans yearned to recapture. The founding generation stood, in Theodore Dwight Bozeman's words, as a "secondary primordium." Bozeman, To *Live Ancient Lives: The Primitavist Dimension in Puritanism* (Chapel Hill: University of North Carolina Press, 1988), 320–22. Such, at least, was the dominant rhetorical posture of ministers. Religious institutions changed far more readily than the rhetoric would suggest, not least because the founding generation's ambivalences and compromises allowed practices to change significantly while claiming fidelity to tradition. David D. Hall, *The Faithful Shepherd: A History of the New England Ministry in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 1972), 202–3; David D. Hall, "Religion and Society: Problems and Reconsiderations," in *Colonial British America: Essays in the New History of the Early Modern Era,* ed. Jack P. Greene and J. R. Pole (Baltimore: Johns Hopkins Press, 1984), esp. 324–25.

44. For an account of religious and legal filiopietism that stresses similarities over differences, see Katherine A. Hermes, "Religion and Law in Colonial New England, 1620–1730" (Ph.D. dissertation, Yale University, 1995), 210–70.

in religion and in law overlapped in time and responded to similar events, such as the disappointment of the Restoration. Key intellectual figures, such as Increase Mather, took part in both developments and spoke freely of the "ecclesiastical and civil constitution" of the colony.[45] But what was the connection between these two constitutions? Was religion the "essence" or central characteristic of the developing legal order? And, whatever we may think, how did contemporaries understand the place of religion in the colony's jurisprudence?

II. The Second Presupposition: Early Massachusetts Jurisprudence Was "Puritan"

The colonists' growing appreciation in the middle to late seventeenth century that they possessed a patterned and distinctive legal order generated the first presupposition that later observers would work into the concept of "Puritan jurisprudence." But what about the second presupposition? Did colonists in this period understand their jurisprudence as "Puritan?" When speaking to English audiences outside of the friendly circle of dissenters, Massachusetts leaders tried not to hold up religion as the basis of their colony's legal order. Increase and Cotton Mather understood the political danger of grounding their constitution on what English imperial officials termed "nonconformity."[46] Within Massachusetts, the situation was more complicated. Under the first charter, ministers and political leaders had long claimed that God blessed the colony's ecclesiastical and civil constitution and that religion "sanctified" government. This convention valorized the ideal of the civil and ecclesiastical constitutions cooperating toward godly ends so as to challenge those who would have the state too openly pursue secular goals.[47] Close inspection reveals, however, that this longstanding formula did not imply, or deny, that Puritan religion and social thought

45. Increase Mather, *A Discourse Concerning the Danger of Apostacy* (Boston, 1679), cited in Middlekauf, *Mathers,* 101.

46. Harry S. Stout, *The New England Soul: Preaching and Religious Culture in Colonial New England* (Oxford: Oxford University Press, 1986), 117.

47. The preface to the colony's 1648 legal code proclaimed that Massachusetts must "frame our civil polity, and laws according to the rules of his most holy word whereby each do help and strengthen other (the churches the civil authority, and the civil authority the churches) and so both prosper the better. . . ." *Laws and Liberties* (1648), in Cushing, *Laws and Liberties of Massachusetts,* 1:5. See also John Cotton, *A Discourse about Civil Government in a New Plantation Whose Design is Religion* (Cambridge, Mass., 1663 [MS, 1637]), 7; Cotton, Letter to Lord Say and Seal (1636) in Everett Emerson, ed., *Letters from New England: The Massachusetts Bay Colony, 1629–1638* (Amherst: University of Massachusetts Press, 1976), 190–91.

was the central characteristic or "essence" of the legal order. In the language of Aristotelian causation familiar to contemporaries, ministers and magistrates upheld godliness as the "final cause" (or ultimate purpose) of the colony's constitution. They tended not to ask to what extent religion operated as an "efficient cause" of legal administration or served as the "formal cause" that gave a unified and recognizable shape to the materials of the law.[48] Posing these questions invited uncomfortable answers. To assess the relative influence of godliness as an efficient or formal cause of the colony's jurisprudence required weighing religion against other factors. The very process of comparison would transform godliness from the assumed foundation and purpose of the colony into a variable.

This habit of thought persisted among the orthodox after the Crown's imposition of the 1691 charter. The new charter transformed Massachusetts from a self-governing corporation to a royal province and partially severed the formerly close relationship of government and the congregational churches. The state demanded tolerance of all Protestant sects, no longer enforced piety as understood by the congregational churches, and sometimes proved indifferent, even hostile, to those churches. Under these conditions, Joseph Belcher, Thomas Foxcroft, and Cotton Mather acknowledged, sometimes ruefully, that they no longer enjoyed intertwined civil and ecclesiastical constitutions as under the first charter.[49] But the orthodox labored to show how New Englanders might preserve their identity as a covenanted people of the Word pursuing godly ends by drawing upon the united efforts of churches, families, and colleges.[50] In assessing their prospects in the last decade of the seventeenth century and the first decades of the eighteenth century, they looked back on the "church-state" of the first charter period,

48. First and second generation ministers and magistrates did not commonly inquire *to what extent* religion served as the efficient and final causes of the law. That is, they seldom compared religion to other possible factors to determine the relative balance of forces shaping their legal order. One can, of course, find broad assertions of the primacy of godliness, such as John Cotton's assertion that God is the "efficient and author" of both the civil and ecclesiastical polity and "God's glory" is the "end of them both." Cotton, *Discourse about Civil Government*, 6.

49. Joseph Belcher, "Preface," *The Singular Happiness of Such Heads or Rulers As Are Able to Chose Out Their People's Way and Will Also Endeavor to their People's Comfort* (Boston, 1701), 3–4; Thomas Foxcroft, *Observations Historical and Practical on the Rise and Primitive State of New-England* (Boston, 1730), 11. For an evocation of the lost "theocracy" of God's "peculiar people" under the first charter period, see Cotton Mather, *Magnalia Christi Americana: Books I and II,* ed. Kenneth B. Murdock (Cambridge, Mass.: Belknap Press, 1977), 246–47, 266.

50. Stephen Foster, *The Long Argument: English Puritanism and the Shaping of New England Culture, 1570–1700* (Chapel Hill: University of North Carolina Press, 1991), 236–37, 243–44; Harry S. Stout, *The New England Soul: Preaching and Religious Culture in Colonial New England* (Oxford: Oxford University Press, 1986), 118–21, 141, 167, 170.

but not to take an accounting of which elements of the legal order emerged from Puritan religious commitments. Rather, they asked how they might preserve Massachusetts's inherited godly mission in a less hospitable constitutional context. No more than their predecessors did they overtly deny that Puritan religion served as the "efficient" and "formal" causes of the legal order of the first charter period. Rather, as with their predecessors, their attention lay elsewhere, with final causes and ultimate purposes, not with a comparative analysis of the factors that shaped the organization and management of early Massachusetts law.

Historians of the middle to late eighteenth century, with the benefit of distance, began this analysis in earnest. By asking what made the structure, administration, and priorities of early Massachusetts law look as it did, these scholars engaged in a form of comparative causal analysis. The most careful and nuanced eighteenth-century historian of Massachusetts, Thomas Hutchinson, grounded the "peculiarities" of the colony's seventeenth-century laws in its social organization and economy as well as its religion. The Puritan drive for a more godly society did explain, in part, the stringency of laws against morals offenses, idleness, indiscipline, and disrespect for authority. But so did the "new and uncultivated" state of the country, which demanded frugality and industry; the relatively small difference in wealth and social standing between the magistracy and the middling sort, which made contempt of authority especially threatening; and the presence of hostile Indians, which called for vigilance and strict self-control.[51]

Those who, unlike Hutchinson, found a consistently "Puritan" legal order shared his curiosity about the (relative) explanatory power of religion, but not his causal pluralism. They wrote in the manner of mid-eighteenth-century "philosophical" historians such as Voltaire and Montesquieu who searched for a coherent "spirit" or "genius" shaping the culture, language, mores, and laws of a society in a given epoch.[52] Scottish historian and presbyterian theologian William Robertson argued in the 1770s that the histories of early Massachusetts and Virginia offer "an opportunity, which

51. Thomas Hutchinson, *The History of the Colony and Province of Massachusetts Bay,* ed. Lawrence Shaw Mayo (Cambridge, Mass.: Harvard University Press, 1936 [1764]), 1:367–77. For another example, see Hutchinson on testamentary rules, ibid., 376. Hutchinson's contemporaries, Edmund and William Burke, portrayed early Massachusetts as a society and legal order divided against itself. The colony "imitated the Jewish polity in almost all respects; and adopted the books of Moses as the law of the land." Yet these laws were "very ill suited to the customs, genius, or circumstances of that country, and of those times; for which reason they have since fallen into disuse." Edmund Burke and William Burke, *An Account of the European Settlements in America,* 6th ed. (London, 1777), 147.

52. On "philosophical" history, see Gunther Pflug, "The Development of Historical Method in the Eighteenth Century," *History and Theory* 11 (1971): 1–23; Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980), 16.

rarely occurs, of contemplating a society, in the first moment of its political existence, and of observing how its spirit forms in its infant state." The "religious principles" of the "mostly zealous puritans" who settled the Bay Colony can be discerned "mingling in all their transactions, and giving a peculiar tincture to the character of the people, as well as to their institutions, both civil and ecclesiastical."[53] New England minister and church historian Isaac Backus observed that the search for a people's "genius and character" was "in some measure, the soul of history."[54] Boston merchant Nathaniel Rogers announced in 1764 that the "first laws of New England were wholly adapted to the promoting [of] religion, . . . and to this all their manners and conduct was mainly bent." Had "commerce been their aim, the spirit of their laws would have been commercial, for laws are the best index of the spirit of a government; but it was religious."[55]

Finding a unifying "genius" or "spirit" in early Massachusetts proved useful in the debates over the causes of the American Revolution. The lawyer and exiled loyalist George Chalmers had a personal stake in understanding the political upheaval that drove him from Maryland to London. His *Political Annals of the Present United Colonies* (1780) argued that early Massachusetts's predominately Mosaic body of laws, "proceeding from the spirit of the people, . . . has greatly influenced the progress of their manners, and their political conduct, from the epoch of their emigration to the present times."[56] As Chalmers made clear in a later work, his *Introduction to the History of the Revolt* (1782), the Mosaic ordinances of

53. William Robertson, *The History of America* (London, 1812), 4:182–83, 283–84, 258. Robertson published his account of the Spanish American empire in London in 1777. He composed histories of early Massachusetts and Virginia in the middle 1770s, but held off publication on account of the American Revolution. His son printed these works posthumously in 1796. I consulted the 1812 London edition. Robertson focused both on religious principles *per se* and on their expression through institutions. The Puritans' restriction to church members of officeholding, jury service, and the colony-wide franchise "contributed greatly to form that peculiar character by which the people of New England have been distinguished." Robertson, *History of America,* 4:291–92. While not a "philosophical" historian, the English dissenting minister Daniel Neal foreshadowed their tendency to sketch early Massachusetts as a Puritan society whose tenets so informed their institutions and governing practices that the colony's history revealed "a little commonwealth rising out of its first principles." Daniel Neal, *History of New England,* 2nd ed. (London, 1747), ii–iii.

54. Isaac Backus, *A History of New England with Particular Reference to the Denomination of Christians called Baptists* (Boston, 1777), 1:3–4.

55. Anonymous, "Introductory Essay," in William Wood, *New England's Prospect* (Boston, 1764), iii. Nathaniel Rogers is identified as the author of this essay in Clifford K. Shipton, *Sibley's Harvard Graduates: Biographical Sketches of Those Who Attended Harvard College* (Boston, 1965), 13:632.

56. George Chalmers, *Political Annals of the Present United Colonies from their Settlement to the Peace of 1763* (London, 1780), 168. Referring to the Maryland colony, Chalmers wrote: "It is in the early laws of every people that we discover their religious and political principles." Chalmers, *An Introduction to the History of the Revolt of the Colonies* (London, 1782), 65.

seventeenth-century Massachusetts were "contrary to the laws and interest of England, because men, who think themselves peculiarly favored by heaven, seldom yield willing obedience to the governors of the world." New England bred separatists, republicans, and "enthusiasts" who "derided the authority of their native land" in the era of George III no less than in the days of James I. Like other loyalist writers, Chalmers claimed that Puritan suspicion of Crown authority, a "contagion," slowly infected the rest of the American colonies and facilitated the Revolution.[57]

Writers sympathetic to the Revolution reversed the loyalists' political valuations. "Enthusiasts" became patriots and Chalmer's "contagion" became the awakening of vigilance. Yet many shared the loyalists' intuition that New England Puritanism prepared the way for the Revolution. Eighteenth-century historian-apologists for English nonconformity, such as dissenting minister Daniel Neal, had popularized the view that Puritan acceptance of the individual's search for religious truth in Scripture—the believer's insistence on private judgment—encouraged resistance to overreaching authority in civil government as well as in the church.[58] Historians of the American Revolution continued this tradition of seeing Puritanism as favorable to liberty, while adding another observation. The semi-autonomy of early Massachusetts allowed New Englanders to nurture within their "theocracy" the commitment to representative government and popular sovereignty that would prove so valuable to the Revolutionary movement.[59]

Writers trying to define the spirit of early Massachusetts often set it off against other colonies and states, particularly Virginia. The loyalist

57. George Chalmers, *History of the Revolt,* 89, 122, 199–201, 395. On Puritans in loyalist historical writing, see Joseph Galloway, *Reflections on the Rise and Progress of the American Revolution* (London, 1780), 19–28; John A. Schutz, "George Chalmers and *An Introduction to the History of the Revolt,*" in *The Colonial Legacy,* vol. 1, *Loyalist Historians,* ed. Lawrence H. Leder (New York: Harper & Row, 1971), 36–58; and Michael D. Clark, "Jonathan Boucher's *Causes and Consequences,*" in ibid., 89–117.

58. Laird Okie, "Daniel Neal and the 'Puritan Revolution,'" *Church History* 55 (1986): 456–67.

59. David Ramsay, *The History of the American Revolution* (Philadelphia, 1789), 1:8–9, 29–30, 66; John Marshall, *The Life of George Washington* (New York, 1969 [1804]), 1:87 (early Massachusetts "strongly tinctured with the spirit of republicanism"); Joseph Story, "Discourse Pronounced at the Request of the Essex Historical Society, September 18, 1828, in Commemoration of the First Settlement of Salem, Massachusetts," in *The Miscellaneous Writings: Literary, Critical, Juridical, and Political of Joseph Story* (Boston, 1835), 70; George Bancroft, *History of the United States* (Boston, 1841), 1:360, 460–69; Rufus Choate, "The Colonial Age of New England" [1834], in *The Works of Rufus Choate, With a Memoir of his Life,* ed. Samuel Gilman Brown (Boston, 1862), 1:351–53; see generally Sydney E. Ahlstrom, "The Puritan Ethic and the Spirit of American Democracy," in *Calvinism and the Political Order,* ed. George L. Hunt (Philadelphia: Westminster Press, 1965), 90–91.

Chalmers no less than the philosophical historian Robertson contrasted stylized portraits of America's "original and parent colonies."[60] Influenced by Montesquieu's *Spirit of the Laws* (1748) and by the four-stage theory of socioeconomic evolution prevalent among Scottish Enlightenment thinkers, Robertson tended to look to a society's natural environment, political structure, and economy in order to find its animating genius. The bulk of his *History of America* explored the results of Europeans at a "more advanced" economic and political stage of development descending upon "less advanced" indigenous peoples in the Spanish American empire. In the section of the *History* concerned with British America, Robertson put to the side his accustomed emphasis on the material and environmental foundations of a society and adopted an organizing scheme familiar from seventeenth-century colonial and English writers: the contrast between a religiously oriented Massachusetts and a commercially oriented Virginia.[61] This old dichotomy gained new purpose and power by enabling the philosophical historian to find an underlying spirit behind the particular customs and manners of early Massachusetts. Chalmers contrasted the colonies to a different end. Seventeenth-century New England "enthusiasts" neglected or disdained the common law and yearned for *de facto* independence; Virginians respected the English constitution and displayed marked loyalty to it until the onset of the Revolution.[62] In this fashion, he could emphasize New England's insidious role in cultivating and spreading its political "contagion" among colonies disposed toward loyalty.

Early national and antebellum writers echoed these contrasts and added new ones, driven by sectional divisions in politics and rivalries among states and regions over the worth of their cultures and the value of their ancestors' accomplishments. The success of the Revolution and the formation of a national political system meant that regions and states in competition increasingly fashioned their identities with respect to one another rather than Britain. New England Federalists advanced claims to national leadership by asserting that their Puritan heritage created a tradition of civil liberty, industry, education, and piety that had made them the leaders of the Revolutionary movement and that could discipline the

60. Robertson, *History of America,* 4:182.

61. On Robertson's historiographical context, see Nicholas Phillipson, "Providence and Progress: An Introduction to the Historical Thought of William Robertson," in *William Robertson and the Expansion of Empire,* ed. Stewart J. Brown (Cambridge: Cambridge University Press, 1997), 58–61; Karen O'Brien, "Robertson's Place in the Development of Eighteenth-Century Narrative History," in ibid., 89; Jeffrey R. Smitten, "Moderatism and History: William Robertson's Unfinished History of British America," in *Scotland and America in the Age of the Enlightenment,* ed. Richard B. Sher and Jeffrey R. Smitten (Edinburgh: Edinburgh University Press, 1990), 168.

62. Chalmers, *History of the Revolt,* 199.

south's moral laxity and exploitive materialism.[63] Southerners lauded their "cavalier" virtues against what they saw as a self-satisfied New England disfigured by the crabbed, intolerant, and hypocritical character inherited from colonial Puritan forebears.[64] These stylized portraits of seventeenth-century New England followed the philosophical historians in depicting religion as the region's "master passion, which directed . . . their customs, their institutions, [and] their laws."[65] Not only cultural and political rivalry, but the practice of federalism made salient the "Puritan" nature of colonial Massachusetts law. As David Konig has observed, federalism in both its political and legal dimensions required recognition and balancing of state and regional legal systems.[66] The importance of precedent and history in American common law jurisprudence focused attention on the colonial legal orders of the various states and regions. The leading "Americanized" version of William Blackstone's immensely influential *Commentaries,* published by Virginia jurist St. George Tucker in 1803, contained an extended comparison of the colonial legal systems of Massachusetts and Virginia. Virginia, "distinguished for its loyalty," undertook a "general adoption of the laws of England." Massachusetts, founded by those "discontented with the established church, and with regal government," did not display "any great affection" for the laws of England,

63. Joseph A. Conforti, *Imagining New England: Explorations of Regional Identity from the Pilgrims to the Mid-Twentieth Century* (Chapel Hill: University of North Carolina Press, 2001), 82–83, 104, 106, 204; Wesley Frank Craven, *The Legend of the Founding Fathers* (New York: New York University Press, 1956), 67; David Waldstreicher, *In the Midst of Perpetual Fetes: The Making of American Nationalism, 1776–1820* (Chapel Hill: University of North Carolina Press, 1997), 247, 252, 258–59; Lawrence Buell, *New England Literary Culture from Revolution through Renaissance* (New York: Cambridge University Press, 1986), 198–99. On the Puritan origins of New England regional character, see, e.g., Thomas Robbins, *An Historical View of the First Planters of New-England* (Hartford, 1815), 280–96; Joseph S. Clark, *A Historical Sketch of the Congregational Churches in Massachusetts from 1620 to 1858* (Boston, 1858), 109 ("Every thoughtful reader will perceive that the bones and sinews of New England character—her social habits and political tendencies, no less than her religious type—were all derived from Puritanism").

64. Jan C. Dawson, "The Puritan and the Cavalier: The South's Perception of Contrasting Traditions," *Journal of Southern History* 44 (1978): 597–614. One example of innumerable comparisons of New England and Southern cultures is George Bancroft's contrast of Puritanism and "chivalry" in *History of the United States* (Boston, 1841), 1:468–69.

65. Jedidiah Morse and Elijah Parish, *A Compendious History of New England,* 2nd ed. (Newburyport, 1809), 108. The geographer and historian Jedidiah Morse was a key figure in fashioning New England's regional identity in the early national period. See Conforti, *Imagining New England,* 79–122.

66. David Konig, "Law and Regionalism," in *The Cambridge History of Law in America* (forthcoming, 2008); David Thomas Konig, "St. George Tucker and the Limits of States' Rights Constitutionalism: Understanding the Federal Compact in the Early Republic," *William and Mary Law Review* 47 (2006): 1291.

which they subordinated to the "laws of Moses" as the "groundwork of their code."[67]

The prevalence of broadly sketched comparisons of regional cultures in early national and antebellum America shared an important feature with the debate over the causes of the Revolution and the practice of philosophical history. All inclined writers away from Thomas Hutchinson's tendency to attribute specific provisions of early Massachusetts law to an assortment of social and economic as well as religious factors—what I have termed his causal pluralism. All, instead, disposed writers to play up the explanatory power of religion and find a dominant Puritan spirit in early Massachusetts, shaped by and visible in its Mosaic ordinances, use of law to reform manners and morals, government by the saints, and Biblicism. This bias toward stressing the "Puritan" nature of early Massachusetts did not, of course, lead to a unity of approach. Writers maintained a variety of orientations to the Puritan past depending on whether they were loyalists or patriots; Federalists, Republicans or Whigs; congregationalists, Baptists, Episcopalians, or Unitarians; supporters or adversaries of disestablishment; or promoters or critics of New England regional culture.[68] Historians and controversialists did not make Puritanism a universal cause responsible for all features of early Massachusetts society. And they paid due attention to the presence of Quakers, Baptists, Anglicans, and friends of the Crown in seventeenth-century Massachusetts and understood that Puritan principles did not reign unchallenged even in their heartland. Yet despite these qualifications, there was a restrained though insistent pressure toward cultural holism in the early national and antebellum periods. For the more that writers could style early Massachusetts as a "Puritan" society with a "Puritan" legal order, the better they could achieve a variety of objectives. They could find the animating spirit of a society in the manner of the leading philosophical historians of the Enlightenment; they could point to a cause of the Revolution (the latent political effects of "Puritan" commitments); they could locate the roots of early national and antebellum Massachusetts's distinctive character (whether admirable or irritating); and they could insist that the practice of federalism accommodate longstanding regional social and legal differences stemming from the colonial period.

These developments helped cultivate widespread acceptance of the second presupposition underlying the concept of Puritan jurisprudence—that Puritan religion and social thought played the leading role in shaping

67. St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to The Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* (Philadelphia, 1803), 1:395–96, 398, 402.

68. Buell, *New England Literary Culture,* 193–238; Conforti, *Imagining New England,* 86, 96–97, 193–95; Waldstreicher, *Perpetual Fetes,* 257–59.

the colony's legal order. This formulation, which was contested and ill-developed in the late seventeenth century, became commonplace by the first third of the nineteenth century. It sounded throughout the nineteenth century in the works of historians of a variety of persuasions. Congregationalist minister Thomas Robbins observed of the early Massachusetts settlers that "religious sentiments" formed an "essential part of their character" and were "ingrafted in all their civil institutions." "Their laws, their regulations, whether of a private or a more public nature, their literary establishment, all bore the same character." They aimed at "the establishment and maintenance of a Christian Commonwealth."[69] An essay in the *North American Review* of 1823 styled the early Massachusetts legal code as "complete in itself, unique in its spirit, [and] peculiar in its elements."[70] John Stetson Barry's *History of Massachusetts* (1855) found the "principles of the Puritans lying at the basis of all their legislation."[71] Peter Oliver, descendant of a prominent Massachusetts loyalist family, wrote an unsparing indictment of the Puritans that observed: "The peculiarity of the Puritan law, as we have before intimated, was its attempt to graft upon Christian civilization the abrogated statutes of the Hebrew Commonwealth." The Court of Assistants served as a crucial "expounder of Puritan Jurisprudence."[72] After 1850, even the title of works pointed to the tendency to portray early Massachusetts as a comprehensive "Puritan" society. Historians increasingly produced studies not only of "Massachusetts" or of "New England" but of the "Puritan colony" or the "Puritan age."[73]

III. Toward the Mature Synthesis

By the nineteenth century, the two preconditions underlying the concept of Puritan jurisprudence were widely accepted. Yet nineteenth-century historians had a fairly thin and selective conception of the colony's legal order by the standards of the mature synthesis of Puritan Jurisprudence worked out in the last fifty years. Many scholars continued the eighteenth-

69. Thomas Robbins, *An Historical View of the First Planters of New-England* (Hartford, 1815), iii, 245, 112.

70. Anonymous, "Laws of Massachusetts," *North American Review* 17 (1823): 77.

71. John Stetson Barry, *The History of Massachusetts,* vol. 1, *The Colonial Period* (Boston, 1855), 267–68.

72. Peter Oliver, *The Puritan Commonwealth: An Historical Review of the Puritan Government in Massachusetts in its Civil and Ecclesiastical Relations* (Boston, 1856), 86, 82.

73. See, e.g., Oliver, *Puritan Commonwealth*; George Edward Ellis, *The Puritan Age and Rule in the Colony of Massachusetts Bay, 1629–1685* (Boston, 1888); John Fiske, *The Beginnings of New England; or the Puritan Theocracy in Relation to Civil and Religious Liberty* (Boston, 1889).

century practice of offering up legal history in a handful of pages devoted to the "remarkable," "notable," and "curious" laws of the Old Bay Colony. Here one found a dog's breakfast of disparate ordinances mixed together to make early Massachusetts look, variously, religiously devout, intolerant, quaint, or, occasionally, forward-looking. A prohibition on Christmas observance and monopolies sat next to a model oath, or a decree encouraging women to spin cloth preceded an act establishing schools and fairs or banishing Jesuits. Ordinances against sins such as blasphemy, idolatry, gambling, drunkenness, scolding, cursing, the wearing of wigs, sabbath breaking, and fornication proved a special favorite.[74] These compilations of curious laws suggest the difficulty that nineteenth-century historians faced in working out the relationship between the early Massachusetts's Puritan beliefs and jurisprudence. The connections were more assumed than explained. Nineteenth-century writers handed down to future scholarship not an account of the mechanisms of influence so much as a bias toward assuming that the colony's religion and law fused together in a kind of cultural holism.

Why was this? To begin with, these historians had not lived through the agitation in several branches of twentieth-century scholarship about the supposed effects of Reformed Protestantism on individualism, political revolution, constitutional government, scientific creativity, and capitalist enterprise. Many of these debates tried to assess the nature and magnitude of Puritanism's importance in helping to cause some phenomenon (say, seventeenth-century science or the "spirit of capitalism"). Was Puritanism an independent variable, a background condition, or an intervening cause? How did it fit into a complex pattern of conjunctive causation? And to what extent did the phenomenon in question bear the imprint of

74. The eighteenth- and nineteenth-century practice of reporting "curious" laws built on seventeenth-century precedents, particularly English travelers' reports. In this regard, see Edward Ward, *A Trip to New England. With a Character of the Country and People, both English and Indians* (London, 1699), 5–7; John Dunton, *John Dunton's Letters from New England,* ed. W. H. Whitmore (Boston, 1867), 72–74 (Dunton visited New England in 1686). Dunton relied on earlier writers, such as John Josselyn, *An Account of Two Voyages to New England* (London, 1674). Eighteenth- and nineteenth-century examples of the "curious" laws approach, include (in chronological order): John Oldmixon, *The British Empire in America,* 2nd ed. (London, 1741), 211–12; Thomas Salmon, *Modern History: Or, the Present State of all Nations,* 3rd ed. (London, 1746), 3:522–23; William Douglass, *A Summary, Historical and Political, of the First Planting, Progressive Improvements, and Present State of the British Settlements in North America* (Boston, 1749), 1:431–37; Samuel Peters, *A General History of Connecticut* (London, 1781), 63–71; James Grahame, *The History of the Rise and Progress of the United States of North America till the British Revolution in 1688* (London, 1827), 306–10; Peter Oliver, *The Puritan Commonwealth: An Historical Review of the Puritan Government in Massachusetts in its Civil and Ecclesiastical Relations* (Boston, 1856), 83–85; John Gorham Palfrey, *History of New England* (Boston, 1899), 3:42–57.

Puritan theology and social thought?[75] These debates provided models for thinking about the mechanisms and limits of religious influence on matters outside the church. Historians working before the late nineteenth century also lacked the benefit of later-developed accounts of Puritan theology and social thought that illuminated the meaning and political implications of vital categories such as "covenant," "Christian liberty," and "calling."

The thinness of legal historical scholarship before the twentieth century also limited the ability of nineteenth-century historians to flesh out the ground-level meaning of Puritan jurisprudence. While they could draw on studies of early Massachusetts constitutionalism, religious toleration, and the regulation of morals, they had access to only a handful of works on private law (contract, property, inheritance, business), court procedure and jurisdiction, the bench and bar, enforcement priorities, and modes of interpretation and dispute settlement.[76] The pace of legal history scholarship picked up in the late nineteenth century and further accelerated in the first third of the twentieth century. The historically minded law professors who did much of this work were primarily interested in how New Englanders carried over and adapted the varied institutions and doctrines known back in England. The quarry was to establish precisely the "sources of law" applied in the colonies. Of the myriad bodies of English law (statutes, common law, ecclesiastical and prerogative court rules, merchant, town and manorial custom, and so forth), which had the colonists retained and reshaped in the New World, in what proportions, and why? Religion, like economics, settlement patterns, and politics, was important insofar as it shaped the selective transmission and evolution of law.[77] The "sources of law" historians wished to chart the diffusion of the common law tradition, a project readily appreciated by their law professor colleagues devoted to the present-day elaboration of that tradition. They were not concerned with

75. For excerpts from and discussions of the extensive scholarly disputes over the relationship of Puritanism and, respectively, science and capitalist development, see I. Bernard Cohen, ed., *Puritanism and the Rise of Modern Science: The Merton Thesis* (New Brunswick: Rutgers University Press, 1990); Hartmut Lehmann and Guenther Roth, eds., *Weber's Protestant Ethic: Origins, Evidence, Contexts* (Cambridge: Cambridge University Press, 1993).

76. See, e.g., Emory Washburn, *Sketches of the Judicial History of Massachusetts Bay from 1630 to the Revolution in 1775* (Boston, 1840).

77. See, e.g., Paul S. Reinsch, "The English Common Law in the Early American Colonies," in *Select Essays in Anglo-American Legal History,* ed. J. H. Wigmore et al. (Boston, 1907), 1:367–415; Charles J. Hilkey, *Legal Development in Colonial Massachusetts, 1630–1686* (New York, 1910); Richard B. Morris, *Studies in the History of American Law, with Special Reference to the Seventeenth and Eighteenth Centuries* (New York: Columbia University Press, 1930). On the historiographical context of these legal historians, see Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10 (1975): 9–55.

developing or rebutting the concept of Puritan jurisprudence. But their excavation of legal detail provided raw material for those who would.

Twentieth-century scholars who worked out the mature synthesis of Puritan jurisprudence drew heavily on this quotidian stuff of legal history while engaging with, if not always agreeing with, the legacy of cultural holism bequeathed by their nineteenth-century predecessors. Indeed, that legacy drew strength from the early twentieth-century enthusiasm (before a critical reaction set in) for linking Puritanism to the rise of liberty, science, capitalism, and other aspects of "modernity." Consider in this light the scholar whose work is still the starting point of modern accounts of Puritan jurisprudence, George Haskins. He set himself the task of giving order and meaning to the detailed knowledge about early Massachusetts rules and institutions that had been accumulating for decades by making law a participant in a broader Puritan "civilization" conceived in terms of Harvard historian Perry Miller's *Orthodoxy in Massachusetts, 1630–1650* and *The New England Mind: The Seventeenth Century*.[78] Haskins treated law as a means of understanding an underlying, animating Puritanism that it expressed and whose inner drives and ambitions it illuminated. Yet a latent tension existed between Haskins's actual historical method and his ambitions toward cultural holism (which Haskins shared with Miller, and which also had a long pedigree in the study of Puritan law, as we have seen). Haskins felt some sympathy for the late eighteenth and early nineteenth-century historians who understood law as an aspect of a society's animating "spirit." The "phenomena of law, language, customs, [and] government are not separate," declared Haskins, quoting romantic era German jurist Friedrich Karl von Savigny in support: "'There is but one force and power in a people, bound together by its nature; and only our way of thinking gives these a separate existence.'"[79] Haskins sometimes wrote of early Massachusetts in this vein. "Orthodoxy in civil and ecclesiastical affairs was the central characteristic of this community in which religion was a living, emotional force." Puritan "religious doctrine was translated into action through political and legal institutions." Haskins saw a common logic organizing not just worship and church discipline, but politics, law, economics, family life, and town disposition. "Every phase of political and social life," he wrote, "was made to contribute to the maintenance of the Puritan system of belief."[80]

Yet the meticulous, nuts-and-bolts legal detail that the "sources of law"

78. Perry Miller, *Orthodoxy in Massachusetts, 1630–1650* (Cambridge: Harvard University Press, 1933); and Miller, *The New England Mind: The Seventeenth Century* (New York: Macmillan, 1939).

79. Haskins, *Law and Authority,* viii.

80. Ibid., 63, 43.

historians had been unearthing for decades, and which Haskins had mastered, continually led him to qualify such pronouncements. The professed lumper worked with the tools of a splitter, chipping away at the supposedly "Puritan" character of early Massachusetts law. He demonstrated with exacting precision that ground-level legal nitty gritty came from English and Continental inheritance and political, economic, and environmental exigencies as readily as from the "Puritan system of belief." Consider the colony's rule for the descent of land in cases of intestacy (where a parent died without a will). Massachusetts divided the land among all the children (with a double portion for the eldest son) in place of the English practice of giving all to the eldest son (primogeniture). Commentators had long ascribed this change to the influence of Puritan biblicism. Haskins, by contrast, downplayed the possibility as he traced partible inheritance to the custom of several English localities and argued that the rule made practical sense in a land-rich and labor-poor environment.[81] Only by considering the available English and Continental models of law and administration and the social and economic pressures faced by the early colony could one assess the originality of Massachusetts practices and the extent of "Puritan" influence.

Haskins helped generate the mature synthesis of Puritan jurisprudence by insisting on simultaneously examining Puritan ideology, environmental circumstances, and English and Continental legal inheritances in order to wrestle with a question: To what extent did ground-level legal practices in Massachusetts reflect the insistent but incomplete Puritan drive for a godly commonwealth? For two generations, students of Massachusetts society have joined card-carrying legal historians in exploring this question from a variety of perspectives, even as many strongly resisted seeing the colony as an "orthodox" Puritan "civilization." Since the 1960s, proliferating studies of community life, religious practice, economic exchange and gender relations, and longitudinal analyses of dispute resolution, have deepened—and challenged—Haskins's formulations. The meaning of Puritan jurisprudence in current historiography emerges from these collective labors.[82] Ultimately,

81. Ibid., 170–72. For a fuller discussion of the point, see Haskins, "The Beginnings of Partible Inheritance in the American Colonies," in *Essays in the History of American Law,* ed. David Flaherty (Chapel Hill: University of North Carolina Press, 1969), 204–44.

82. A very selective list of this scholarship would include: David Grayson Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 1981); Bozeman, *Live Ancient Lives;* T. H. Breen, *The Character of the Good Ruler: A Study in Puritan Political Ideas in New England, 1630–1730* (New Haven: Yale University Press, 1970); Elizabeth Dale, *Debating—and Creating—Authority: The Failure of a Constitutional Ideal in Massachusetts Bay, 1629–1649* (Aldershot, England: Ashgate, 2001); Dayton, *Women Before the Bar;* Kai Erikson, *Wayward Puritans: A Study in the Sociology*

though, my purpose is not to assess the various perspectives and methods that scholars since Haskins have brought to bear on the problem of Puritan jurisprudence. My ambition has been to show the gradual and complex evolution of the idea that something called "Puritan jurisprudence" governed early Massachusetts.

IV. Conclusion: The Costs of Puritan Jurisprudence

Puritan jurisprudence is a concept with a long and complex history. Scholars in the final two-thirds of the twentieth century worked out the mature synthesis of this concept by transforming the thin and question-begging account of "Puritan" law inherited from the nineteenth century. The nineteenth-century account itself rested on presuppositions that took roughly two hundred years to become widely accepted, propelled forward by the intellectual and political interests of generations of interpreters. As scholars and controversialists slowly came to accept the presuppositions of Puritan jurisprudence and then labored to make the notion more nuanced and richer, the fact that the Puritans themselves did not use the concept faded from view.

Should this matter? Should we be troubled if our interpretive categories strain against those of the Puritans? Historians often investigate and characterize the past using concepts that contemporaries lacked or rejected and that later generations devised out of their own preoccupations. The characteristics of an age that historians consider critical are frequently invisible to those within it. We might be tempted to say, at first glance, that the early Massachusetts colonists lacked sufficient perspective to recognize that they lived under a Puritan jurisprudence. Perhaps they were like fish who appreciated that they had been swimming in water only when removed from it.

Such conclusions would mislead. The ministers, magistrates, and leading spokesmen of early Massachusetts did not keep at arm's length the notion of Puritan jurisprudence because they lacked the imagination to see it. The

---

of Deviance (New York: Wiley & Son, 1966); David H. Flaherty, *Privacy in Colonial New England* (Charlottesville: University Press of Virginia, 1972); David T. Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629–1692* (Chapel Hill: University of North Carolina Press, 1979); John M. Murrin, "Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England," in *Saints and Revolutionaries: Essays in Early American History,* ed. David D. Hall, John M. Murrin, and Thad W. Tate (New York: Norton, 1984), 152–206; Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (New York: A. A. Knopf, 1996); Darrett B. Rutman, *Winthrop's Boston: A Portrait of a Puritan Town, 1630–1649* (New York: Norton, 1972); Howard Schweber, "Ordering Principles: The Adjudication of Criminal Cases in Puritan Massachusetts, 1629–1650," *Law and Society Review* 32 (1998): 367–408; and Warden, "Law Reform."

political perils of living under a self-consciously distinctive and Puritan legal order were all too apparent. And they preferred to think of religion as the assumed "final cause," or ultimate purpose, of their law rather than as an independent variable whose influence on the law needed to be assessed—the latter, a stance helpful to eighteenth- and nineteenth-century historians curious about the (relative) explanatory power of religion. These reasons suggest the first important cost of obscuring the colonists' reservations: We will suffer an impoverished understanding of the meaning of Puritan jurisprudence if we do not appreciate why the Puritans themselves did not use the concept.

The second cost of forgetting that the early settlers of Massachusetts did not think in terms of a Puritan jurisprudence is that we lose sight of the two-centuries' long, complicated process by which the concept arose. Puritan jurisprudence came to be a widely accepted interpretation through a series of political and forensic maneuvers. The presuppositions underlying the idea proved useful to a variety of controversialists and scholars—for example, to post-Restoration colonists confronting a newly assertive English empire, to Enlightenment "philosophical" historians trying to break free of providential and denominational narratives, to Tory opponents of the American Revolution finding its roots in Puritan separatist enthusiasm, and to antebellum writers defining their regional identities and legal cultures against stylized accounts of their rivals. These makers of "Puritan jurisprudence" found the concept helpful whether they judged the early Massachusetts legal order attractive, fascinating at arm's length, or repulsive. Historians, lawyers, and, more typically, contemporary political activists invoke the notion of Puritan jurisprudence to capture a legal order born of intense early American religiosity. More grandly, the concept alludes to a lost tradition of faith guiding law at our nation's founding. The notion may retain its usefulness, but take on a tincture of irony or poignancy, as we discover that those founders did not use the concept and that later generations came to accept it as they struggled with issues far removed from the concerns of the Puritans.