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The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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EDITORIAL

The Rt. Hon. Sir Zelman Cowen, 19th Governor-General of Australia, passed away this month. He was a important constitutional law scholar, university administrator and public intellectual. It was through his inspiration that I founded *The Journal Jurisprudence*.

Sir Zelman's list of accomplishments astound even in the most accomplished circles. He was knighted three times and served as both the Provost of Oriel College and as Pro-Vice-Chancellor of the University of Oxford. A landmark in any legal career, he reached the top of the profession as a QC and the paramount of academia, having been awarded the very rare substantive degree of Doctor of Civil Law by Oxford.

However impressive Sir Zelman's list of accolades are, it was his strength of being as a person that will be missed by so many, myself included. He was an open, generous person who used his network to bring people together. He became Governor-General in 1977, succeeding the difficult tenure of Sir John Kerr. During his time as Australia's head of state, he helped heal the wounds of the 1975 dismissal and used his warm interpersonal skills to inspire a nation.

In the last two decades of his life, Sir Zelman was afflicted with Parkinson's disease. Although his body became frail, his mind did not suffer. During his retirement, he continued with the work he began long before he became Governor-General. He advanced educational causes, including encouraging a great

many young Australians to push themselves to greater educational opportunities, particularly at Oxford.

He led a life with integrity and upstanding honour. Most of all, he was a patriot who believed strongly in the good of our nation. His leadership inspires many, myself included. Australia and the wider world was better because of this champion of community, understanding and scholarship. The world is a lesser place without him, but I know that Sir Zelman has inspired three generations of Australians who will continue his legacy.

Aron Ping D'Souza

Editor

17 December 2011

Melbourne, Australia

PURITANISM, GODLINESS, AND POLITICAL DEVELOPMENT

IN BOSTON & THE GENERAL COURT

(1630-1640)

PETER J. MAZZACANO*

The goal of this article is to examine the degree to which Puritanism influenced early American political culture. That is, how did Puritan values and practices facilitate the development of an exceptional political culture during the formative years of Massachusetts Bay? Utilizing a case-study method of analysis, this article examines the political developments in the General Court and the town of Boston during the decade 1630 to 1640. The research methods used are primarily the writings of leading Puritans, and concomitant town, church, and colonial records. The main finding is that the Puritans paid little heed to notions of democracy, theocracy, oligarchy, or British political traditions; instead, Puritan institutions and practices were based on the primary Puritan ideal of godliness. However, the formative influence of the godly ideal inadvertently reinforced democratic and republican ideals. The conclusion is that the focus on godliness provides a comprehensive and multiple explanations for the course of political developments in early Massachusetts Bay.

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I. INTRODUCTION

Utilizing a case study method of analysis, this article examines the influence of the ideas, beliefs, and practices of the Puritans¹ in the General Court of Massachusetts Bay and in the town of Boston, in the decade 1630 to 1640, in an attempt to discern the extent to which such values and practices facilitated the development of an exceptional, that is, a democratic² and republican³ political culture.⁴

The intent to study Puritanism⁵ as a formative political influence reflects the conviction that, during the formulation of a new nation, there is incorporated into that nation's political culture, various systems of belief that can crystallize into a specific ideology and set of practices. In the founding of the American nation, it is

¹ The 'Puritans' were originally English reforming Protestants who aimed for a simpler form of worship, expressly warranted by scripture, and for the abolition of clerical hierarchy. During their repression, many separated from the Church of England and emigrated to America. As used in this article, the term 'Puritans' will refer to the dissenting Church of England immigrants of Massachusetts Bay who were generally congregational members. It was this first generation of Puritans in New England who brought to America a sub-variety of English Puritanism known as the 'covenant theology'.

² 'Democratic' or 'democracy' used here means rule by the people as opposed to rule by any section, class, or interest. If any decision can be attributed to the people, either because they took part in making it or because it ultimately depended upon their consent, it will be termed 'democratic'.

³ The term 'republican' denotes the form of government rule that is based on the principle that the authority to rule or lead is extended by the people (who hold franchise) to their representatives and officials.

⁴ As defined in this study, 'political culture' means a historically transmitted set of implicit and explicit values, conceptions, and orientations that generally characterize a specific social or political group. Here, Puritan attitudes and action regarding popular participation, arbitrary power, and civic duty in the institutions of the town and the commonwealth will be addressed.

As already noted, however, this article will limit itself to early American political culture, specifically, to the period 1630 to 1640 in Massachusetts Bay. To emphasize certain points, occasional references beyond 1640 will be made. On this tangent, it should be noted that some scholars have traced the influence of Puritanism from the seventeenth century to the present day. See, eg, E Digby Battzell, *Puritan Boston and Quaker Philadelphia* (Beacon Press, 1982); Sacvan Bercovitch, *The Puritan Origins of the American Self* (Yale University Press, 1975); Clinton Rossiter, *The First American Revolution* (Harcourt Brace Jovanovich, 1984).

⁵ 'Puritanism' refers to the body of beliefs that accompanied the Puritans to Massachusetts Bay. More specifically, the term as used in this article will refer to congregational members' devotion to their ideals and practices regarding civil and ecclesiastical life. While the essence of New England Puritanism is the covenant theology, their ideals and practices included a tenacious striving to achieve independence and antinomy in their community life, and the freedom to worship according to their own principles. Puritanism also stressed self-restraint, the sovereignty of the conscience, in addition to the moral conduct of the individual.

possible that Puritanism was one of those formative ideologies that contributed to the shaping of distinctive political and ecclesiastical institutions.

Because Puritanism is believed by certain academics to have contributed to the character of US political institutions, some studies on colonial America have tended to focus on the homogeneity of that American society.⁶ Thus, Alexis de Tocqueville could write that ‘the whole destiny of America is contained in the first Puritan who landed on these shores,’ because ‘Puritanism was almost as much a political theory as a religious doctrine’.⁷ He also noted that religious and political conflicts in England drove dissenters to America. It was from this ‘Puritan movement’ and the English ‘middle-classes’ from which most of the emigrants sprang, hence, ‘the colony came more and more to present the novel phenomenon of a society homogeneous in all its parts’.⁸

John Jay had enunciated a similar sentiment two generations before Tocqueville’s statement. In the *Federalist Papers*, Jay discussed the common heritage of American immigrants: ‘Providence has been pleased to give this one connected country to one united People—a People descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs’.⁹

More recently, Louis Hartz developed the controversial ‘fragment theory’. He believed that the colonial beginnings of America shaped its political culture well into the twentieth century. To Hartz there was a dissenting, liberal fragment that migrated to America: this fragment ‘detaches itself from the whole [...] and the part develops without inhibition’.¹⁰ Detached, it became for the first time the ‘master of a whole region’.¹¹ Thus, ‘the fragmented British Puritan can make Calvin universal in New England, simply by virtue of his migration’.¹²

⁶ See, eg, T H Breen, *Puritans and Adventurers* (Oxford University Press, 1980) xi-xviii.

⁷ Alexis De Tocqueville, *Democracy in America* (George Lawrence trans, Doubleday & Co, 1969) 38, 279 [trans of: *Le Démocratie en Amérique*, (first published, 1835-1840)].

⁸ Ibid 39.

⁹ Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Bantam Books, 1982) Nos 2, 7.

¹⁰ Louis Hartz et al, *The Founding of New Societies* (Harcourt Brace, 1964) 7.

¹¹ Ibid 5.

¹² Ibid 10, 11.

A variation of Hartz's fragment theory is Seymour Lipset's theory of formative events. To Lipset, 'Countries, like people, are not handed identities at birth' as Hartz's theory contended, 'but acquire them through the arduous process of 'growing up''.¹³ Lipset essentially argued that early events favored certain outcomes over others: 'historical events establish values and predispositions, and these in turn determine later events'.¹⁴ That is, certain historical 'formative' events served to fix certain values in the public mind, largely by embodying these values in institutions and patterns of behavior that would endure.

Although it may be difficult to quantify the theses expounded above by Tocqueville, Jay, Hartz and Lipset, it must be noted that Massachusetts Bay was only a part of New England, and by extension, the New England way, was not necessarily the American way.¹⁵ Thus, it becomes necessary to turn from the analyses of general characteristics of the influence of Puritanism on American political culture and to focus attention on temporal local records in an effort to discover more particularized information concerning the affect Puritanism had on its more immediate surroundings.

A study of political participation¹⁶ in the General Court of Massachusetts Bay, as well as the concomitant practices on a local level, in the town of Boston, will, hopefully, determine the extent to which the Puritans were homogeneous in thought and practice in the decade 1630 to 1640. More importantly, with such a focused study, an examination of the degree to which the Puritans laid a democratic and republican foundation in designing their institutions, should be evident. Contrarily, divisions, factionalism, authoritarian, and anti-republican components within the Puritan community, as well as transplanted British beliefs and practices, should be revealed through a study on Puritan political practices in Massachusetts Bay.

Such a narrow focus should also help to combat outdated, but still popular, generalizations concerning the impact of Puritanism on American political culture. For example, in the nineteenth century, historians tended to adopt a filiopietistic approach towards the New England Puritans. Representative of this trend was

¹³ Seymour M Lipset, *The First New Nation* (W W Norton, 1979), 16.

¹⁴ Ibid 7.

¹⁵ Richard P Gildrie, *Salem, Massachusetts, 1626-1683* (University Press of Virginia, 1975) ix.

¹⁶ 'Political participation' is not as broad as the notion of 'democracy', which implies the right to vote. Political participation denotes taking part in church and community decisions through a formal or informal meeting or vote.

John Gorham Palfrey who uncritically praised his Puritan ‘ancestors’ for their unique contribution towards the rise of American democracy.¹⁷ Similarly, Herbert L. Osgood, writing in 1891 on the political theory of the Puritans, noted that both the church and the state were organized to maximize political participation, and that both institutions ‘were pure democracies,’¹⁸ largely in the lands of the people.¹⁹

In the early twentieth century arose the ‘antifiliopietist’ school that opposed the basic tenants of the Puritan democratic hypothesis. The best-known members of this school were Charles Francis Adams, Jr., and his brother Brooks. To the Adams’, Puritan Massachusetts was a theocracy, whereby ministers and their churches tyrannically controlled the governing institutions.²⁰ Unlike Palfrey, the central theme of Massachusetts history was its gradual emancipation from the authority of the ministers and their officials.

The Adams’ influence on subsequent historians, such as Vernon L. Parrington, writing in 1927, is evident. Parrington introduced the new dimension of social conflict. He saw in early Massachusetts history not only a struggle for freedom from the control of the theocracy, but also class conflict over civil and ecclesiastical power.²¹ Like the Adams’, Parrington believed Puritanism meant intolerance, repression, and authoritarianism, which was inspired by church officials and enforced by the magistrates. Thus, the rise of American democracy, far from being an outgrowth of Puritanism, was won by overcoming its effects.

Since the 1930s, scholars have raised new questions and suggested new approaches to Puritan history. The result has revealed the complexity and diversity of seventeenth century New England Puritanism, making the use of grandiose generalizations hazardous. Placing the two-camp, democratic or

¹⁷ See David D Hall (ed), *Puritanism in Seventeenth-Century Massachusetts* (Holt, Rinehart, and Winston, 1968) 1-2; Herbert L Osgood, ‘The Political Ideas of the Puritans II’ (1981) 6 (2) *Political Science Quarterly* 201 (describing the influence of the New England Puritans on the development of American democracy).

¹⁸ See Osgood, *ibid* 16.

¹⁹ ‘The people’ as defined here includes all those subject to the governing civil and ecclesiastical institutions of Boston and Massachusetts Bay, irrespective of status, class, or actual wealth and power.

²⁰ Brooks Adams, ‘The Rule of the Priesthood’ in David D Hall (ed), *Puritanism/Massachusetts* (Holt, Rinehart, and Winston, 1968), 71-75; See also Hall (ed), *Puritanism in Seventeenth-Century Massachusetts* above n 17, 2.

²¹ Vernon L Parrington, ‘Puritanism as an Antidemocratic Ideology’ in Hall (ed), *Puritanism/Massachusetts*, above n 20, 49-54; Hall (ed), *Puritanism in Seventeenth-Century Massachusetts* above n 17, 2.

theocratic/oligarchic polemic to one side, some scholars have focused their attention less on the ideological components of Puritanism, and more on the development of its institutional forms.

A prominent figure in this group was George L. Haskins who showed the effects of non-Puritan English law and traditions in the shaping of the colony's governmental institutions.²² Similarly, T. H. Breen argued that the local origins of the English colonists influenced their attitudes and institutional focus in colonial America.²³ According to these scholars, it was the Puritans' determination to maintain the local English church and the self-contained towns that largely determined the character Massachusetts' social and governmental institutions.

A. The Godliness Hypothesis

To Perry Miller, 'about ninety percent of the intellectual life, scientific knowledge, morality, manners and customs, notions and prejudices' of the New England Puritans, were held in common with all Englishmen.²⁴ To him, therefore, the hypothesis of the transplantation of British traditions to New England was superfluous. In order to discover the essence of Puritanism it becomes necessary to analyze the other 'ten percent' that made the difference between the New England Puritans and their British brethren. Also paramount among those who have sought to understand the essence of Puritanism was Samuel Eliot Morison.²⁵ Together, Miller and Morison attempted to rebut those scholars who had found the Puritans repressive, anti-intellectual, and altogether an adverse influence on later America.

What Miller and Morison shared in common with all Puritan historians was the belief that the colonists' religious ideas played a leading role in shaping the political development of Massachusetts. But whether the Puritans were narrow-minded theocrats and oligarchs, Renaissance humanists, or British traditionalists, is a question that again leads directly to the central enigma concerning the Puritans of Massachusetts Bay. Were the seeds of democracy evident in the governing

²² George Lee Haskins, *Law and Authority in Early Massachusetts* (Macmillan, 1960), 2.

²³ Breen, above n 6, xi-xviii, 3-24.

²⁴ Perry Miller and Thomas H. Johnson (eds), *The Puritans: A Sourcebook of Their Writings* (Harper and Row, 1963) vol 1, 7. See generally Perry Miller, *The New England Mind, The Seventeenth Century* (Harvard University Press, 1954) 64-108.

²⁵ See generally Samuel Eliot Morison, *Builders of the Bay Colony* (Northeastern University Press, 1981).

institutions, or was it an authoritarian society run by elite theocrats? If it was neither completely democratic nor authoritarian, what was the relationship between the people and their government?

What Miller and Morison discovered was that the Puritans' character, ethics, and dedication to their ideals dominated early Massachusetts.²⁶ With the support of the populace, the Puritans shaped their institutions according to their religious principles. While Morison and Miller were vague or elusive in defining the Puritans' specific guiding principle, this article will hypothesize that the erection of a truly godly community by a participant religious—that is, a congregational-sect was the Puritans' primary guiding ethic, and it unintentionally facilitated the development of a participant or democratic political culture, and reinforced republican ideals. Thus, a participatory democracy became the logical outgrowth of the Puritan attempt to create a community of 'visible saints'.²⁷

If the Puritan attempt to create, as John Winthrop stated, 'a city upon a hill'²⁸ fostered democratic and participatory values, the study of church and state institutions and practices will reveal that the creation or maintenance of a godly community led to an understanding of political participation that transcended class lines, and admitted the common people into the structure of government. For the Puritan community in relying upon the criterion of individual godliness—i.e., covenantal church members—in determining the extent of political participation in governmental affairs, seemed to aim to ensure that the majority of political and religious decisions were acceptable to those most affected by them. This article anticipates, therefore, that in designing the institutions in a new society, the Puritans shaped a system that satisfied their own desire to control the colony for godly purposes, as well as meet the wishes of colonists in their desire to participate in governmental affairs.

More specifically, in attempting to gauge the extent to which the Puritan ideal of godliness helped (or hindered) the development of democracy and republicanism in Massachusetts Bay, motives for the Puritan migration from England will be surveyed. Economic considerations for the migration should be secondary to the primary Puritan motive of emigrating in order to attempt to erect a model godly

²⁶ The domination of such ideals spanned between 1630 and 1720.

²⁷ Edmund S Morgan coined the phrase 'visible saints'. See Edmund S Morgan, *Visible Saints: The History of a Puritan Idea* (Cornell University Press, 1987).

²⁸ John Winthrop, 'A Modell of Christian Charity' (Speech delivered at the *Arbella*, on the voyage to New England, 1630), in Miller and Johnson (eds), *The Puritans*, above n 24, 195, 199.

community.

If the Puritans settled Massachusetts Bay largely for religious reasons, the Puritan religious creed will then be examined in an effort to extract a residual political theory. The Puritan creed should be in either direct or indirect harmony with democratic and republican ideals, and a review of political participation in the General Court should document the utilization of such political ideals. Similarly, the Puritan experience with godliness in the town of Boston also anticipates the fostering of political participation in the democratic direction.

The creation and maintenance of a godly community, however, is to be distinguished from a theocracy. The term theocracy denotes government by ministers or government in which the priestly class controls and imposes its values on the subordinate governing institutions. In a godly community, the ministers do not necessarily control the government, although they may have significant influence in political affairs. Instead, the godly community is organic in the sense that there is a unity of purpose among the majority of members in the community. In the case of the Massachusetts Bay Puritans, their aim was to create a political society in which both the electors and the elected were in covenant with God. Thus, while the ministers and governmental rulers occupied a particular status, their society was not so much an aggregation of individuals as it was a holistic organism, functioning for a definite religious purpose, attempting to unite men's spiritual lives with their communal lives.

Consider that in England, the energy released by the Puritan movement led to a civil war, the overthrow of the royal government, and social disorder. In Massachusetts Bay, this same energy was channeled into the creation of a model community, where there was to be a powerful unity between the state, church, and the individual community members.

If there were differences among these individuals, this was to be for the glory of God and for the common good. An organic community with societal ranks led logically to the requirement that the community remain orderly. It was in part the disorder of early seventeenth century English society that prompted so many Puritans to emigrate elsewhere. Thus, not only were individuals to maintain strict control over their lives, but the entire community of 'saints' was to remain orderly in an attempt to achieve their godly ideals. Because weak individuals exposed the entire community either to incursions of the Devil or the angry chastisements of

God, how individuals behaved became the concern of the entire community.

Thus, the godly community hypothesis is not to suggest that the creation of such a godly community be equated with the erection of governing institutions based on strictly theocratic principles, or imply that the people and leaders of Massachusetts Bay were thoroughly democratic. Furthermore, in many of its essential features, political practices in Boston and the General Court should not simply imitate British practices.

The godly community hypothesis, however, has the potential to incorporate and synthesize elements of democracy, theocracy, and authoritarianism. Its democratic component can stem from the latent individualistic Puritan conviction that all men are ultimately responsible for their own behavior. Even the most rigidly orthodox Puritans betrayed egalitarian suspicions that salvation was open to all men without reference to political, economic, or social standing. By stressing the competence of the individual, therefore, the Puritans inadvertently dismantled barriers to religious, and subsequently, political equality. The belief in the competence of the congregation most likely helped to democratize political participation.

Any movement towards individualism and democracy, however, was not only unintentional, but also limited, being subordinate to communal values. According to God's will, men were to live in a social environment. In a world of sinful men seeking salvation, a compact society had the advantage of quick discipline by those in authority. It was the duty of these men in political power, being limited agents of God, to goad the individual conscience and insist on communal responsibility before individual freedom, hierarchy before democracy, and order before liberty. Thus, leaders, once selected by the community, were to scourge the morally indolent, for their own good, for the welfare of the community, and for the glory of God.

However, the authority exercised by Puritan leaders depended entirely upon the consent of the inhabitants. Here lay the latent democratic component within Puritan communities. Discipline was the responsibility of the elders of the community, and not the minister. But all leaders were held accountable to those they led.

If the godly community hypothesis is correct, therefore, an analysis of political participation in the General Court and in the town of Boston will reveal practices

which were governed neither exclusively by democratic ideals nor by oligarchic, theocratic or authoritarian principles, but by a set of guidelines which attempted to foster or preserve godliness within the community. These included acts, laws, and statements whose objective was to promote moral behavior, and ultimately, salvation. Hierarchy would not be negated, but the pattern of subordination would most likely be based not on wealth or class, but on church membership, it being the primary criterion for salvation. Church membership, in turn, should help in the evolution of a political order that became centered around democratic precepts, albeit a largely unintentional development.

The anticipated results also include the probability that the unregenerate, that is, the unenlightened community members, remained outside the parameters of formal political power. The exclusion of any group from the political process may appear to be an anti-democratic tendency. However, individual godliness as a franchise requirement can be considered democratic—especially by seventeenth century English standards—to the extent that it helped to assimilate the bulk of the lower social ranks into the community by giving them the prerequisite for full political rights. Thus, the franchise should include the poor, if they met the religious requirement, as well as exclude unregenerate men of wealth. And narrow as it may have been in Massachusetts Bay it should cut through the populace vertically, and not horizontally as in England. In this way, the Puritans were to become familiar with the practice of including all types of men in political affairs. But before actual political practices are analyzed, the primary motive and guiding principle that lead to the Puritan migration to Massachusetts Bay requires further examination.

II. MOTIVES FOR THE MIGRATION

The first step in answering the question concerning how Puritanism influenced the political development of Massachusetts Bay is to examine the motives that prompted the Puritans to migrate from England and settle in the new world. With this evaluation of motives and the corresponding ideas pertaining to the type of society the Massachusetts Bay Puritans wished to construct, an initial determination of the godliness hypothesis described in the previous section can be made. In addition, a familiarity with the events surrounding the migration and the nature of the emigrants in the 1630s is necessary for an understanding of New England Puritanism. However, before motives for the migration are examined, it would be useful to characterize the type of people most likely to settle in Massachusetts Bay in the first decade.

It has been estimated that between 1630 and 1642, some fifteen to twenty thousand people moved to New England.²⁹ In the first year of the wave, 1630, nearly 1,000 men, women, and children followed John Winthrop to Massachusetts Bay.³⁰ Initially, the movement was strongly East Anglian in character. Part of the strength of Winthrop and his circle was their skill as recruiting agents, arising from their intimate contacts among the Puritan gentry and clergy of the region. Certainly, contemporaries were well aware that the middle-class in the coastal areas of East Anglia made good Puritans, and that middle-class Puritans were especially likely to become New England colonists.³¹

In general, the New England settlers were staid and orderly, some migrating in groups from the same parish or community, and included a high proportion of the clergy.³² Not surprisingly, the emigrants were also grouped into relatively small nuclear families, occasionally accompanied by servants and grandparents or in-laws.³³ The heads of these families were aged, typically in their thirties or forties and were mainly craftsmen or farmers; few really poor people left for New England.³⁴ The absence of large numbers of single unattached males in early New England probably contributed to social stability and helped Massachusetts Bay to avoid the type of recurring internal conflict that plagued colonies like Virginia.

Although full documentation is lacking, evidence that does exist suggests that the majority of settlers in Massachusetts Bay to 1642 were Puritans. After 1642, the political climate in England was more favorable to the Puritans and their emigration diminished substantially. Such homogeneity in migration patterns helps to account for the firm structure of government and society that was so quick to emerge. And though it may be difficult to prove that all of the emigrants to Massachusetts Bay were inclined to congregationalism before their departure, it is clear they found the congregational way appealing once they arrived.

Despite admission procedures that had grown increasingly more restrictive since 1630, about half, and possibly more of the adult males in the migration became church members in Massachusetts Bay, usually within a few years of their arrival.³⁵

²⁹ Everett Emerson, *Puritanism in America 1620-1750* (Wayne Publishers, 1977) 37; Breen, above n 6, 46-67.

³⁰ Richard C Simmons, *The American Colonies, From Settlement to Independence* (W W Norton, 1981) 28.

³¹ Breen, above n 6, 56.

³² Simmons, above n 30, 28.

³³ Breen, above n 6, 49.

³⁴ Emerson, *Puritanism in America*, above n 29, 37.

³⁵ Breen, above n 6, 57.

In one study of a group of 1637 migrants, thirty-eight of eighty-one adult males joined a church.³⁶ Of the remaining forty-three, twenty persons were so obscure that nothing was known of them, several died soon after their arrival, and several more moved to towns like Ipswich, where the early church records have been lost.³⁷ Another study of Roxbury adult males for the period 1638 to 1640 showed that fifty-eight out of sixty-nine men were church members.³⁸ To understand why migrants decided to exchange their settled English vocations for life in a pioneer community of uncertain prospects, the circumstances surrounding the migration needs further elaboration.

A. The English Background

The New England Puritans were part of a group that had its origins in sixteenth century England during the reign of Elizabeth I. This group was a reform movement within English Protestantism that sought to purify the Church of England and invigorate the daily practice of religion. As put forward by the Puritan leader Thomas Cartwright in the 1570s, reformation was to include the abolition of bishops, stricter enforcement of church discipline, elimination of most ceremonies and rituals, and higher standards for the clergy.³⁹

At this time, it was not their intention to establish their own church. The reform was to be conducted within the Church of England. But with Elizabeth preventing reform, some Puritans chose a more radical alternative. Claiming that their salvation was threatened because the Church of England was not a true church, they established their own purified congregations. While these Separatists, who established the Plymouth colony in 1620, had little impact on the Church of England, it revealed that the Puritans generally suffered from frustration at being unable to practice their religious beliefs in their own country.

In 1603, Elizabeth I was succeeded by James I, whose son, Charles I, became King in 1625. The Stuart kings disliked Puritanism as intensely as had Elizabeth, and refused to satisfy Puritan requests for reform. The Independents or Congregationalists, who comprised the nonconforming clergy and laity, hoped that reform would come from within the Church of England. Leaving England for

³⁶ Ibid 219 nn 48.

³⁷ Ibid.

³⁸ Morison, above n 25, 381.

³⁹ Emerson, *Puritanism in America*, above n 29, 20-21.

Massachusetts Bay at a time when Charles I and his Archbishop seemed in control, the Puritans believed that the only remedy lay in the establishment of a model or godly community. By setting an example for the unification of spiritual and communal lives in the new world, they would 'raise a bulwark against the kingdom of Antichrist' in the old world.⁴⁰ As Edward Johnson, who emigrated to Boston in 1630 also noted, '[w]hen England began to decline in religion' and the 'multitude of irreligious lascivious and popish affected persons spread the whole land like grasshoppers [...] Christ created a New England to muster up the first of his forces'.⁴¹ The 'oppressed, imprisoned and scurrilously derided' of England, Johnson continued, were to be gathered together and 'shipped for his service, in the Western World, and more especially for the planting' of the colonies of New England.⁴²

Edward Johnson and his migrating brethren were mainly of East Anglian origin and formed a close body of relatives and friends.⁴³ They were convinced that great calamities were about to fall upon England and sought to avoid this irreligious chaos by leaving their native country and erecting a truly godly community. Writing in England in 1629, John Winthrop noted how in his mother country '[t]his land grows weary of her inhabitants' and 'the Lord begins already to frown upon us, to threaten us fearfully'.⁴⁴ The new world is to be 'a refuge for many whom he means to save out of the general calamity' for 'the church hath no place left to fly into but the wilderness'.⁴⁵ Winthrop then appealed to other countrymen 'who are known to be godly' to forsake the corruptions so evident in England and 'join themselves to this church' which would be 'an example of great use both for removing the scandal of worldly and sinister respects which is cast upon the adventurers [...] and to encourage other[s] to join the more willing in it'.⁴⁶ Similarly, writing to his wife in 1629, Winthrop echoed these same sentiments. He stated: 'I am very persuaded God will bring some heavy affliction upon this land,' but in the new world, God 'will provide a shelter and a hiding place for us and

⁴⁰ John Winthrop, 'Reasons to be Considered for the ... Intended Plantation in New England [1629]' in Alan Heimert and Andrew Delbanco (eds), *The Puritans in America*, (Harvard University Press, 1985) 70, 71.

⁴¹ Edward Johnson, 'Wonder-Working Providence of Sions Saviour,' in Miller and Johnson (eds), *The Puritans*, above n 24, 143-144.

⁴² *Ibid* 144.

⁴³ Breen, above n 6, 48-49.

⁴⁴ Winthrop, 'Reasons to be Considered for the ... Intended Plantation in New England [1629]', above n 40, 71.

⁴⁵ *Ibid* 71.

⁴⁶ *Ibid* 71 (emphasis added).

others [...] he will not forsake us'.⁴⁷

As these passages suggest, in the new world the Puritans felt they could carry out what they conceived to be God's will, as discerned from a study of the Bible as well as from the convictions of their own inner consciousness. With men so closely knit in their ideas and purposes, it seemed possible for the Puritans to implement a program for the erection of a model godly community in the new world.

B. Non-Religious Motives

However, secular-minded historians, in particular, Vernon Farrington, are wont to argue that Puritanism had little to do with the beginnings of New England. Just as there were non-religious reasons for being a Puritan, there were non-religious reasons for leaving England. Of key importance in this argument is the notion of economic crisis and political conflict.

Consider that at the beginning of the seventeenth century in England, the old agrarian society began the transformation to an industrial society that initially suffered from severe dislocations. For example, the primary industry in the strongly Puritan areas of East Anglia and Kent was badly hit by the disruption of continental markets and poor government policy, resulting in economic depressions for the years 1619-1624, 1629-1631, and 1637-1640.⁴⁸ In addition, there were also years of plague and bad harvests in East Anglia, where economic conditions reached a crisis level in 1629.⁴⁹ Possibly associated with such conditions were millenarian expectations. The economic blight led many English Puritans to believe that human history had now entered a final phase, and that great and portentous events connected with the second coming of Christ were underway. Thus, thousands of Englishmen left the mother country and sailed to the scattered English colonies in search of salvation.

Associated with this crisis was the political situation in England in the 1620s and 1630s, and this provides another reason that may have prompted the English migration. Just after being crowned, Charles I issued, in 1626, a decree to religious

⁴⁷ Justin Winsor (ed), *The Memorial History of Boston* (James R Osgood & Co, 1885) vol 1, 105.

⁴⁸ Emerson, *Puritanism in America*, above n 29, 32; Breen, above n 6, 52.

⁴⁹ Emerson, *Puritanism in America*, above n 29, 32.

and secular leaders ‘to require and collect a loan for the King’s use from Persons able to lend’.⁵⁰ Issued for what Charles called reasons of state, this act infringed upon the prerogatives of Parliament, and many men refused to furnish the money demanded. Among those who resisted the so-called benevolence, and were consequently imprisoned, were the Earl of Lincoln, a key figure in the creation of the Massachusetts Bay Company; Samuel Vassal and William Spurstow, who were original members of the Company, and William Coddington, who came to Massachusetts in 1630.⁵¹ This incident was only one of many which persuaded Englishmen, especially those sympathetic to Parliament and the Puritans, that the King was exceeding the proper limits of royal power and was precipitating a political crisis.

C. Religious Motives

Non-religious and religious reasons for the migration were not mutually exclusive, and many of the settlers probably had mixed motives for emigrating to the new world. But for most, the religious consideration was not incidental. There is no doubt that these conditions helped in the creation of the Massachusetts Bay Company. The leaders, John Winthrop, Thomas Dudley, Isaac Johnson, Sir Richard Saltonstall and Enunaniel Dewing, ardent Puritans all, as well as others, believed that a model church and community, in which both polity and worship would be determined in the Puritan fashion, would be an example to their brethren and the mother church as to how the proper religious community ought to live.⁵² Specifically, a Puritan church and state within which God’s will would be made effective, would furnish an opportunity to apply Puritan ideas as to how life was to be lived, worship conducted, government administered, God venerated, and His law obeyed.⁵³ Such a community was to have only one supreme ruler, God. ‘Power of civil rule, by men orderly chosen, is God’s ordinance,’ stated John Davenport, even if ‘it is from the light and law of nature’ because ‘the law of nature is God’s law’.⁵⁴

For this reason, those who wrote back to England from Massachusetts Bay argued

⁵⁰ Ibid 32.

⁵¹ Ibid.

⁵² Charles M Andrews, *Our Earliest Colonial Settlements* (Cornell University Press, 1984) 73.

⁵³ See, eg, Roger Williams, ‘The Bloody Tenent of Persecution’, in Miller and Johnson (eds), *The Puritans*, above n 24, 216.

⁵⁴ John Davenport, *A Sermon Preach’d at the Election...May 19th 1669* (np, 1670) in Publications of the Colonial Society of Massachusetts, X, 4, quoted in Miller and Johnson (eds), *The Puritans*, above n 24, 191.

that the primary reason for migrating to New England was religion, and the establishment of Puritan churches was emphasized as a major motivating factor.⁵⁵ Religious circumstances, as opposed to economic and political contentions, had provided the New England Puritans with what their ministers later called ‘an open door of liberty’ to establish their own religious community.⁵⁶ The Puritan ministers in England urged their congregations to migrate to a place where they could practice their religion in a pure church.⁵⁷

One typical migrant was Michael Metcalfe. Unlike most of his fellow settlers, Metcalfe left a detailed account of his reasons for leaving England. A master weaver from the East Anglian town of Norwich, Metcalfe was a parishioner of the suspended Thomas Allen and found himself in trouble with the ecclesiastical courts in 1633, and again in 1636, for failing to bow at the name of Jesus.⁵⁸ Metcalfe defended himself with such asperity that a church official threatened him: ‘Blockhead, old heretic, the Devil made you, I will send you to the Devil’.⁵⁹ Following this exchange, Metcalfe prudently departed England, after which he listed his reasons, all religious, in a pamphlet addressed ‘to all the true professors of Christ’s gospel within the city of Norwich’.⁶⁰ ‘Therefore, seeing what the Lord hath done unto thee’ he stated, ‘Norwich: prepare to meet thy God’.⁶¹

Religious refugees like Metcalfe suggested to T.H. Breen that the Puritans departed England because the King and his Archbishop sought to interfere with the church and religious practices within the local communities.⁶² The Puritans, therefore, erected in New England the form of church polity that had been denied in the mother country. In other words, the Puritans, in reacting to the religious oppression in England, created a new form of religious worship, the congregational way. Therefore, they could not have, as Breen suggests, transplanted the threatened English institutions onto American soil. Instead, they

⁵⁵ See John Winthrop’s (letter dated May 15, 1629), Justin Winsor (ed), *The Memorial History of Boston* (James R. Osgood & Co, 1885) vol 1, 99, 105; See also Winthrop, ‘Reasons to Be Considered for...the Intended Plantation in New England,’ above n 40, 71-74; John Cotton, ‘Forward to John Norton, The Answer to...Mr. William Apollonius (1648)’ in Alan Heimert and Andrew Delbanco (eds), above n 40, 109-111.

⁵⁶ Emerson, *Puritanism in America*, above n 29, 32.

⁵⁷ Ibid 32-33. See also Everett Emerson (ed), *Letters from New England, 1629-1638: The Massachusetts Bay Colony* (University of Massachusetts Press, 1976) vol 2.

⁵⁸ Breen, above n 6, 54.

⁵⁹ Ibid 54.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

responded to Stuart centralism by creating in their new environment the type of institutions that would restore the Protestant faith and preserve true religion from worldly corruptions.

Anticipating the formation of the congregational way, John Winthrop noted, '[w]hat can be a better work and more honorable and worthy a Christian than to help raise and support a particular church while it is in its infancy and to join our forces with such a company of faithful People?'⁶³ Thus, the New England venture offered the possibility for like-minded Puritans to establish, not transplant, institutions beyond the corruptions that were so threatening to Winthrop and others in England.

Indeed, the congregational system was virtually unknown to the Puritans of England. The first appearance of congregationalism came in 1580 when Robert Browne formed a Separatist congregation in Norwich.⁶⁴ This group was then persecuted and exulted, yet their ideas anticipated those found later within the Puritan communities of New England. The Puritans were not as concerned with the congregational aspects of their religion prior to the exodus to America.⁶⁵ In New England, the congregational system was not fully established until 1640, and it is most likely that it did not exist in 1629.⁶⁶ However, virtually all Puritans agreed on certain principles of church organization and on the basic nature of church doctrine. They most likely would have accepted the theoretical expression of the true church as first stated by John Field in 1572. Perhaps the foremost early Puritan leader, Field defined a church as,

[A] company or congregation of the faithful called and gathered out of the world by the preaching of the Gospel, who following and embracing true religion, do in one unite of Spirit strengthen and comfort one another, daily growing and increasing in true faith, framing their lives, government, orders and ceremonies according to the word of God.⁶⁷

Having been denied the establishment of this type of church, community, and concomitant governmental structure, the settlers sought to create in New England these institutions. They had chafed under Episcopal and royal control and had been coerced into working within the parish system, with its mix of the elect and

⁶³ Alexander Young (ed), *Chronicles of the First Planters of the Colony of Massachusetts Bay* (Charles C Little and James Brown, 1846), 272; Winthrop, *The Winthrop Papers*, Allyn B Forbes et al (eds) (Merrymount Press, 1931) vol 2, 114-115.

⁶⁴ Morgan, *Visible Saints*, above n 27, 37.

⁶⁵ *Ibid* 13.

⁶⁶ *Ibid* 93.

⁶⁷ *Ibid* 14.

the profane. In reaction, the Puritans carried to Massachusetts Bay, not their traditional institutional forms, but a vision of a reformed church placed within the realm of a godly community. But before examining the actual political practices within their newly-founded godly community, it would be useful to gain some familiarity with the Puritan thought embodied in these formative institutions of Massachusetts Bay.

III. THE POLITICAL THOUGHT OF THE PURITANS

Winthrop's *A Model of Christian Charity*, delivered aboard the *Arbella*, the flagship of the 1630 migration, just prior to its landfall in Massachusetts Bay, is perhaps, the most eloquent exposition of the motives and ideals of the Puritans of New England.⁶⁸ As for Winthrop, so important a figure was he in the migration that the 'Chief undertakers' of the new settlement would not depart without him, as 'the welfare of the plantation' depended 'upon his going'.⁶⁹

Anticipating the thoughts of Winthrop, John Cotton, who was to migrate to Boston in 1633, preached to the departing party in 1630 on a text from II Samuel 7:10: 'Moreover I will appoint a place for my people Israel, and will plant them, that they may dwell in a place of their own, and move no more; neither shall the children of wickedness afflict them anymore, as beforetime'.⁷⁰ To Cotton, it was clear that a special providence was guiding the migrants to create a new community. Later, Thomas Shepard, another clerical leader in the commonwealth, saw their efforts in the perspective of world history, and believed the founders had realized their dream. To Shepard, the plantation in the new world was the new Israel that enjoyed '[t]he help of all the former ages and other nations as well as our own, godly and learned divines in them, to take pattern and example from, in the laying of our first foundation both of religion and righteousness doctrine and discipline, church and commonwealth'.⁷¹

The organic society envisioned by Winthrop and the early migrants to Massachusetts Bay indicated a desire to recapture a traditional way of life. Most

⁶⁸ John Winthrop 'A Model of Christian Charity' in Heimert and Delbanco (eds), above n 40, 82. See also Alan Heimert and Andrew Delbanco (eds), above n 40, 81.

⁶⁹ Allyn B Forbes et al (eds) 'Particular Considerations on the Case of J:W' in Winthrop, *The Winthrop Papers*, vol 2, above n 63, 295.

⁷⁰ John Cotton, 'God's Promise to His Plantations (1630)' in Heimert and Delbanco (eds), above n 40, 76.

⁷¹ Miller, *The New England Mind*, above n 24, 471.

likely, however, the Puritans were interested in leaving behind the interfering Stuart officials and troublesome Anglican bishops. Winthrop listed some causes of his own dissatisfaction: ‘the daily increase of the multitudes of papists,’ ‘scandalous and dumb ministers,’ and ‘suspension and silencing of many painful learned ministers for not conform[ing] in some points of ceremonies’.⁷²

In New England, each group of immigrants would have the opportunity to create an independent community, a village or town in which local institutions would be safe from outside interference. Elections, for example, would be open to men who would have normally been excluded from the vote in almost every English borough and town. The settlers also realized that within an organic community, broad participation in civil and ecclesiastical affairs would help secure local independence from central authority.

This reactionary origin of the Puritan community was to provide each group with a sense of local identity, a rationale for excluding outsiders, and a means for achieving continuity between generations. But more importantly, by promoting internal harmony and preserving homogeneity, the strong sense of community would help to ward off the kind of external interference that had caused so much trouble in England. Screening potential inhabitants would help many towns avoid the types of problems that conflicting backgrounds and traditions might have bred. And some towns were to go so far as to accept only those people who had emigrated from a particular English district.⁷³

A. The Nature of the Godly Community

In delivering his lay sermon to his fellow passengers aboard the *Arbella*, Winthrop, in a single phrase, summarized his thoughts concerning the type of community he, as a Puritan, wished to establish: ‘we shall be as a city upon a hill’.⁷⁴ The Puritan community was to be much more than that depicted in the Gospel of Matthew, from which the phrase was borrowed.⁷⁵ In Matthew 5:14 the regenerate ‘are the light of the world. A city that is set on a hill cannot be hid’. But to Winthrop, the phrase in his peroration reflected the core of his thinking concerning the type of

⁷² Darrett B Rutman, *Winthrop's Boston: A Portrait of a Puritan Town, 1630-1649* (W W Norton and Company, 1972) 5.

⁷³ Breen, above n 6, 18.

⁷⁴ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 295.

⁷⁵ From the King James edition. Rutman, *Winthrop's Boston*, above n 72, 4.

society that he and his fellow passengers sought to establish. It would be a city in the literal sense, for the leaders of the Winthrop fleet—eleven ships carrying about seven hundred passengers—planned to settle in one, centralized community.⁷⁶ The community itself would be an urban center, the place of church and government.

It would also be a city in the biblical sense, as God's city. Like Saint Augustine's medieval notion of the organic town, as depicted in his *The City of God*, Winthrop's image of the city was highly metaphorical, the term denoting more a community of saints than a physical city. The basis of the city was moral values or metaphysical ideas. While the foundation of a physical city was selfishness, the city Winthrop envisioned was based on the love of God. Here men would save God in the ways that He demanded. In the church, men would worship God and His word in its purest form, which would be heard by all. But most importantly, men would fit into a society in such a way that would contribute to the glory of God and His son, Jesus Christ. Thus, using spiritual bodily imagery to represent the societal body, Winthrop stated:

Christ and His church make one body. The several parts of this body, considered apart before they were united, were as disproportionate and as much disordering as so many contrary qualities or elements. But when Christ comes and by his spirit and love knits all these parts to himself and each other, it is become the most perfect and best proportioned body in the world.⁷⁷

This notion of a godly society dominated Winthrop's thoughts to such an extent that in his discourse it received the greatest attention. The new Puritan community was to be so godly that God would 'delight to dwell among us as his own people, and will command a blessing upon us in all our ways, so that we shall see much more of his wisdom, power, goodness, and truth, than formerly we have been acquainted with'.⁷⁸ With such an omnipotent force residing in this community, 'ten of us shall be able to resist a thousand of our enemies'.⁷⁹

In this tract, Winthrop also envisioned a social order in New England in which there would be a well-defined place for all, with clearly understood and easily fulfilled obligations within the social hierarchy. While his societal conception was clearly one of a godly, organic community, Winthrop was cognizant of the God-ordained nature of social stratification: 'God Almighty in His most holy and wise providence hath so disposed of the condition of mankind, as in all times some must be rich, some poor, some high and eminent in power and dignity, others

⁷⁶ Ibid.

⁷⁷ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 286.

⁷⁸ Ibid 294.

⁷⁹ Ibid.

mean and in subjection'.⁸⁰ This God had done in order to make his glory manifest in the creation of variety. But there was a political utility to such an arrangement: 'first upon the wicked in moderating and restraining them, so that the rich and mightily should not eat up the poor, nor the poor and despised rise up against their superiors'.⁸¹ These godly gifts, given for God's purposes, were also a means for social order within the Christian community, allowing for the enhancement of individual mutual dependence. But Winthrop also believed that natural disparities should not be allowed to advance untempered. Authority was not the right of the powerful; it was a godly duty to deal with subordinates in 'love, mercy, gentleness, temperance'.⁸²

The idea of laissez-faire would have, therefore, struck Winthrop and his fellow Puritans with horror. This Puritan attitude was most likely medieval in origin, its fullest expression given by St. Augustine. In viewing the worldly community as a consequence of the fall, it was government as a counsel of desperation.

The Puritans also viewed their state as an incarnation of their collective will. Government was not necessarily a natural social virtue, but was a necessity created to curb men's depravity. Without Government 'there would be no living together for Mankind, but Human Societie must disband; Murder, Adulteries, Rapine, and all manner of Oppressions would rage; and there would be less of Order in the Habitable World, then in Hell it self'.⁸³

The other intellectual heritage so clearly evident in Winthrop's speech is the one which regarded the community as an organism. In this case, man was a natural political animal and government was perceived not only as an indispensable and perpetual necessity, but also as part of the law of nature. This view most likely emerged in Puritan thought less because they had studied it in Aristotle's *Politics*, than because they were just emerging from feudalism and were still possessed by a deep, ingrained sense of community.⁸⁴ However, there is little doubt that the godly quest to and in New England helped to accentuate this tribal proclivity, and buttressed the analogy with the people of Israel, encouraging each member to think of the whole community, rather than of its individual parts.

⁸⁰ Ibid 282.

⁸¹ Ibid.

⁸² Ibid 285.

⁸³ Miller, *The New England Mind*, above n 24, 417. Where possible, quotations are with the original spelling.

⁸⁴ Ibid 416.

The Puritan organic community also led each member to believe that in this body ‘each parte soe contiguous to [the] other[s] as thereby they do mutually participate with eache other, both in strengthe and infirmity[,] in pleasure and in paine’.⁸⁵ Arising out of this organicism was contractual theory. Contractualism would eventually develop towards liberalism and individualism, permitting differences in power and wealth to different abilities and opportunities, with little regard to the welfare of the whole community.

This contribution to liberalism was inadvertent. English Puritans first turned to the theory of contract to protect their rights against royal absolutism. It was later used by the New England Puritans to justify their actions in subordinating individuals to the community once the ideals of the community had been rightly conceived, and power placed in approved hands.

Thus, it was neither an authoritarian nor ardent theocratic propensity that inspired Winthrop and other Puritans. Nor was his conception of the godly community centered upon democratic precepts. Rather, Winthrop envisioned an organic community where a godly growth in grace might be possible amid worldly corruptions, and if a spiritual success, their community would be emulated by ‘succeeding plantations’.⁸⁶ In order for godly grace to flourish among the settlers, however, Winthrop realized the necessity for social unity and stability. This ideal could be realized, Winthrop believed, because the settlers were infused with the Christian regenerating principle. ‘We are a company professing ourselves fellow members of Christ,’ and having embarked on this voyage ‘we ought to account ourselves knit together by this bond of love, and live in the exercise of it’.⁸⁷

Without Christian love, the godly community would never be perfect. In its absence, selfish individualism would replace the communal spirit. Such an individualistic community would be no more than an aggregation of independent objects as disproportionate and as much disordering as so many contrary qualities or elements.⁸⁸ Contrarily, Christian love in a godly community would serve as ‘a bond or ligament,’ binding the individual members into a single body.⁸⁹ Individualism would be preserved, but ‘all of the parts of this body being thus

⁸⁵ Ibid.

⁸⁶ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 294.

⁸⁷ Ibid 291.

⁸⁸ Ibid 287.

⁸⁹ Ibid.

united are made so contiguous in a special relation as they must needs partake of each other's strength and infirmity; joy and sorrow, weal and woe'.⁹⁰

But, the anti-individualistic component within Puritanism would never surrender completely to the belief that certain men deserve to be more honorable or wealthy than others 'out of any particular and singular respect to himself but for the glory of his Creator and the Common good of the Creature, Man'.⁹¹ One consequence of this ideal within an organic community was that the Puritans could advance ideas of contractual limitation and the protection of individual rights, but would never phrase these rights so loosely as to lose sight of God's glory and the common good of the community.

Clearly, the Puritan creed was aware of individual differences, and certainly, salvation was each man's own responsibility. However, the anti-individualistic nature of the godly community usually demanded that the regenerate act and be treated alike. The lone, heroic frontiersman was not a figure of Puritan communities. 'Society in all sort of human affaires is better than Solitariness'.⁹² Instead, the nature of the community required it to move and settle in groups and towns, and there was to be maintained a firm government over all its units. The Puritan community, therefore, was corporate in the sense that it was autonomous, having control over its members and often acting on their behalf.

By implication, each member of the body would have a specific function within the total structure; but each individual would contribute in his own way for the benefit of all. As John Cotton exhorted to the settlers in his farewell sermon, 'go forth every man that goeth, with a public spirit, looking not on your own things only, but also on the things of others'.⁹³ Winthrop, describing the individuals' duty in the model godly community, echoed Cotton: 'the care of the public must oversway all private respects'.⁹⁴ Private good is to give way to the general welfare because this is the imperative of the thriving spiritual community. Men return God's favour by committing themselves to the best interests of the community. This is not only God's will, but is also a matter of practical necessity. In

⁹⁰ Ibid 287-288.

⁹¹ Miller, *The New England Mind*, above n 24, 416.

⁹² Ibid.

⁹³ John Cotton, 'God's Promise to His Plantations (1630)' in Heimert and Delbanco (eds), above n 40, 80.

⁹⁴ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 287.

journeying to a strange, foreign land, dangers and difficulties will constantly beset the settlers. Winthrop therefore stated:

For this end, we must be knit together in this work as one man. We must entertain each other in brotherly affection, we must be willing to abridge ourselves of our superfluities, for the supply of others' necessities. We must uphold a familiar commerce together in all meekness, gentleness, patience, and liberality. We must delight in each other, make others' condition our own, rejoice together, mourn together, labour and suffer together, always having before our eyes our commission and community in the work, our community as members of the same body.⁹⁵

The settlers were not to be coerced into labouring for communal ends, with the authority of the magistrate or minister threatening the individual to act. Instead, individuals were to be motivated by the virtue of the godly nature of the community they wished to create and which had joined them together in this united purpose. The will to act, therefore, was a gift from God. As one minister, Peter Bulkeley, was to later phrase it:

Where the Lord sets himself over a people, he frames them unto a willing and voluntary subjection unto him, that they desire nothing more then to be under his government...When the Lord is in Covenant with a people, they follow him not forcedly, but as farre as they are sanctified by grace, they submit willingly to his regiment.⁹⁶

B. The Covenant

One of the unique features of New England Puritanism was its highly developed notion of the covenant, a cornerstone of the model community. This Puritan concept, which was to eventually swell into the popular idea of the social contract in the eighteenth century, was an obsession with the Puritans. They found the covenant throughout the Old Testament. Abraham had entered into a covenant with God in order to be the 'father of many nations'.⁹⁷ In turn, Abraham's family

⁹⁵ Ibid 294-295.

⁹⁶ Perry Miller, *Errand Into The Wilderness* (Harvard University Press, 1984) 149, quoting Peter Bulkeley, *The Gospel-Covenant* (London, 1651) 219-220. See also Peter Bulkeley, 'The Gospel-Covenant' in Heimert and Delbanco (eds), above n 40, 117; Miller, *The New England Mind*, above n 24, 420.

⁹⁷ Gen. 17:4 (KJ).

had entered into a ‘church estate’ by a covenant with Abraham; and Moses led a ‘church in the wilderness’ which was founded by a covenant.⁹⁸

With these biblical precedents in mind, Winthrop was to later write, ‘[i]t is of the nature and essence of every society to be knit together by some covenant, either expressed or implied’.⁹⁹ Similarly, Cotton stated, ‘[i]t is evident by the light of nature that all civil relations are founded in covenant’.¹⁰⁰ Apparently, the Puritans of New England read their bibles in light of man’s covenant with God and derived therefrom a pervasive political philosophy:

When Jehovah made a covenant between the King and the people, that covenant was but a branch of the Lord’s covenant with them all, both King and people: for the King promised but to rule the people righteously, according to the will of God: and the people to be subject to the King so ruling. Now these duties of the King to them, and of them to the King, were such as God required in his covenant, both of him and them.¹⁰¹

This unification of theology and political theory also had its origins in England when the Puritans were becoming more deeply entangled in the constitutional struggle with the King. This belief in a higher law, which could be appealed to against the arbitrariness of rulers, led irresistibly, into a developing political creed. With increasing earnestness, the Puritans advanced the thesis that government originated in a compact of the People and was to be limited by the terms of the agreement. As Cotton noted: ‘Look what a King requires of his people, or the people of a king, the very same doth God require of his people, and the People of God [...] this is, a governor, a provider for, and a protector of his people’.¹⁰² To Cotton and other Puritans, limiting the rulers’ power by a higher law was a divine ordinance to restrain the innate sinfulness of man. However, it also served a second function: it was a device to avoid oppression and despotism.

On their way to the new world, Winthrop could thus preach to the settlers that they were obliged to act in godly ways because they had established a covenant with God. Having accepted the obligation to live in a Christian way, their new community was to be relatively free from the corruptions of the world. Winthrop thus spoke of the settlers as having ‘entered into a covenant with Him for this work’.¹⁰³ By virtue of their having committed themselves to God’s protection on

⁹⁸ Emerson, *Puritanism in America*, above n 29, 49.

⁹⁹ *Ibid* 52.

¹⁰⁰ *Ibid* 49.

¹⁰¹ Miller, *The New England Mind*, above n 24, 415.

¹⁰² *Ibid* 413.

¹⁰³ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 292.

the voyage and in the new world, He had ‘ratified this covenant and sealed our commission [and] will expect a strict performance of the articles contained in it’.¹⁰⁴

Having agreed to be God’s people and to live in a godly fashion, Winthrop said little about government, except that providence had provided them with an opportunity ‘to seek out a place of cohabitation and consortship under a due form of government both civil and ecclesiastical’.¹⁰⁵ Although Winthrop did not define these terms, their meaning was already implicit. In the godly city, the natural leaders were to rule in the best interests of the community, seeking ‘their welfare in all things’.¹⁰⁶ In turn, the people were to accept the government because of their God-ordained duty to ‘faith, patience, obedience’.¹⁰⁷

It was not until 1637 that Winthrop elaborated on the political aspects of the covenantal relationship between the rulers and the ruled.¹⁰⁸ Before the General Court, Winthrop set forth the unified theory of the Puritan community. As Winthrop explained it, the political theory, upon which the community was based, was part of Puritan theological doctrine, and the binding idea was the notion of the covenant: ‘The essential form of the commonweal[th] or body politic such as this is [...] I take to be this—the consent of a certain company of people to cohabit together under one government for their mutual safety and welfare’.¹⁰⁹ The Puritan belief that the covenant was the central instrument that allowed men to live together harmoniously, even though the relationship occasionally caused problems, led Winthrop to reach the following conclusions:

1. No commonweal[th] can be founded but by free consent.
2. The persons so incorporating have a public and relative interest each in other, and in the place of their cohabitation and goods and laws, etc., and in all means of their welfare so as none can claim privilege with them but by free consent.

¹⁰⁴ Ibid 292.

¹⁰⁵ Ibid 290.

¹⁰⁶ Rutman, *Winthrop’s Boston*, above n 72, 12.

¹⁰⁷ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 282.

¹⁰⁸ The idea of the covenant in Puritan thought pervades their writings. Other examples which echo those below can be found in John Cotton’s farewell sermon to the departing fleet in 1630 and Thomas Hooker’s address before his flight from England in 1633. Winthrop not only expounded the notion of the covenant aboard the *Arbella* in 1630 but also in 1637, while replying to the Antinomians, and in 1645 to the General Court. See Miller, *The New England Mind*, above n 24, 415.

¹⁰⁹ John Winthrop, *The Winthrop Papers*, Allyn B Forbes (ed) (Merrymount Press, 1943) vol 3, 422-423.

3. The nature of such an incorporation ties every member thereof to seek out and entertain all means that may conduce to the welfare of the body and to keep off whatsoever doth appear to tend to their damage.
4. The welfare of the whole is not to be put to hazard for the advantage of any particular members.¹¹⁰

To Winthrop, individuals, in a natural, graceless state, were at liberty to do as they please. However, when these same individuals became infused with the godly spirit, they were then at liberty to do only what God commanded. The regenerate, therefore, came together and formed churches and a state upon explicit agreements, in which they all promised to live with one another according to the laws and for the purposes of God. The government was created by an act of the people.

But this was not any type of government; it was to be a government that God had circumscribed, as discerned from the Bible. The rulers were not self-appointed, therefore, but were God-appointed through the people and elected to an office that had been established by God. As Winthrop stated: 'It is yourselves who have called us to this office, and being called by you, we have our authority from God, in a way of ordinance'.¹¹¹ Other Puritans also echoed such beliefs. John Cotton stated to Roger Williams that no magistrate had power over the bodies or property of the people, except by their free consent.¹¹² However, because regenerate men were only 'stewards' of their bodies and property, in order to improve them for God's glory, 'they may not give their free consents to any Magistrate to dispose of their bodies, goods, lands, liberties at large as themselves please, but as God (the sovereign Lord of all) alone [pleases]'.¹¹³

Similarly, John Eliot noted that in both church and state, the godly willingly submitted to His regiment. The regenerate were eager to 'enter into covenant with the Lord to become His people, even in their Civil Society, as well as their Church Society'.¹¹⁴

¹¹⁰ Ibid 423.

¹¹¹ John Winthrop, *The History of New England from 1630 to 1649*, James Savage (ed) (Little Brown and Co, 1853) vol 2, 280.

¹¹² Miller, *The New England Mind*, above n 24, 420.

¹¹³ Ibid 420.

¹¹⁴ Ibid.

In the godly Puritan community, therefore, men thrice committed themselves to the rule of law and the control of authority: first with God, then with each other in the church, and again in the state. With such regulated relationships, Winthrop could insist that though the government of Massachusetts Bay was bound by law and received its authority through God and the people's elected officials, the people were nevertheless at 'liberty to that only which is good, just and honest'.¹¹⁵ By entering into a covenant with God, and then with each other, the citizens were to renounce their natural lusts, and retain only the freedom that 'is maintained and exercised in a way of subjection to authority'.¹¹⁶

Thus far, it is evident from this analysis of the theoretical basis of the Puritan state that the notion of the covenant was one outcome of the Puritan attempt to create a godly community. In Puritan thought, this state was an authoritarian theocracy only insofar as God was the absolute sovereign, whereby His fiats were law, and the magistrates and ministers were His officials, but were chosen by the people. Although both church and state were conceived to have derived their authority from God, and both sought to do God's will, their functions were separated. However, this division was not always absolute. The functions of church and state differed and their powers were distinct, but both were a part of an organic community whose goal was to serve God. The state's primary concern was to be the rule of law; men's souls were the responsibility of the church. While church and state were committed to the welfare of the entire community, the church was to guide it in the way of God's truth; the state, in turn, was to preserve order in the community. The 'ultimate and supreme' goal of both was that 'the common Good of the Society, State or Kingdom' be preserved and '*God in all things [...] glorified*'.¹¹⁷

As described by the Puritan theorists, the state was not a theocracy or even an oligarchy, as officials were ultimately responsible to the people and were compelled to rule in the best interests of the community. John Cotton, for example, who displayed certain aristocratic proclivities, could still proclaim that the people 'in whom fundamentally all power lyes' should only give as much power to their officials as God allowed, and the magistrates 'should desire to know the utmost bounds of their own power'.¹¹⁸

¹¹⁵ Miller, *Errand Into The Wilderness*, above n 96, 149.

¹¹⁶ *Ibid.*

¹¹⁷ Darrett B Rutman, 'The Mirror of Puritan Authority,' in George M Waller (ed), *Puritanism in Early America* (D C Heath and Co, 1973) 79, 81.

¹¹⁸ Miller, *The New England Mind*, above n 24, 409.

Indeed, by the terms of the covenant, there was to be a limitation on the power of all officials, as based on the rule of law. As Cotton stated, neither magistrates nor ministers should ‘affect more liberty and authority then will do them good, and the people good,’ so it became necessary ‘that all power that is on earth be limited’.¹¹⁹ Although the people were not to rebel at every minor injustice, when they discovered that their rulers ‘have broken the fundamental Articles of thier Covenant,’ they were released from their oaths of obedience.¹²⁰ Anticipating Locke and the ideas that were to become so popular in the eighteenth century, one Puritan leader went so far as to assert the then novel and revolutionary idea that when rulers violate ‘the way of justice and happinesse, which they are sworn to maintain [...] it is lawful to take up armes of defence’.¹²¹

When the Massachusetts Bay Puritans planned to create their state, the influence of their English experience came to the fore. In reaction to this experience, they developed a number of novel and innovative institutional features. The new state was English, but only in a negative respect: it was created in order to limit the King’s prerogative by migrating beyond his reach and by establishing covenantal rights as a protection against absolutism and arbitrariness. On a more local level, the congregational format of church polity in New England was based somewhat on the English model of the Parish. Indeed, many of thee first settlers were drawn from country villages and had participated in local government by serving on the vestries which controlled parish activity.¹²² However, the numbers of those participating had been extremely limited as local government in England had been relatively oligarchic.¹²³

In contrast to English traditions, the Puritan state was constructed upon a foundation of reason and democratic godliness in which men came together to form churches and a state with an explicit agreement. Together they promised to live with one another according to the laws and for the purposes of God. Thus, the government of the godly community was democratic in that it was brought into being by an act of the people. In turn, God guided the society by acting through the people. The collective will of the godly, bound together by the covenant, projected and continued the will of God into the state. As John Davenport expressed it: ‘In regular actings of the creature, God is the first Agent; there are not two several and distinct actings, one of God, another of the People:

¹¹⁹ Ibid.

¹²⁰ Ibid 410.

¹²¹ Ibid.

¹²² Rutman, *Winthrop’s Boston*, above n 72, 59.

¹²³ Ibid 59.

but in one and the same action, God, by the People suffrages, makes such an one Governour, or Magistrate, and not another'.¹²⁴

As Davenport suggested, actions were not disjointed in a godly community. All outcomes were part of a coherent divine plan. This resulted from the terms of the agreement between the people and God, where they had compacted to form a godly state in which His ordinances were to be practiced.

Thus, in Puritan thought, the holy society to be erected was extremely voluntaristic and here lay the potential for fostering democratic and republican values. The godly community was to be created by men through their own free choice. Church and state institutions were to be made up of 'visible saints,' drawn from all ranks of society who migrated because of a desire to participate in the creation and direction of a godly community, and not because they were of noble birth or were forced to participate in community affairs. The leaders, therefore, were not to be of a specific economic class, but were drawn from the holy and regenerate, which, in theory, transcended class lines. One example, noted by Winthrop, revealed that a black servant woman was admitted to the Dorchester church because of her 'sound knowledge and true godliness'.¹²⁵

Though every resident in the community was obliged to attend and pay taxes for the support of the church, no one became a member unless she or he signified this strong desire. The visible saints were expected to act positively because they had in them a spirit of God that made them capable of every exertion. When persecuted in one state, for example, they imitated the apostle and fled, not to escape government, but to establish a better government. They maintained, however, that any government into which men did not voluntarily enter was not worthy of the name.

Paradoxically, in a world with limits on social action, Puritan theory relied heavily upon voluntarism. This was possible because when a man received the spirit of God, he availed himself of his liberty to enter a compact with God, promising to abide by His laws. In return, God guaranteed redemption. A regenerate man was thus committed to God's cause not only in his personal life, but also in church and community affairs. In other words, when a man became regenerate, he was to volunteer his liberty, and do only what God commanded. And God commanded

¹²⁴ Miller and Johnson (eds), *The Puritans*, above n 24, 190.

¹²⁵ Baltzell, above n 4, 124-125.

certain acts from the entire community of saints as well as from each individual saint.

Consequently, voluntarism within the social theory of Puritanism was based upon the law of God and it required the willing submission of citizens. As men exist in nature, stated Thomas Hooker, no one person had any power over another: 'there must of necessity be a mutuall ingagement, each of the other, by their free consent, before by any rule of God they have any right or power, or can exercise either, each towards the other'.¹²⁶ He continued: 'All relations which are neither naturall nor violent, but voluntary, are by virtue of some covenant'.¹²⁷ But the fact that social relations originated with 'free' consent did not compromise the order God had ordained; it indicated only that this order was not to be one of caste.

However, as already noted, the quest for a godly community did not translate into a theocratic polity for the towns of Massachusetts Bay. There was to be a division of labour between magistrates and ministers, so Massachusetts was not a theocracy in the sense of rule by the clergy. Yet, in the organic Puritan community, both church and state believed in their duties to govern for godly ends. It now remains to be seen to what extent these Puritan ideals were realized by the earliest settlers in the institutions and practices of colony and town.

IV. PARTICIPATION IN COLONIAL GOVERNMENT

As noted above, Puritan religious and political beliefs were intimately connected. In particular, their ideas concerning the covenant, as well as their notion of an organic godly community, led them inextricably on a course of religious and political action, which, theoretically, should have fostered political participation. Having explicated their values, it is now necessary to analyze the extent to which the Puritans embodied these religious and political ideals in their institutions and practices during the formative years of Massachusetts Bay.

¹²⁶ Miller and Johnson (eds), *The Puritans*, above n 24, 188.

¹²⁷ Edmund S Morgan, *The Puritan Family* (Harper and Row, 1966) 26.
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A. Background to Representative Government

When the first group of approximately 200¹²⁸ Puritans first arrived on Shawmut¹²⁹ in the summer and fall of 1630, they had no formal plan of political organization. While the congregational church polity would eventually be of great influence in moulding town government, their only immediate guide was the provisions contained in the Charter of the Massachusetts Bay Company¹³⁰. At this early period, limits between the powers of the colonial government, and those of the town, as well as the church, were not well-defined or carefully observed.

Originally established under the guise of a commercial enterprise in March of 1629, the Charter of the Massachusetts Bay Company was empowered to regulate itself and its possessions through a relatively simple government. By this instrument, the stockholders, or freemen, in this open, joint-stock corporation, were to meet together four times a year as ‘one great, general, and solemn assembly,’ to admit additional freemen and to ‘make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions’ for the colony, provided only that such were ‘not contrary to the laws’ of England.¹³¹

The management of the corporation was to be in the hands of a governor, a deputy governor, and eighteen assistants (or ‘magistrates’), all of whom were to be chosen each spring by and from the freemen of the Company. In utilizing this participatory procedure, the freemen expected these elected officials to conform to the terms of the Charter and ‘take care for the best disposing and ordering of the general business and affairs of [...] the said lands and premises [...] and the government of the people there’.¹³²

Initially, it was assumed by royal officials that the governing body of the Massachusetts Bay Company would reside in England. But the failure of the

¹²⁸ Rutman, *Winthrop's Boston*, above n 72, 57.

¹²⁹ The name ‘Shawmut’ came from the native Indians. The inhabitants of Charlestown called the peninsula ‘Trimountain’. By an order of the General Court, dated September 7, 1630, the name of the settlement was to be ‘Boston’. Nathaniel B Shurtleff (ed), *Records of the Governor and Company of the Massachusetts Bay in New England* (Williams White, 1853-54) vol 5 (I), 75.

¹³⁰ ‘The Charter of the Colony of Massachusetts Bay in New England’, in Shurtleff (ed), *Colony Records*, vol 5, above n 129, 3-20.

¹³¹ Shurtleff (ed), *Colony Records*, vol 5, above n 129, 16.

¹³² *Ibid* 12.

Charter to specify the meeting place of the Company allowed the Puritans to take the Charter with them and establish a quasi-independent state. That this was a premeditated manoeuvre in order to provide a stable basis for the planned Puritan godly community is evident in an agreement dated August 26, 1629. Known as 'The Agreement of Cambridge' and signed by twelve prominent Puritans,¹³³ it stated:

[H]aving weighed the greatness of the work [...and] God's glory [...] we will so really endeavour the prosecution of this work, as by God's assistance [...] (under God's protection,) to inhabit and continue in New England: Provided always, that before the last of September next, the whole government, together with the patent for the said Plantation, be first, by an order of Court, legally transferred and established to remain with us and others which shall inhabit upon the said Plantations.¹³⁴

In addition to the Cambridge agreement was a technical procedure in the Charter which effectively limited control over the Company to the godly who were willing to venture to the new world. The Company officials were to be elected annually at each General Court out of the stockholders. However, only those stockholders who could attend the General Courts could vote, so they alone possessed all effective power in the Company as well as in the colony. But once in the new world, political participation could be provided to those worthy inhabitants who were not stockholders. Growth was provided for by the Charter's giving the Governor, acting with at least six assistants, 'full power and authority to chose, nominate and appoint such and so many others as they shall be willing to accept the same to be free of the said Company and Body, and them into the same to admit'.¹³⁵

B. Godly Ideals and Political Participation

Legally, the stockholders were not obliged to share their power. If they abided by the terms of the Charter and did not violate divine law, there would be no foreseeable problem in ruling the inhabitants. However, the settlers had departed from England for essentially the same reason: to escape the corruptions of the old world in order to plant a pure, godly community. If unity of action and purpose was so coherent among the departing Puritans, there would be little reason for the

¹³³ Richard Saltonstall, Thomas Dudley, William Vassall, Nicholas West, Isaac Johnson, John Humfrey, Thomas Sharpe, Increase Nowell, John Winthrop, William Pinchon, Kellam Browne, and William Colbron.

¹³⁴ Alexander Young (ed), above n 63, 281-282.

¹³⁵ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 11-12.

stockholders to deprive like-minded community members of the franchise. Indeed, according to Winthrop, without the right to vote, men would be ruled by arbitrary government, a relic they sought to escape under King Charles. As he was to later define it, arbitrary government was ‘where a people have men set over them without their choice, or allowance: who have power to govern them, and judge their causes without a rule’.¹³⁶

Any threat of arbitrary rule was put aside on October 19, 1630, when the General Court assembled in Boston for the first time in the new colony.¹³⁷ The meeting was open to all residents of the colony who wished to attend. Apparently, broadening political participation was not feared, as the rulers and the ruled had an impassioned unity of purpose. By no means at that time a representative body, but a gathering at which all those who were freemen were expected to be present, it was decided that the electoral base of the governor, deputy governor, and the assistants, would be broadened. In turn, the executive, legislative, and judicial powers were to be limited to those elected to rule. This was to be accomplished by having the freemen elect the assistants, who would subsequently elect the governor and deputy governor from among themselves, as opposed to having them elected directly by the freemen.

At this same meeting, the freemen also voted to grant the magistrates the power to make laws, a power that under the Charter had resided in the freemen. This procedure was adopted, in part, because it was also decided to admit others to the franchise in order to give them a voice in selecting their rulers. Freemanship was thus conferred upon 109 settlers who petitioned the Court to grant these rights even though some had not yet become members of a church. At the next session of the General Court in May of 1631, 116 men, that probably comprised a majority of the male population of the colony,¹³⁸ were also admitted to freemanship. But to safeguard the future from potential rule by the ungodly—‘to the end the body of the commons may be preserved of honest and good men’—it was also decided that ‘no man shall be admitted to the freedom of this body politic but as such as are members of some of the churches within the limits of the same’.¹³⁹

¹³⁶ Nathaniel B Shurtleff (ed), *Records of the Governor and Company of the Massachusetts Bay in New England* (Williams White, 1853-54) vol 4 (I), 468.

¹³⁷ Shurtleff (ed), *Colony Records*, vol 5 (I), above n 129, 79 .

¹³⁸ Robert Emmet Wall, *Massachusetts Bay: The Crucial Decade, 1640-1650* (Yale University Press, 1972) 6.

¹³⁹ Shurtleff (ed), *Colony Records*, vol 5 (I), above n 129, 87.

Some historians have claimed that the religious requirement in this statute was the basis of the ‘religious oligarchy,’ effectively restricting the franchise.¹⁴⁰ These advocates have used this law as the prime example of Puritan antidemocratic authoritarianism. For example, George H. Haynes believed that ‘no statute of the colony’s first half-century struck so severe a blow at popular government, and none has brought upon the fathers of the colony so much reproach’.¹⁴¹ Another historian went so far as to claim that this law ‘actually disfranchised some who had hitherto enjoyed the rights of citizenship’.¹⁴² One other has stressed that it was instituted on the people by a few aristocratic leaders who were more interested in retaining their position.¹⁴³ The extent to which this law limited the number of freemen, and therefore restricted democracy in the context of the time, needs to be addressed.

Evidence on the exact number of church members at this time is scarce, but there is some indication that the first settlers were mostly orthodox Puritans and would probably have approved of a law restricting freemanship to church members. A Massachusetts Bay Company letter dated April 17, 1629, described how thoroughly all those in the Company’s service were screened in religious beliefs. Should unorthodox persons, or ‘libertines’ not be removed, colony officials were warned, those responsible were to be corrected and punished or be returned to England.¹⁴⁴

If the 1631 law was undemocratic in nature, it might be helpful to determine its contemporary unpopularity (or popularity) as well as discover who was responsible for instituting the franchise requirement. Evidence indicates that although the religious requirement was not intended to serve democratic ends, it was popular.¹⁴⁵ As noted above, records show that in October of 1630, 109 men ‘desired’ to be made freemen.¹⁴⁶ At the next Court meeting in May, the records list those who were ‘made’ freemen, many of whom were on the October list.¹⁴⁷ The question

¹⁴⁰ George H Haynes, *Representation and Suffrage in Massachusetts, 1620-1691* (Johnson Reprint Corp, 1973) 15.

¹⁴¹ *Ibid* 15.

¹⁴² Haynes, above n 140, 15, referencing John Andrew Doyle, *English Colonies in America* (Henry Holt and Co) vol 1, 259.

¹⁴³ Morison, above n 25, 85.

¹⁴⁴ Shurtleff (ed), *Colony Records*, vol 5 (I), above n 129, 393.

¹⁴⁵ Katherine B Brown, ‘Freemanship in Puritan Massachusetts’ (1954) 59 *American Historical Review* 865, 865-883.

¹⁴⁶ Shurtleff (ed), *Colony Records*, vol 5 (I), above n 129, 79.

¹⁴⁷ *Ibid* 79-80, 366-367.

then is whether these men were admitted before the franchise legislation was passed, or was the law imposed on the people by a few leaders?

Edward Johnson, who was made a freeman in May of 1631, stated clearly that the first group of men were made freemen before the law was passed restricting freemanship to church members. ‘At this Court, he wrote, many of the first Planters came and were made free, yet afterward none were admitted to this fellowship, or freedome, but such as were first joyned in fellowship with some one of the Churches of Christ’.¹⁴⁸

Other evidence that the 1631 law was instituted *by* and not imposed *on* the people is found in the wording of the early records. The environment depicted at the first General Court meeting indicated a democratic and not a ‘patriarchal undertaking’ as described by Parrington.¹⁴⁹ For example, in the first General Court of October 1630, the proposal that the ‘freemen’ should have the power of choosing the assistants was ‘fully assented unto by the general vote of the people, and erection of hands’.¹⁵⁰

At the next court in May, the law was explained and elaborated on, the religious requirement receiving ‘the full consent of all the commons’ present.¹⁵¹ The ‘commons’ obviously meant the people in general, for Winthrop noted in his journal on May 17th that ‘all the freemen of the commons were sworn to this government’.¹⁵² There is no evidence of a struggle regarding the adoption of an order restricting the franchise at this or subsequent meetings. It must be concluded, therefore, that the franchise legislation was not only acceptable to a population of largely orthodox Puritans, but also that they were involved in its making, becoming freemen before its passage and voting in its favour.

In addition, the ‘people’ referred to in the October meeting also meant more than the eight company members. As already noted, Winthrop had thrown open the first meeting of the General Court to the entire body of settlers. And by a vote of the people who attended this meeting, the magistrates were transformed from a type of executive council into a legislative assembly.

¹⁴⁸ Brown, ‘Freemanship in Puritan Massachusetts’, above n 145, 869.

¹⁴⁹ Ibid.

¹⁵⁰ Shurtleff (ed), *Colony Records*, vol 5 (I), above n 129, 79.

¹⁵¹ Ibid 79.

¹⁵² John Winthrop, *The History of New England from 1630 to 1649*, James Savage (ed) (Phelps and Farnham, 1825) vol 1, 55.

The term 'freeman' was likewise transformed from a designation for the members of a commercial company, exercising full political control over the company and its property, into a designation for the citizens of a state, with a right to vote and hold office. For it was also decided that annual elections were to be held which unintentionally acted to increase the peoples' political power. Each May the people had the opportunity to judge the performance of all major officeholders. And under the Charter, no person could acquire ruling authority except at the polls.

This transformation of the Company's Charter into a constitution for government of the colony would have been neither necessary nor desirable had the original members of the Company intended to keep power in their own hands. The reduction of the freemen's direct role in governing, and the securing of popular consent to this change presaged the admission to freemanship a large portion of settlers, men who had little to contribute to the joint stock of the company save godliness.

More importantly for the development of democracy, since the people technically had no political rights under the Charter, they were given a role to which they had no legal claim. Seen in this context, the religious requirement was not so much a limitation, but an invitation to every future church member to exercise the privileges of freemanship, allowing the godly settlers to select those who would make the laws and govern their model community. As 1 Corinthians vi, 2, stated, 'Do ye not know that the saints shall judge the world?'

This serendipitous step towards democracy clearly stemmed from the Puritan notion of the covenant and their reading of the Bible. The covenant was not only the basis of the individual's salvation, but was also the foundation of every true church and state. The religious requirement simply constituted an explicit acceptance of these covenants.

The religious requirement might also have been designed to help attract other Puritan emigrants to Massachusetts Bay. But so as not to allow later immigration of potentially ungodly men to undermine their Christian community through the selection of sinful rulers, it was determined that only church members were to become freemen. The subsequent franchise limitation, therefore, must be seen as a concession to the colony's divine mission, intended as a guarantee of godly rule.

But the religious qualification had definite democratic consequences. By limiting freemanship to church members, political rights were extended to a larger portion of the people than enjoyed such rights in England—and to people who were not mere possessors of a forty shilling freehold, an aristocratic requirement in English political tradition dating back to 1430.¹⁵³ Indeed, at this time, the decision to first open the franchise to willing inhabitants was a near revolutionary procedure for political participation and the fostering of democracy. Consider that in the seventeenth century, the vote was not a right of Englishmen, or even of all propertied Englishmen.¹⁵⁴

However, Winthrop and the Puritan leaders of Massachusetts Bay did not intend to create a democracy. Their foremost duty was to ensure that the colony's covenant with God would be enforced. In carrying out this duty, Winthrop believed that the people, or a qualified portion of them, were entitled to determine the form of government to be established and to select the persons that should run that government.

If a ruler failed in his duty to enforce the laws of God, the people were obliged to eject him from office. But if he faithfully carried out his duty, his authority was absolute, and, regardless of any errors in judgment, the people were obliged to submit. Indeed, anything less than submission would be considered a rebellion against the authority of God.

Puritan thought seen in this context indicates that there was no perceived reduction in the authority of the government by the extension of the franchise to church members. They were simply to select men who were to direct governmental affairs largely towards religious ends. This gave the government a practical strength as well, for the leaders of Massachusetts Bay were probably aware that the people would more readily submit to a ruler if they had a voice in choosing him, regardless of any divine authority the ruler might claim.

For some Puritans, the powers of the freemen were still great. As John Cotton was to state, '[n]one are so fit to be trusted with the liberties of the Commonwealth as church membership for the liberties of the freemen of this Commonwealth are such as require, men of faithful integrity to God and the state

¹⁵³ J R Pole, *Political Representation in England and the Origins of the American Republic* (St Martin's Press, 1966) 397-398.

¹⁵⁴ Francis J Bremer, *The Puritan Experiment* (St Martin's Press, 1976) 61.

to preserve the same'.¹⁵⁵ The two principal liberties of the freemen he stated, were the election of magistrates and, in a later political development, the choice of deputies. 'Now both these liberties are such as carry along much power with them, either to establish or subvert the Commonwealth'.¹⁵⁶

Cotton's views as well as Winthrop's actions in the General Court indicate the extent to which the earliest New England Puritans based political decisions—and ultimately the shaping of civil and ecclesiastical institutions—on their entrenched notion of godliness. The primary purpose of the connection between church membership and the franchise was not to foster democracy but to construct a political society whereby the godly would rule. More importantly, godly rule would ensure the protection and preservation of the Puritan model community from encroachments by corrupt, worldly men.

Such a state was not antithetical to democratic concepts. As Roger Williams noted, the Bible provided enumerable arguments for the godly community, and '[w]hen the Righteous rule, the people rejoyce'.¹⁵⁷ Typical of Puritan writings, the emphasis was on the necessity, not for theocratic or democratic rule, but a godly magistracy. For this reason, godly rulers were to be chosen by the 'honest and good men' on whom the 1631 franchise law had conferred this liberty.¹⁵⁸ Contrarily, worldly men, as electors, stated John Cotton,

would as readily set over us magistrates like themselves, such as might hate us according to the curse, Levit. xxvi.17. and turn the edge of all authority and laws against the church and the members thereof, the maintenance of whose peace is the chief end which God aimed at in the institution of Magistracy.¹⁵⁹

C. The Rise of Representative Government

While political participation and representation based on the criterion of godliness seemed to be acceptable to a majority of the populace, a group of Watertown

¹⁵⁵ Albert E McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* (Burt Franklin, 1969) 305, quoting Cotton, *Winsor, Boston I*, 150.

¹⁵⁶ *Ibid.*

¹⁵⁷ Richard C Simmons, 'Godliness, Property, and the Franchise in Puritan Massachusetts: An Interpretation' (1968-69) 55 *Journal of American History* 495, 496.

¹⁵⁸ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 87.

¹⁵⁹ Simmons, above n 157, 497.

residents challenged the settlement of 1630-31. When, in 1632, the General Court levied a tax¹⁶⁰ on the inhabitants of each town, George Phillips, a minister, and Richard Brown, the town's ruling elder, advised the townsmen against paying the tax.¹⁶¹ They asserted that it was contrary to their rights to pay a tax upon which the people or their representatives had not voted.

This protest has led some historians to view the early years of Puritan rule as authoritarian or oligarchic. George H. Haynes, for example, noted of this incident that 'the freemen were at last thoroughly aroused. An oligarchic spirit had been steadily growing which was all the more dangerous from the very fact that the conspicuous merit of the leaders bade fair to disguise their gradual usurpation of power'.¹⁶² Haynes was correct in suggesting that the Watertown residents were not adequately represented in the General Court. However, this was due, not to the ruling 'oligarchy' and their accretion of power, for the Puritan creed, so often expounded by the rulers, recognized the injustice of arbitrary rule. Instead, the Watertown residents reacted so sensitively to the tax issue primarily because it was the only large town without a resident among the lawmakers.¹⁶³ Sir Richard Saltonstall, the founder of Watertown, had been a member of the body of assistants and would have represented the town's interest on the General Court, but he had recently sailed back to England, never to return.¹⁶⁴

The Watertown Protestants were summoned before the General Court in the spring of 1632. In front of Winthrop and the assistants, they challenged that 'this government was no other but as of a mayor and aldermen, who have not power to make laws or raise taxations without the people'.¹⁶⁵ The influence of their English background is clear in this remonstrance. Winthrop, likewise, replied to this concern with an allusion to English governmental procedure. However, he suggested the representative and responsible nature of Puritan civil rule: 'this government was rather in the nature of a parliament, and that no assistants could

¹⁶⁰ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 93.

¹⁶¹ They declared to the assembled people, 'that is not safe to pay moneys after that sort, for fear of bringing themselves and posterity into bondage'. Morison, above n 25, 88.

¹⁶² Haynes, above n 140, 18.

¹⁶³ Wall, above n 138, n 7.

¹⁶⁴ Ibid.

¹⁶⁵ John Winthrop, *The History of New England*, vol 1, above n 152, 70.

be chosen but by the freemen, who had power likewise to remove the assistants and put in others'.¹⁶⁶

D. Representation Entrenched

With the freemen demanding more input in the affairs of the General Court, it appeared as though the representation issue had been settled. Said Winthrop: 'they were fully satisfied; and so their submission was accepted and their offence pardoned'.¹⁶⁷ But within two months, because of this sensitivity over representation and the limits of governmental rule, the General Court passed an act that formally defined the governor's powers.¹⁶⁸ One month later, in May of 1632, at the next Court of Election, the freemen voted that the governor, deputy governor, and assistants, should all be chosen every year by the General Court, an act which effectively abolished the practically life tenure of the assistants.¹⁶⁹ More importantly for the evolution of democracy and representative government, was the enactment that every town chose two men 'to advise with the Governor and assistants about the raising of a public stock, so as what they should agree upon should bind all'.¹⁷⁰ Taxation would no longer be determined by a select few; the people, through their own town representatives, would now tax themselves.

More importantly, it was implicitly recognized that in a community of visible saints—where both electors and the elected were in covenant with each other and with God—no godly member was to impose his will on the others without their free consent. Recall Winthrop's Puritan dictum that no body politic 'can be founded but by free consent'.¹⁷¹ Furthermore, 'the persons so incorporating [themselves] have a public and relative interest each in other, and in the place of their cohabitation and goods, and laws, etc., and in all the means of their welfare so as none other can claim privilege with them but by free consent'.¹⁷² As this statement and the action of the General Court make clear, it was recognized that the rulers were not self-appointed, but were God-appointed through the free actions of the people. For this reason, the freemen of Massachusetts Bay insisted

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid 70-71.

¹⁶⁹ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 95.

¹⁷⁰ John Winthrop, *The History of New England*, vol 1, above n 152, 95.

¹⁷¹ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 423.

¹⁷² Ibid.

that legislative powers—even in a godly society—ought to be limited by the terms of the original compact.

The following year little of importance is recorded concerning the political development of the colony. In May of 1634, however, the deputed freemen of the towns went to the General Court and claimed they ‘desired a sight of the patent’.¹⁷³ Their concern was to ensure that their rulers on the General Court were abiding by the strict provisions enumerated in the Charter. Apparently, the Puritan creed dictated that no divergence from a covenant was to be tolerated. Upon their reading of the Charter, these deputies of the freemen discovered that according to the Charter, all laws were to be made by freemen and the officers on the General Court. Taking counsel with Winthrop, the deputies protested that the freemen had been denied their legislative rights.

Winthrop countered that the broadening of the franchise in 1630 and 1631 rendered the assemblage of freemen for legislating impractical.¹⁷⁴ He noted that when the Charter was granted, the number of freemen was no greater than could conveniently meet and pass laws.¹⁷⁵ Now the franchise had been so extended that the making and executing of laws should be effected by a delegation of representatives.

However, the Charter was explicit regarding the form of government and the election of officials: the governor, deputy governor and eighteen assistants were to be annually elected by the General Court, consisting of all freemen, who had supreme legislative power. Ignorant of a direct violation of the Charter, at the first meeting of the General Court in 1630, the newly enfranchised freemen agreed to have the governor and deputy governor elected by and out of the assistants. In this process, the assistants had arrogated executive, legislative, and judicial power, and ruled in this way for four years.

Concerned for the will of the godly electorate, the deputies of the freemen argued before the General Court that it return to the original provisions of the Charter. Winthrop finally agreed that the freemen should directly choose the governor and deputy governor, and not merely the assistants. That both Winthrop and the General Court acquiesced is a measure of their acceptance, however limited, of

¹⁷³ Ibid. 152.

¹⁷⁴ Winthrop, *The History of New England*, vol 1, above n 152, 153.

¹⁷⁵ Ibid.

popular or democratic rule. The deputies of the freemen thus took their seats in the General Court, sitting as one house with the assistants. Together, this body allowed a number of resolutions to be passed on which lay the basis for popular representative government in Massachusetts Bay:

That none but the General Court hath power to chose and admit Freemen.

That none but the General Court hath power to make and establish laws, nor to elect and appoint officers.

That none but the General Court hath power to raise monies and taxes and to dispose of lands.¹⁷⁶

It was also decided that a new freeman's oath was to be formulated. From this time forward, each candidate swore allegiance, under pain of punishment and banishment, not to the Crown, but to the godly community: 'by the great and dreadful name of the ever living god' to be 'true and faithful' to the commonwealth, giving it 'assistance and support' with both their '[p]erson and estate' and submitting 'to the wholesome laws made and established by the same'.¹⁷⁷ Those men not eligible for freemanship were required to take the inhabitants oath of fidelity, the only difference being the lack of reference to voting.¹⁷⁸

After these enactments, the freemen were ready to proceed with the election of the officers of the General Court. Most probably, the annual election of officers was not entirely agreeable to Winthrop and the assistants. It was, however, a necessity under the terms of the Charter, and now, clearly the wish of the freemen. John Cotton shared Winthrop's notion of government rule as a sacred stewardship, and preached an election sermon to the effect that assistants, once elected, should not be turned out of office, except for a reasonable cause.¹⁷⁹ The freemen quickly repudiated this notion by, for the first time, passing over Winthrop as the choice of governor.¹⁸⁰ Thomas Dudley thus became the first governor to preside over the colonial legislature that contained elected representatives of the freemen, and not merely assistants.

¹⁷⁶ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 117.

¹⁷⁷ Ibid 117.

¹⁷⁸ Ibid.

¹⁷⁹ Morison, above n 25, 87.

¹⁸⁰ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 117.

The freemen, having renewed their Charter rights and expanded their powers, having supplanted the Governor and indirectly rebuked the assistants, now sought to establish a representative colonial legislature on a permanent basis. It was also enacted that four General Courts were to be held annually, as summoned by the governor, and were not to be dissolved without the consent of the majority of members.¹⁸¹ In the General Court of election, every freeman was to ‘give his own voice’.¹⁸² In the three other courts, it was ordered:

[I]t shall be lawful for the freemen of every plantation to choose two or three¹⁸³ [representatives] of each town before every General Court, to confer and prepare such public business as by them shall be thought to consider of at the next General Court, and that such persons as shall be hereafter so deputed by the freemen of the several plantations to deal in their behalf in the public affairs of the commonwealth, shall have full power and voices of all said freemen derived to them for the making and establishing of laws, granting of lands, etc., and to deal in all other affairs of the commonwealth wherein the freemen have to do, the matter of election of magistrates and other officers only excepted.¹⁸⁴

E. The Democratic Component

The action of the freemen in 1634 providing for the election of deputies to represent them in the General Court has been called ‘revolutionary,’ the Massachusetts Bay Company having finally freed itself from a ruling oligarchy to ‘become a representative democracy’.¹⁸⁵ Of these momentous events, Winthrop noted merely that ‘all things were carried very peaceably’.¹⁸⁶ His lack of emotion, perhaps, suggests that the step towards a ‘representative democracy’ was not a great one. As his and other Puritan writings have already suggested, democracy was a component already accounted for in the Puritan theory of the state. That the democratic component grew, however slowly, does not underscore the fact that in the godly community, democracy was a constituent working part of the commonwealth.

¹⁸¹ Ibid 117-120.

¹⁸² Ibid 119.

¹⁸³ Perhaps because of its population or importance, the town of Boston was later allowed three representatives on the General Court.

¹⁸⁴ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 118-119.

¹⁸⁵ Haynes, above n 140, 22.

¹⁸⁶ John Winthrop, *The History of New England*, vol 1, above n 152, 132.

Yet Parrington maintained that the election of deputies was another illustration of the ‘persistent hostility of the leaders to every democratic tendency’.¹⁸⁷ Similarly, John D. Hicks wrote that ‘[e]arly Massachusetts was not a democracy; it was an aristocratic theocracy’.¹⁸⁸ And Thomas J. Wertenbaker went to great lengths to describe the colony as a government of the many by the few.¹⁸⁹ But as B. Katherine Brown has shown, modern historians have misunderstood the problematical definitions such as ‘democracy’ and ‘aristocracy’ as used by the Puritans of the seventeenth century.¹⁹⁰

Parrington and other like-minded historians have frequently cited the statement of John Cotton that condemned democracy as the worst form of government. Writing to Lord Say and Seal in 1636, Cotton stated, ‘[d]emocracy, I do not conceyve that ever God did ordeyne as a fitt government eyther for church or commonwealth’.¹⁹¹ ‘As for monarchy and aristocracy,’ he continued, ‘they are both of them clearely approved, and directed in scripture’.¹⁹² It would appear as though in a godly community, Cotton approved of rule by the few and disapproved of democracy. What some historians have chosen to emphasize, if not expound, was that Cotton meant ‘the people’ were to be denied participation in government.

Cotton, however, used the term ‘aristocracy’ in a context that suggested that the people were to delegate authority to their elected officials who, in turn, were to make laws and govern in a responsible fashion. Such a scheme was, in fact, borne out by the events of the General Court indicated above. Thus, Cotton had already factored-in the democratic component in his theory of government in the godly community. However, at the same time, he sought to emphasize the aristocratic component in order to reassure Lord Say and Seal. He was contemplating emigration, but was worried about rumors of political practices in Massachusetts Bay that seemed to run counter to English tradition.¹⁹³ In particular, he was concerned that where men were given the franchise on the requirement of

¹⁸⁷ Vernon L Parrington, *Main Currents in American Thought* (New York, 1927) vol 1, 21, 52-53, quoted in Katherine B Brown, ‘A Note on the Puritan Concept of Aristocracy’ (1954) 41 *Mississippi Valley Historical Review* 105, 105.

¹⁸⁸ *Ibid* 106.

¹⁸⁹ Thomas Jefferson Wertenbaker, *The Puritan Oligarchy* (Charles Scribner’s Sons, 1947) vii.

¹⁹⁰ Brown, ‘A Note on the Puritan Concept of Aristocracy’ above n 187, 105-112. The discussion contained in the following three paragraphs is attributable to the work of Ms. Brown, specifically her discussion of the Puritan concepts of aristocracy and democracy.

¹⁹¹ Miller and Johnson (eds), *The Puritans*, above n 24, 209.

¹⁹² *Ibid* 210.

¹⁹³ *Ibid* 211.

godliness and not social position, he and some of his friends might be excluded.¹⁹⁴ With this in mind, Cotton used conciliatory terms to explain the colony's form of government:

Nor neede your Lordship feare (which yet I speake with submission to your Lordships better judgment) that this corse will lay such a foundation, as nothing but a mere democracy can be built upon it. [Jean] Bodin¹⁹⁵ confesseth, that though it be *status popularis*, where a people choose their owne governors; yet the government is not a democracy, if it be administred, not by the people, but by the governors, whether one (for then it is a monarchy, though elective) or by many, for then (as you know) it is aristocracy. In which respect it is, that church government is [j]ustly denied (even by Mr. [John] Robinson¹⁹⁶) to be democratical, though the people choose their owne officers and rulers.¹⁹⁷

To Cotton, therefore, it seemed as though the people might participate in government using their franchise rights, regardless of whether or not the form of government was democracy, monarchy, or aristocracy. Even in his seventeenth-century terms, Cotton defined aristocracy by how many ruled and not by how those rulers came to power.¹⁹⁸ If the entire populace assembled to govern, it was a 'democracy;' if the people instead chose delegates to represent them, it was an 'aristocracy'. Hence, Cotton's conciliatory allusion to the principles of, firstly, the secular theorist, Bodin, that congregational theory was not necessarily democratic, and secondly, to those of its most radical exponent, Robinson, that congregational theory did not necessarily translate into popular government.

Cotton's view of popular political participation is also documented elsewhere. In every instance, he was unambiguous in his thoughts, strongly believing in the liberties of the people and their right to elect their own rulers. John Winthrop, for example, noted in his journal that Cotton, in a sermon delivered in 1634, preached that the strength of the assistants was their authority, the strength of the people was their liberty, and the strength of the ministry was their purity.¹⁹⁹ Cotton believed that each body should provide a check on the powers of the other bodies, but the ultimate power was in the whole body of the people.²⁰⁰ In another sermon on the limitation of government in church and commonwealth, Cotton emphasized that a balance of power in government was best, and he declared the

¹⁹⁴ Ibid.

¹⁹⁵ The French political philosopher.

¹⁹⁶ John Robinson, was a separatist and pastor of the Scrooby congregation in England.

¹⁹⁷ Miller and Johnson (eds), *The Puritans*, above n 24, 211.

¹⁹⁸ Brown, 'A Note on the Puritan Concept of Aristocracy' above n 187, 107.

¹⁹⁹ John Winthrop, *The History of New England*, vol 1, above n 152, 133-134.

²⁰⁰ Ibid.

right to elect their officials as the first power of the people, ‘in whom fundamentally all power lies’.²⁰¹

Like Cotton, Winthrop ascribed to the notion that civil (and ecclesiastical) rule in the Puritan community contained a significant democratic component. While Winthrop called the commonwealth a ‘mixed aristocracy,’ he believed the people, by their power of election, were the democratic part of the government.²⁰² Of this democratic element he wrote: ‘Where the chief ordinary power and administration [...] is in the people there is a democracy’ and added that ‘the deputies are the democratical part of our government,’ because if the power ‘be in the deputies it is in the people’.²⁰³

However, having delegated authority to others, Winthrop believed that the people were bound by oath to submit to the laws made by their representatives. As he was later to declare:

It is yourselves who have called us to this office, and being called by you, we have our authority from God, in way of an ordinance [...] I entreat you to consider, that when you choose magistrates, you take them from among yourselves, men subject to like passions as you are [...]. We account him a good servant, who breaks not his covenant. The covenant between you and us is the oath you have taken of us, which is to this purpose, that we shall govern you and judge your causes by the rules of God’s laws and our own, according to our best skill.²⁰⁴

Thus, Winthrop did not question the right of the people to elect their rulers, but held that those godly members with the franchise had the right to select rulers from among themselves, who were then to be obeyed once in office. Moreover, these officials were not to be viewed as potential oligarchs, but were an integral part of a unified holy community, the guardians of its ideals and purposes. As members of the church, as freemen, and by their oath of office—a covenant between the rulers and the people—officials were ‘regulated by their relation to the people, to seeke their welfare in all things’ stated Winthrop.²⁰⁵

²⁰¹ Miller and Johnson (eds), *The Puritans*, above n 24, 212-214, quoting John Cotton, ‘Limitation of Government’. See also Brown, ‘A Note on the Puritan Concept of Aristocracy’ above n 187, 107.

²⁰² Brown, ‘A Note on the Puritan Concept of Aristocracy’ above n 187, 108-107.

²⁰³ Ibid 109.

²⁰⁴ Miller and Johnson (eds), *The Puritans*, above n 24, 205-207, quoting John Winthrop, ‘Speech to the General Court, July 3, 1965’.

²⁰⁵ Miller, *The New England Mind*, above n 24, 424.

F. The Culmination of Political Participation

I. The ‘Negative Voice’

For the next ten years, the ‘mixed aristocracy’ was instituted, with both deputies and assistants sitting together in one house, over which the Governor presided.²⁰⁶ This action on the part of the freemen in 1634, in providing for the election of deputies to represent them in the General Court, laid the basis for a unicameral legislature, which was electoral accountable and a more representative chamber. It was more representative because the freemen were represented twice: by the assistants, who stood for the commonwealth as a whole, and by the deputies who represented the interests of each town. However, a new problem arose for the assistants. The large number of deputies could consistently outvote the assistants. It seemed that those who believed they were destined by God to rule, were now in a minority, being overwhelmed by the democratic component in the ‘mixed aristocracy’. While there was a general belief in popular participation among the godly in the electoral process, the assistants resisted the idea of total popular rule.

It was now the assistants’ turn to invoke the Charter for support and insist that the people’s role in the elections was strictly confined to choosing a ruling class. In September of 1634, the settlers of Newtown (Cambridge) petitioned the General Court for permission to leave their town and settle in Connecticut. A majority of deputies approved of the move, but a majority of the assistants disapproved. The assistants immediately asserted that the Charter granted them the power of the ‘negative voice’ or veto, but the deputies refused to acquiesce.²⁰⁷

Finally, in a compromise, the assistants and deputies agreed to a recourse that was a Puritan panacea for all moral and political ills, a day of fasting, humiliation, and prayer.²⁰⁸ John Cotton was called upon to preach. In his sermon he upheld the authority of the assistants, subject to an ultimate appeal to the people. According to Winthrop, Cotton sought to achieve a compromise and placated both sides by

²⁰⁶ In 1644, to settle the issue over the ‘negative voice’ or veto, the General Court would sit and vote in two chambers. Bills could originate with either the assistants or the deputies, but the approval of a majority in each chamber was necessary to the passage of an act. For the next forty years, this procedure was to remain unchanged. See Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 58-59.

²⁰⁷ John Winthrop, *The History of New England*, vol 1, above n 152, 141-143.

²⁰⁸ *Ibid.*

showing ‘how all of these had a negative voice’.²⁰⁹ Cotton’s suggestions were so successful that ‘it pleased the Lord so to assist him, and to bless his own ordinance, that the affairs of the court went on cheerfully; and although all were not satisfied about the negative voice to be left to the magistrates, yet no man moved aught about it’.²¹⁰

Without conceding the principle in question, both sides eventually reached a compromise that was, in the following year, codified into law. The law required that in the case of a deadlock, a joint committee composed of an equal number of deputies and assistants, might be chosen, who, with an umpire selected jointly, would decide the contentious issue.²¹¹

The issue over the negative voice reveals the extent to which the rulers believed that voting rights were to be used by the godly to bind them to the government, rather than to encourage the expression of a variety of views. Political Participation by those with the franchise was seen by the Puritans as a means to promote consensus.

Their theory demanded that members of the community unite. There was, therefore, no room for the lone dissenter, who was sometimes persecuted. This was despite the fact that the Puritan migration occurred for the very reason that their beliefs differed from that of their bishops. In New England, they moved in communal groups, and maintained firm control over this united entity. They believed they were establishing a community in which the one and only truth would reign forever, and for that reason, unanimous acceptance of the majority consensus was essential. Relatively broad political participation, therefore, was not to facilitate the expression of divergent viewpoints, but to provide the broadest base possible for community consensus. And having participated in the political process, the freemen usually felt obliged to accept the results.

But although they were united in the creation of a godly community, the Puritans were not always in agreement on every issue. However, in the issue over the veto, while the assistants fought what they perceived to be encroachments on their authority, as based on their more stringent views of a well-functioning godly

²⁰⁹ Ibid.

²¹⁰ Ibid 168-169.

²¹¹ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 161.

community, they eventually capitulated to the majority wishes of the freemen and their deputies. Ultimately, the assistants, however grudgingly, did their best to ensure that political decisions were acceptable to those most affected by them: the freemen who represented the community. In this way, political participation was used for forming a consensus and allowed the community to march together towards the ‘one truth’ desired by all.

This did not mean that the assistants, when pressed, based their decisions on exclusively democratic ideals; nor does it mean that they were oligarchic, authoritarian, or theocratic. The assistants were concerned with the Puritan ideal of maintaining community cohesiveness, and preserving their, and the people’s covenant with God. Equally, the freemen were concerned with the Puritan ideal of upsetting any possibility of arbitrary government. So while each group focused and emphasized different aspects of Puritan thought, both freemen and assistants had the best interests of the godly community placed at the fore.

This was always most apparent when the colony seemed on the verge of a political crisis: during the Pequot war, the Roger Williams case, and the Antinomian debate. In each instance, the freemen, through their deputies, relied upon the experienced leadership of the assistants and deferred to their judgement at almost every suggestion.²¹² The assistants, in turn were, as a group, essentially united in their outlook and purpose, and energetic in their leadership. Although composed of men with strong personalities and differing temperaments, there was remarkably little dissension among them concerning the policies to be pursued.²¹³ In addition, the freemen, and their deputies who came to share power with the assistants, were essentially in agreement with them as to the basic mission of the colony, the erection of a godly society.

With this goal in common, the assistants and freemen could agree on limiting an aspect of pure democracy: universal suffrage. Neither side disturbed a single provision of the settlement of 1630-31: freemen would be selected only from among church members. Going a step further, the General Court in 1635 passed an act in which only freemen (and therefore church members) would be allowed to vote in local elections.²¹⁴ Freemen, deputies, and assistants, while placing various emphases on the dangers of rule by the few, were in agreement with the principle

²¹² Wall, above n 138, 13.

²¹³ Ibid.

²¹⁴ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 161.

that their experiment—their attempt to create a godly community—would have to be protected from the ungodly.

2. Rights Entrenched in Law

The non-arbitrary, participatory, godly conception of government was the Puritan cornerstone upon which the political institutions of the commonwealth were built. Religious beliefs had united with political theory and provided the main strands that held together the social fabric of the colony. In particular, the Puritan conception of a godly community led to a course of political action that limited the franchise to church members. To this end the freemen and assistants were in agreement, wanting to keep the colony in the hands of the godly. But while the Puritan experiment led to a panoply of political innovations in the new world, it did some borrowing, with adaptations, from what the colonists had known in England.

Specifically, when the freemen began to participate more directly in the government of the colony, they worked to ensure that their elected rulers abided by established and published laws. As early as 1635, Winthrop recorded in his journal:

The deputies having conceived great danger to our state, in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Carta, which, being allowed by some of the ministers, and the general court should be received for fundamental laws.²¹⁵

While the visible saints were to have a technical monopoly on the franchise, codified political rights for all inhabitants were to be established in order to destroy any lingering vestige of arbitrary government.

To this time, the assistants used the Bible as a guide in order to dispense punishments. This was a logic the freemen could not deny. There was a consensus that the fundamental law in a godly community should be the law of God, as found in the Bible. However, the freemen came to believe that the Bible left too much to the assistants' discretion. The assistants, for their part, were not as eager to proceed with the adoption of a body of laws. This was not because they were a power-hungry oligarchic clique. Rather, as Winthrop noted in detail, he and others wished to delay for two reasons, which relate to English tradition:

²¹⁵ John Winthrop, *The History of New England*, vol 1, above n 152, 323.

1. One was, want of sufficient experience of the nature and disposition of the people, considered with the condition of the country and other circumstances, which made them conceive, that such laws would be fittest for us, which should arise pro re nata upon occasion, [etc.,] and so the laws of England and other states grew, and therefore the fundamental laws of England are called customs, consuetudines.

2. For that it would professedly transgress the limits of our charter, which provide, we shall make no laws repugnant to the laws of England, and that we are assured we must do. But to raise up laws by practice and custom had been no transgression; as in our church discipline, and in matters of marriage, to make a law, that marriages, would not be solemnized by ministers, is repugnant to the laws of England; but to bring it to a custom by practice for the magistrates to perform it, is no law made repugnant, [etc].²¹⁶

As George Lee Haskins has noted, and as the above passage illustrates, in the area of *law*, the Puritans relied heavily upon the English model.²¹⁷ However, such emphasis should not obscure the elements of Puritan thought also evident in the desire to establish a body of laws. Recall that the Puritan movement was founded in reaction to repression and sensitivity to arbitrariness. In addition, a body of laws would crystallize the Puritans' ideal of the covenant by embodying in contract-form clear rules of social justice.

With mounting pressure, therefore, a committee, headed by John Cotton, was appointed to frame a body of laws in 1636. Composed of assistants and ministers, it was 'to make a draught of laws agreeable to the word of God, which may be the Fundamentals of the commonwealth, and to present the same to the next General Court'.²¹⁸ In the meantime, the assistants were to mete out justice 'according to the laws now established; and where there is no law, then as near the law of God as they can'.²¹⁹

In the following year, Cotton finished his code of fundamental laws, entitled, *A Model of Moses, His Judicials*. He presented it to the General Court, which

²¹⁶ Ibid 388-389.

²¹⁷ See above n 22.

²¹⁸ Morison, above n 25, 227.

²¹⁹ Ibid.

respectfully received the work, but did not find it entirely acceptable.²²⁰ There is no record of the discussion on it or why the General Court refused to accept it. However, it seems possible that the General Court rejected the document because it smacked of theocratic rule. Drawing directly from the Bible, Cotton made certain that the code's provisions were supported by scripture in order to prove that the government would rule in harmony with God's law.²²¹ But perhaps most objectionable to the deputies was a provision which provided that the assistants 'be chosen for life'.²²² Here Cotton put forward his idea of life tenure for assistants, which the freemen had already repudiated.

During 1637, the General Court was so busy with the Pequot war and the Hutchinson controversy that the matter of the body of laws was allowed to rest. By the spring of 1638, the General Court asked the freemen to assemble in their respective towns and draw up a list of 'such necessary and fundamentall lawes as may bee sutable to the times and places whear God by his providence hath cast us'.²²³ Evidently, the freemen were to have direct participation in the establishment of a set of fundamental laws. While not all towns acted upon this grass-roots suggestion, eventually a large committee was established by the General Court to make 'a compendious abridgment' of the laws considered.²²⁴ While little is known about this committee's workings, it is known that Nathaniel Ward, a committee member, compiled a set of laws drawing on the towns' contributions. Together with Cotton's code, both drafts were submitted to the General Court in November of 1639 for consideration.

Instead of rejecting one code and accepting the other, the General Court ordered that a new committee be established to combine both codes into one. Winthrop, a member of the committee, stated that the two codes were

digested with divers alteration and additions, and abbreviated and sent to every town, to be considered of first by the magistrates and elders, and then to be published by the constable to all the people, that if any man should think fit, that any thing therein ought to be altered, he might acquaint some of the deputies therewith against the next court.²²⁵

²²⁰ John Winthrop, *The History of New England*, vol 1, above n 152, 240-241.

²²¹ Morison, above n 25, 226-229.

²²² Ibid 228-229.

²²³ Ibid 229.

²²⁴ Ibid.

²²⁵ John Winthrop, *The History of New England*, vol 1, above n 152, 389.

Like elsewhere in the godly community, democracy and theocracy were to be synthesized. The freemen would have their legal code and the assistants and ministers would be moved to compromise their authority ‘to satisfy the people’.²²⁶ The resulting compendium, the *Body of Liberties*, did its best to balance religious orthodoxy with popular rights.²²⁷ While it recognized that all law originates with God, and contained elements of *Moses, His Judicials*, the selection was carefully based on universal morality, rather than on the harsh ordinances of the Bible.²²⁸ Moreover, as Winthrop noted, the real basis for the final product was Ward’s code, and his point of departure was not so much the Bible, but English common law.²²⁹ This was evident in the preamble to the *Body of Liberties*, which illustrated the blending of liberty and authority in an organic godly community:

The free fruition of such liberties, Immunities, and priveleges as humanitie, Civilitie, and Christianitie call for as due to every man in his place and proportion without impeachment and infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof, the disturbance if not the ruine of both.

We hold it therefore our dutie and safetie whilst we are about the further establishing of this Government to collect and expresse all such freedoms as for present we foresee may concerne us, and our posteritie after us, And to ratify them with our sollemne consent.

Wee doe therefore this day religiously and unanimously decree and confirme these following Rites, liberties and priveleges concerning our Churches and Civill State to be respectively impartiallie and inviolably enjoyed and observed throughout our Jurisdiction for ever.

1. No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restryained, banished, dismembered, nor any wayes punished, no man shall be deprived of his

²²⁶ Ibid.

²²⁷ The *Body of Liberties* was not adopted by the General Court until 1641. Morison, above n 25, 230.

²²⁸ Although Cotton’s *Moses, His Judicials* was not adopted in Massachusetts Bay, John Davenport, a friend of Cotton, took a copy of the code with him to New Haven where it served as the colony’s constitution in the first quarter-century of its existence. See Morison, above n 25, 229.

²²⁹ John Winthrop, *The History of New England*, vol 2, above n 111, 66.

wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under color of law or Countenance of Authoritue, unlesse it be by vertue of equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any particuler case by the word of God.²³⁰

With the *Body of Liberties* came the culmination of the establishment of fundamental rights for the inhabitants of Massachusetts Bay. With its passage, the freemen put an end to their fear of arbitrary government. The rulers, for their part, had reduced the possibility of the formation of a pure democracy or rule by the ‘mob’.

Just as importantly, the *Body of Liberties* was a departure from the relative limits placed on authority in England during this same period. It constituted a truly democratic innovation primarily by championing civil rights and limited the assistants’ judicial powers through a written constitution. For example, in general, many of the provisions in the *Body of Liberties* were more humane than those in English common law. The rights of servants were humanitarian in character; lashes inflicted for punishment were limited to forty; and the capital laws were more lenient than the contemporary practice in England.²³¹

Furthermore, theft was not punishable by death, although in England robbery, burglary, and larceny over the value of one shilling were capital felonies.²³² Cruel and barbarous punishments were forbidden, as was torture, except on a convict for a capital offense to discover accomplices, in which case the torture was not to be ‘barbarous and inhumane’.²³³

Feudal dues were also prohibited, complete testamentary liberty was guaranteed, and foreigners were assured the equal protection of the laws. Indeed, the *Body of Liberties* provided that ‘everie man shall have libertie to complaine to the Generall Court of any Injustice done him in any Court of Assistants or other’.²³⁴ Whether a man be ‘[i]nhabitant or foreigner, free or not free,’ he was allowed to attend any

²³⁰ Morison, above n 25, 231.

²³¹ Ibid 232.

²³² Ibid.

²³³ Ibid.

²³⁴ Rutman, *Winthrop’s Boston*, above n 72, 236.

court, council or town meeting and propose consideration of his case ‘in convenient time, due order, and respectful manner’.²³⁵ In all such cases, the defendant was given the privilege ‘to put himself on the court’ to avoid a jury verdict.²³⁶

Penalties were not fixed except for capital laws; indeed, penalties were very rare in the early statutes of Massachusetts Bay. This was in accordance with Winthrop’s and the assistants’ belief that justice could best be secured by considering each case on its own merits, as well as on the grounds that the Bible prescribed few fixed penalties except for capital crimes.²³⁷

Other features of the *Body of Liberties* were also peculiar to the Puritans of Massachusetts Bay. Payments for legal defense were forbidden; crops or vegetables in the field or garden could not be taken from someone in distress; and taxes could not be levied on a man for property that ‘he hath in England, or in any foreign partes’.²³⁸

Monopolies, which the Puritans were striving against in England, were prohibited. But the greatest limit on authority came with the right of the freemen to elect any of their body to the magistracy and refuse to re-elect them without cause.²³⁹ This limit on a ruling authority was also carried over into the religious sphere where the congregational way and church government was protected against the encroaching jurisdiction of church councils and synods.²⁴⁰

The *Body of Liberties* was also well ahead of its time in the area of women and animal rights. While the common law authorized a man to chastise his wife with a ‘reasonable instrument,’ the *Body of Liberties* declared that ‘[e]verie married woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his own defense upon her assault’.²⁴¹ And, although animals received no protection under English law, ‘The Brute Creature’ was given a section of its own in the *Body*

²³⁵ Ibid 160.

²³⁶ Morison, above n 25, 233.

²³⁷ George Lee Haskins, ‘The Government of the Massachusetts Bay Colony, 1630-1650’ in Sydney V James, (ed), *The New England Puritans* (Harper and Row, 1968) 73, 82.

²³⁸ Morison, above n 25, 233.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid 234.

of *Liberties*. Clearly, the Puritan compilation of fundamental laws was enlightened, and it would have done credit to any Commonwealth in the seventeenth century.

As for theocracy, the *Body of Liberties* clarified what had already been practiced.²⁴² Massachusetts Bay was established as a model godly community and not as a theocracy. On this point, the *Body of Liberties* was emphatic. Law 58 stated that '[c]ivill Authoritie hath power and libertie to see the peace, ordinances and Rules of Christ observed in every church according to his word, so it be done in a Civill and not in an Ecclesiastical way'.²⁴³ A subsequent section limited church authority by decreeing: 'All churches have liberty to deal with any of their members in a church way,' but the church had no power to 'retard or hinder' the course of civil authority.²⁴⁴ To ensure this absence of ecclesiastical interference, the *Body of Liberties* also boldly stated that '[n]o church censure shall degrade or depose any man from any Civill dignitie, office or Authoritie he shall have in the Commonwealth'.²⁴⁵ In the case of a jurisdictional dispute, the General Court would have the sole power to interpret the matter.

Thus, by the end of the first decade, a fine balance had been struck between the ruling authorities, the ministers, and a godly democracy. In this model community, the line between church and state had been drawn to the extent that the freemen selected rulers and shared in the making of laws, while the officials usually retained power through entrenched concepts relating to Puritan theology. For these reasons, the freemen never sought to overturn the power of their assistants, for it was their destiny to rule. But this rule was to be limited, and the rights of the ruled, now codified in law, were not to be threatened.

By 1640 the freemen, as well as the inhabitants, enjoyed unprecedented political rights, especially for the freemen in the area of direct political participation. More importantly to the Puritans, by living up to godly ideals in their communal lives,

²⁴² John Cotton, for example, recognized that Massachusetts Bay was not a theocracy in his letter to Lord Say and Seal. He stated: 'that magistrates are nether chosen to office in church, nor doe governe by directions from the church, but by civill lawes'. Miller and Johnson (eds), *The Puritans*, above n 24, 210. Evidence of this separation between church and state is also contained in Winthrop's 'Model of Christian Charity' where the settlers sought 'to seek out a place of cohabitation and consortship under a due form of government *both civil and ecclesiastical*' (emphasis added). Heimert and Delbanco (eds), above n 40, 89.

²⁴³ Aaron B Seidman, 'Church and State in the Early Years of the Massachusetts Bay Colony' (1945) 18 *New England Quarterly* 211, 216.

²⁴⁴ Seidman, above n 243, 216.

²⁴⁵ Ibid 216-217.

God's covenant with these members was upheld. It is now necessary to examine the affairs of Boston, to determine the extent to which the members of that town, in the first decade, satisfied these same Puritan ideals.

V. POLITICAL PARTICIPATION IN BOSTON

The political developments during the first decade in the history of the General Court have shown how the Puritan ideal of godliness accommodated itself to democracy. An examination of political practices in the town of Boston during this same period should reveal similar developments. The town and the colony should essentially mirror one another with popular innovations stemming from the Puritan quest for the erection of a holy community.

A. Town and Church Established

The founders of Massachusetts Bay were also, for the most part, the founders of the town of Boston. Primarily for this reason there was initially no sharply defined line separating the powers which the town or colony might exercise. In addition, the distinction between town and church organization in the early years of Boston was essentially nonexistent. The limitations of each developed by slow degrees, formal separation seeming to be a natural development rather than a premeditated effort. But this correspondence of church and community was part of the Puritan ideal of godly unity reflected in Winthrop's speech aboard the *Arbella*.

In order to retain communal unity, one of the first acts of the General Court was to prevent dispersal. On September 7, 1630, it ordered that 'noe p[er]son shall plant in any place within the lymitts of this Pattent, without leave from the [Governor] and Assistants, or the major [part] of them'.²⁴⁶ This order came after a small succession of groups moved across the river from the Charlestown encampment and settled on Shawmut. When Winthrop moved to Shawmut in September of 1630, this attracted even more people from Charlestown, and by mid-October the town had a population of approximately 150.²⁴⁷

²⁴⁶ John F Cronin and John Noble (eds), *Records of the Court of Assistants of the Colony of the Massachusetts Bay 1630-1692* (County of Suffolk, 1901-1928) vol 2, 4.

²⁴⁷ Rutman, *Winthrop's Boston*, above n 72, 29.

During these initial months, the emerging towns were governed by local leaders, like Winthrop, who were accepted as superiors in the community and respected for their offices in the Company structure. Acting as justices of the peace, together with the body of assistants, they tried civil and criminal suits and generally regulated town life.²⁴⁸ While this group assumed leadership roles in the new towns by virtue of their status, their authority was, nevertheless, soon challenged. In the case of Boston, the inhabitants were to form a parallel locus of power to serve as the local arbiter. This group was organized first as the religious congregation, but soon evolved into the corporate town itself.

As noted earlier, the exact form of church polity the Puritans were to establish in New England was not yet determined when the first fleet set sail from England in 1629. While most Puritans seemed disposed towards congregationalism, this form of church government was not fully developed in England. They had, however, taken care to obtain ministers to serve the spiritual needs of the settlers. Under the peculiar Puritan proclivity to contract, two ministers, George Phillips and John Wilson, sailed under a written agreement with the Winthrop fleet. Both were to be consummate Puritans in New England. Phillips was familiar with congregational theory in England, and Wilson had been a student of Paul Baynes, a minister who had preached against hierarchy and the mixture of the godly and ungodly in the churches.²⁴⁹

The Court of Assistants, meeting on August 23, 1630, ordered that houses be built for the ministers 'at the public charge' and that they receive an annual salary.²⁵⁰ On this same date, the assistants also established communal support for William Gager, a man of 'godliness and abilities in the art of Churchery'.²⁵¹

The attempt to establish a church in the new town of Boston has the potential to reveal the political biases of the community leaders. If there was an oligarchic propensity in this group, a hierarchical design of church polity would be anticipated, with power and control of the church in the hands of a few. Theocratic propensities would be revealed by a church organization that allowed for the control of civil affairs by church officials. English traditions would be

²⁴⁸ Ibid 43-44.

²⁴⁹ Ibid 52.

²⁵⁰ Cronin and Noble, above n 246, 1-2.

²⁵¹ Winthrop, *The Winthrop Papers*, vol 2, above n 63, 199. See also Cronin and Noble, above n 246, 2.

evident by practices that imitated the old-world parish. Finally, a democratic church would have all members direct its affairs.

As its history indicates, the establishment of the church in Boston illustrates a process of political organization that paid little heed to oligarchy, theocracy, British traditions, and democracy. Instead, the leaders and community members sought to erect a model church that would be maintained by the godly. While their fundamental criterion for political organization was godliness, in the process of attempting to achieve this end, they often synthesized divergent political concepts and inadvertently reinforced democratic ideals. For example, the inhabitants relied upon English tradition when it came time to decide on the institutional form of church polity, leaving this decision with their leaders. In England, the villager tended to accept the form of worship used ‘from his landlord,’ the gentry.²⁵² To the advantage of the inhabitants, the leaders of New England came to choose a form of church organization that would admit the godly, regardless of socio-economic status, an unintentional democratic measure that cut vertically through class ranks.

B. The Covenant

In 1630, when the community leaders were left to discuss the question of church organization on behalf of the settlers, they were heavily influenced by the unique features of the congregational churches recently established in Salem and Plymouth. Winthrop, and others, were already familiar with the Biblical notion of the covenant between God and His people. Winthrop, having spoken of the covenant in his *Arbella* speech, was also to write, ‘[i]t is the nature and essence of every society to be knitt together by some Covenant, either expressed or implied’.²⁵³ As John Cotton would write, covenants could be utilized for a variety of purposes. They were not,

peculiar to the Paedagogy of the Old Testament, for it is evident by the light of nature, that all civill Relations are founded in Covenant... There is no other way given whereby a people... free from naturall and compulsory engagements, can be united or combined together into one visible body ... but only by mutual Covenant; as appeareth between husband and wife in

²⁵² Rutman, *Winthrop’s Boston*, above n 72, 49.

²⁵³ Rutman, *Winthrop’s Boston*, above n 72, 50, quoting Winthrop to Henry Paynter, 1640, Winthrop Papers, IV, 170.

the family, Magistrates and subjects in the Commonwealth, fellow Citizens in the same Citie.²⁵⁴

The leaders, therefore, had little difficulty in applying the idea of the covenant, with its inadvertent democratic proclivities, to the formation of a church polity. Under covenant the congregation would have the power to determine its own affairs, especially in its election of officers and in the control of church property. However, the admission of the incorrigible into the church would put it in danger. But a covenant church would have inherent control if ‘such godly persons that are amongst them and known each to other’ were to form the initial congregation, entering ‘into covenant with the Lord to walk in his ways’.²⁵⁵

On August 27, 1630, the Boston church covenant was drafted, which also established general rules for town affairs. Essentially, it was to be an agreement among the godly inhabitants to abide by certain rules and was to be signed by all members of the First Church. The first rule seemed the most important to the town, expressing the desire for unity in religion. It is quoted in full:

In the name of our Lord Jesus Christ & in Obedience to His holy will & Divine Ordinance.

Wee whose names are herevnder written, being by His most wise, & good Providence brought together into this part of America in the Bay of Massachusetts, & desirous to vnite our selves into one Congregation, or Church, vnder the Lord Jesus Christ our Head, in such sort as becometh all those whom He hath Redeemed, & Sanctified to Himself, do hereby solemnly, & religiously (as in His most holy Proesence) Promise, & bind o’selves, to walke in all our wayes according to the Rule of the Gospell, & in all sincere Conformity to His holy Ordinaunces, and in mutuall love, & respect each to other, so near as God shall give vs grace.²⁵⁶

The covenant was immediately signed by the leaders of the community²⁵⁷ and others were admitted in quick succession. Its intention seems to have been to admit all but the most incorrigible into church membership, so there would be a

²⁵⁴ Rutman, *Winthrop’s Boston*, above n 72, 50, quoting John Cotton, *The Way of the Churches of Christ in New-England* (London, 1645), 4.

²⁵⁵ Rutman, *Winthrop’s Boston*, above n 72, 53, quoting Fuller and Winslow to Bradford and others, July 26, 1630, Mass Hist Soc, *Collections*, 1st Ser, 3 (1794), 75-76.

²⁵⁶ George E Ellis, *History of the First Church in Boston, 1630-1880* (University Press: John Wilson and Son, 1881) 3.

²⁵⁷ This included John Winthrop, Issac Johnson, John Wilson, and Thomas Dudley.

correspondence between church and community. This was part of Winthrop's ideal of town unity. For this reason, the covenant did not imply the creation of a religious elite removed from the generality. Instead, the covenanters wrote that they were 'desirous' of forming a church, promising to bind themselves to walk in godly ways. In the formation of the church, the covenanters promised the inhabitants of the town that they would admit anyone 'as shall appear to be fitly qualified'.²⁵⁸ The prospective member would be evaluated on the basis of conduct and religious faith. Conduct and faith being products of instruction, the covenant had the potential to bring all community members into the church, fulfilling the Puritan ideal of creating a godly and organic society, with each individual part nurturing and contributing to the whole.

C. The Franchise

An important feature implicit in the covenant was that church membership was to be a prerequisite for full political rights, which included no reference to property. In this way, the political practices traditional in seventeenth century England seem to have been overturned. As a result, men without property, or with less property than required for the franchise in England, were legally entitled to vote and hold office, since they were of the godly class. While the existence of a franchise based on a religious rather than a property test inadvertently led to a levelling tendency, the religious qualification initially was not regarded as a device to create a wide suffrage. While it indirectly reinforced democratic ideals, its main purpose was to keep political control of the town in the hands of the godly.

The Puritan notion of godliness was, however, extensive enough to transcend social ranks, so privileges and duties associated with residence within the community were conferred to all men. Every adult male participated in communal affairs and held office when called upon. As heads of families, they all shared in the distribution of town land, and let their livestock graze on those lands that the town held in common. The community also extended protection and care for the sick and all contributed to the support of the town, church, and commonwealth.

That initially the Puritan notion of godliness led to a levelling tendency in Boston was exemplified by the proportion of church membership to the total populace. While the exact ratio is difficult to determine due to poor records, an

²⁵⁸ Rutman, *Winthrop's Boston*, above n 72, 56, quoting the covenant in First Church Records, and Fuller and Winslow to Bradford and others, Mass Hist Soc, *Collections*, 1st Ser, 3 (1794), 75.

approximation can be made. From 1630 to 1635 the population of the town grew from 175 to 575.²⁵⁹ Excluding children, of the identifiable 131 men and women who came and remained in the town in 1630, 71 were listed as members of the First Church before September, 1633.²⁶⁰ By 1633, therefore, approximately 54 percent of the adult residents of the town were church members.

Perhaps more important than the ratio of church members to town population was family representation in the church. Of the 45 families arriving and remaining in the town in 1630, 42, or 93 percent were represented in the church by at least one adult member.²⁶¹ Indeed, church membership was initially so important in the community that in the first decade, no major officeholder or prominent community member remained outside the church, with the exception of the merchant John Coggan, and even he was represented in the church by his wife, daughter, and nephew.²⁶² As for the less prominent town members, they too were represented in the church, coming from all levels on the social hierarchy, including merchants, coopers, farmers, and laborers; even Blacks and Indians were not expressly excluded.²⁶³ Bound servants and apprentices were also assimilated into the community through the church, and in the first decade, 61 servants were admitted to church membership.²⁶⁴

A further indication of the variety on the social hierarchy represented in the town and church can be made by noting the occupations listed by the incoming settlers. The most common occupational designations in mid-decade were 'mercier,' 'draper,' 'carpenter,' 'joiner,' 'tailor,' 'glover,' 'miller,' 'shoemaker,' and 'tanner'.²⁶⁵ While not all incoming settlers became church members and freemen, this preponderance of laborers in the town is further evidence that participation in the political affairs of the town was open to all 'good, just and honest' men.²⁶⁶

In the years following 1635, the proportion of church members to total adult population, and the family/church ratio decreased slightly until the Hutchinsonian controversy in 1637. This crisis caused the expulsion of many church members and the delay of new communicants at a time when the town's population began

²⁵⁹ Rutman, *Winthrop's Boston*, above n 72, 57-58, 147-148.

²⁶⁰ *Ibid* 145, nn 21.

²⁶¹ *Ibid* 58.

²⁶² *Ibid* 146.

²⁶³ *Ibid* 139.

²⁶⁴ *Ibid* 139. See also Morgan, *The Puritan Family*, above n 127, 123.

²⁶⁵ *Ibid* 140.

²⁶⁶ Miller, *Errand Into The Wilderness*, above n 96, 149.

to surge. From 1637 to 1640 the town's population shot upwards, doubling from 1000 to 2000 in the course of four years. During this same period, only 76 members were added to the church membership list, an increase that was essentially nullified by the exiled Hutchinsonians. It would be at least a decade before the churches in Boston would be able to absorb into membership the town's swelling population. But by the 1650s, about half of the male population in Boston were church members.²⁶⁷ In the interim, innovative procedures would be implemented to accommodate those worthy town residents, who were not church members, but who sought to participate in the town's political affairs.

D. Political Adaptation

After 1637, the population explosion helped lead to a divergence between community and church. With this rapid growth, the homogeneity of the town began to give way to heterogeneity. In recognition of this transformation, the town sought to maintain communal unity. As early as 1635, town citizenship was made contingent upon membership in the church, as commonwealth citizenship had been earlier. This was an action on the part of the General Court, which placed conditions upon participating in town affairs for the first time by ordering that 'none but freemen shall have any vote in any towne, in any action of authority ... as receiveing inhabitants, and laying out of lotts'.²⁶⁸

Also in 1635, there was a large segment of the town absenting themselves from the Church on the Sabbath. Acting on behalf of Boston and other towns, the General Court made attendance mandatory upon pain of a fine or imprisonment.²⁶⁹ Furthermore, in this year the town had been proceeding on the assumption that only freemen were involved in land distribution, but now it resolved that only those 'likely to be received members of the Congregation' were to be granted town land.²⁷⁰

The main purpose of these regulations was not to keep power in the hands of an oligarchic few, but to help restore the earlier godly homogeneity of the town in the face of growing diversity. Even more than an attempt to return to a bygone

²⁶⁷ Rutman, *Winthrop's Boston*, above n 72, 145, nn 21 and 147.

²⁶⁸ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 140.

²⁶⁹ Ibid.

²⁷⁰ Ibid. See also John Winthrop, *The History of New England*, vol 1, above n 152, 122.

religious age was the desire to foster godliness within the existing community. By 1635, the church was not an exclusive body, for the idea of conversion was strong, reinforcing egalitarian values by attempting to entice all types of men into membership. But after the Hutchisonian affair in 1637 and the simultaneous population explosion, the ready acceptance of new members into the church became a relic of the past.

As always, membership was based, not on social rank, but on godliness. However, the definition of godliness became narrower in scope, and now excluded those with pious enthusiasm of the Hutchisonian brand. ‘Be very careful in admission of members’, Winthrop wrote to his son at Ipswich, ‘[t]here be some of these new opinions that will simulate and dissimulate beyond expectation, to gett into our churches’.²⁷¹ In Boston, potential members were required to speak extensively of their ‘knowledge in the principles of religion, and of their experience in the wayes of grace, and of their godly conversation amongst men’; those found ‘ignorant, and graceless, or scandalous’ were refused.²⁷²

An indication of the shift to a narrower conception of godliness is also evident in the renewed First Church covenant of 1636. The first covenant had expressed the hope of following God’s will; the renewed covenant, while expressing a ‘deep acknowledgment of our great unworthiness’ was quick to establish that the congregational members were God’s ‘Covenant people’ bound together to walk ‘as a right ordered Congregation, and church of Christ, in all ways of His worship according to the holy rules of the word of God’.²⁷³

As a result of this growing discrepancy between church and town, the Church turned inward and began to shun its social function. In the process, it is likely that the secular components of Puritan congregational theory began to separate from this religious body of thought. Before 1635, the Church screened men for the community. After this date, it gradually became an esoteric unit within the larger community and became less inclined to consider itself the guardian of public morality.

²⁷¹ Rutman, *Winthrop’s Boston*, above n 72, quoting Winthrop to John Winthrop, Jr, *Winthrop Papers* (Jan 31 1637/38) IV, 10-11.

²⁷² Rutman, *Winthrop’s Boston*, above n 72, 144.

²⁷³ Winthrop, *The Winthrop Papers*, vol 3, above n 109, 223-225.

In the second half of the decade, the Church ended the disciplining of town offenders and stopped advising magistrates and others in community affairs. When Winthrop and his group first settled Shawmut, the Church and town were essentially two facets of the same community, and a crime against one was a moral offense within the jurisdiction of the other. Often, disputes between town residents were settled by arbitration within the Church, without recourse to the assistants. It was with this type of organic community in mind that at a general meeting in 1635 the town ordered that ‘none of the members of this congregation or inhabitants among us shall sue one another at law before that Mr. Henry Vane and the two Elders [...] have had the hearing and desyding of the cause if they cann’.²⁷⁴

After 1635, the Church still gave advice on public affairs, but the demarcation between religious and secular spheres was becoming increasingly distinct. By 1640 Cotton could write that ‘[t]he government of the church is as the Kingdom of Christ is, not of this world, but spiritual and heavenly [...] the power of the keys is far distant from the power of the sword’.²⁷⁵

As originally conceived, the Puritan organic community had a common goal: ‘The Establishment of pure Religion, in doctrine, worship, and government, according to the word of God: As also in the reformation of all corruptions in any of these’.²⁷⁶ Thus, the Church insisted upon ‘sweet and wholesom laws’ and ‘civil punishments upon the wilful opposers and disturbers’ of the community.²⁷⁷ To a disinterested observer, it would appear as though ‘Moyses and Aaron ...magistrate and minister, in church and common[wealth]’ were walking ‘hand in hand, discountenancing and punishinge sin in whomsoever, and standinge for the praise of them that doe well’.²⁷⁸ But for public affairs like ‘the disposing of mens goods or lands, lives or liberties, tributes, customes, worldly honors, and inheritances’— ‘in these the Church submitteth, and referreth it self to the civill state’.²⁷⁹

The First Church’s inward movement towards ‘tribalism’²⁸⁰ was inevitable considering that eventually, the number of unregenerate who came to settle in Massachusetts Bay with the godly eventually became too great a number to deprive

²⁷⁴ Rutman, *Winthrop’s Boston*, above n 72, 154.

²⁷⁵ Ibid, quoting John Cotton, *Way of the Churches of Christ in New England* (1640-1641).

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Ibid 155, quoting John Cotton, *Way of the Churches of Christ in New England* (1640-1641).

²⁷⁹ Ibid.

²⁸⁰ This term was coined by Morgan, *Puritan Family*, above n 127, 168-186.

of community rights. Indeed, the eligible voters, it is estimated, amounted to about twenty to twenty-five percent of the total population by the end of the first decade.²⁸¹ While this figure has been challenged,²⁸² it seems clear that by mid-decade, the godly in the town of Boston were in a minority. Consequently, the godly founders of the town decided that they should retain formal control of the government, as they had failed to do in England. In the new world, if they had not escaped from the company of worldly men, they at least gained formal political power over them. Again, the guiding principle in politics was not to establish a democracy, theocracy, oligarchy, or a derivative from English tradition; godliness was the primary organizational factor in the development of the political institutions of the Puritans.

While godliness directed the governing institutional focus in Boston, it also inadvertently reinforced democratic and republican ideals. If godliness cut through class distinctions to enable all qualified men to participate directly in the political process, it also led to the indirect political involvement of the ungodly. Even the most rigidly orthodox Puritans betrayed suspicions that all men were somehow competent, responsible, and potentially salvageable, so the way to salvation was open to all without regard to political, economic, or social standing. By its very nature, this Puritan logic put individual judgement in place where previously more traditional modes of thought had put the judgment of authority. In this way, the Puritans stressed the competence of the individual and this, in turn, opened the door to political equality.

Environmental factors also contributed to the fostering of political participation among the less-than-godly. Though by no means the intent of the Puritan enterprise, a democratic spirit evolved in the town because of the essential equality of condition to which all men were reduced in the wilderness settlement. Both gentlemen and servants were forced out of necessity to labor in the fields and build and provide for a home. This process not only helped to level distinctions, but also compelled familiarity in social intercourse. In addition, the atmosphere of exile and the decay of the sense of loyalty to the English monarch, were indirect contributions to the growth of common interests among all inhabitants, which helped to offset the disparity between the godly and the unregenerate.

²⁸¹ Ibid 171. See also Miller and Johnson (eds), *The Puritans*, above n 24,191; See also Morison, above n 25, 379-386. Katherine Brown notes, however, that after the church requirement for the vote was dropped in 1664, the number of freemen amounted to about 61 percent of all adult men in Boston by 1679. See Brown, 'Freemanship in Puritan Massachusetts', above n 145, 881-883.

²⁸² See especially Morison, above n 25, 379.

***E.* Growth of Political Participation**

Towards the end of the first decade, the town decided it had to establish a new framework by which it could deal with those new settlers and non-church members who sought political rights. While the godly would retain formal control over the affairs of the town, worthy inhabitants were to be granted limited political privileges. But in order to retain control over the residents, the town assumed the right to judge the character of potential townsmen and refused to allow a newcomer 'to take up his dwelling in the vill, without the express permission of the community'.²⁸³ While only a portion of the town was to be occupied by the godly, at least the incorrigible would be kept outside the community. As a further measure, in 1635 the town passed an ordinance requiring the approval of the town's authorities for the sale of any town land by a settler to a 'stranger'.²⁸⁴ The following year, the town empowered the newly created selectmen, who were elected by the community to run mundane town affairs, to oversee 'all comers in unto us' and they subsequently prescribed that 'no Townsman shall entertain any strangers into their houses for above 14 days, without leave' from the selectmen.²⁸⁵

***F.* Inhabitants and Political Participation**

In order to provide the rights and privileges of town citizenship to worthy residents who were not necessarily church members or freemen, a new status of 'inhabitant' was established. Occupying a subordinate position, inhabitant status theoretically allowed the individual, as Cotton stated, the rights of 'freedom of commerce and inheritance of such land as the generall courte or the severall townes wherein they dwell shall allot unto them'.²⁸⁶ However, in practice, the right to own land in the town was conferred with inhabitantship. Along with this status came the privilege of using the town land or 'commonage' for the grazing of cattle: all 'those who are admitted ... to be inhabitants ... have equall Right of Commonage in the towne'.²⁸⁷

²⁸³ Haskins, *Law and Authority in Early Massachusetts*, above n 22, 78.

²⁸⁴ Rutman, *Winthrop's Boston*, above n 72, 156.

²⁸⁵ Shurtleff (ed), *Colony Records*, vol 5, above n 129, 88; 'The Charter of the Colony of Massachusetts Bay in New England', in Nathaniel B Shurtleff (ed), *Records of the Governor and Company of the Massachusetts Bay in New England* (Williams White, 1853-54) vol 5 (II) 177-178.

²⁸⁶ Rutman, *Winthrop's Boston*, above n 72, 158.

²⁸⁷ *Ibid* 159.

More importantly, participation in town government became associated with inhabitantship. While the criterion of godliness was required for the right to vote, it appeared that the inhabitant was allowed a voice in public affairs at the town level. Although salvation might evade the bulk of the inhabitants in the eyes of the godly, they were deemed worthy enough community members and, hence, were allowed certain political privileges.

For example, throughout this period, Boston's town meetings appear to have been an open body. The usual notice for the meeting was stated in the following terms: 'a Generall meeting upon Publique notice or Warning,' a phrase that suggests that it included more than the visible saints.²⁸⁸ In another example, the record of May 13, 1639 states: 'Att a Generall Meeting upon a particular or private Generall notice giveing from house to house'.²⁸⁹ At this meeting both deputies to the General Court and selectmen were elected. If the number of townsmen participating in these town meetings were limited to freemen, the notice would probably not have been given from house to house. Furthermore, it was the townsmen who calculated the town's tax rates and divided the land, privileges that were technically reserved for only freemen.²⁹⁰ These practices were not limited only to Boston. The records of Salem, Woburn, Watertown, and Dorchester reveal similar practices.²⁹¹

There are also indications that political participation by non-freemen was a common occurrence at these meetings. For example, occasional entries in the town records, such as that in 1636, indicate that decisions affecting the town were not always made solely by the freemen, but were carried out with 'the consent of this Towne's inhabitants'.²⁹²

Not only did non-freemen participate in town elections, they were also elected to office. For example, William Hibbens was admitted an inhabitant in 1639 and elected a selectman to the General Court of that same year, even though he did not become a freeman until a year later.²⁹³ Another selectman, Thomas Fowle,

²⁸⁸ Ibid 161.

²⁸⁹ Brown, 'Freemanship in Puritan Massachusetts', above n 145, 870.

²⁹⁰ Ibid.

²⁹¹ Brown, 'Freemanship in Puritan Massachusetts', above n 145, 865-883.

²⁹² Rutman, *Winthrop's Boston*, above n 72, 161.

²⁹³ Registry Department of the City of Boston, *A Volume of Records Relating to the Early History of Boston, Contains Miscellaneous Papers*, vol 29 (Municipal Printing Office, 1900) 140. See also Rutman, *Winthrop's Boston*, above n 72, 161.

admitted to inhabitantship in 1639, was never recorded as a freeman.²⁹⁴ Boston also elected William Tynge deputy in 1639 and later a selectman, but he cannot be found on the official list of freemen.²⁹⁵ Similar practices are found in other town records.²⁹⁶ Thus, it must be concluded that these inhabitants were regarded as active, worthy, and competent individuals in public affairs, even though they were not church members.

G. Freemanship and Political Participation

A means to discover the limitations of freemanship is to discern the social classes represented by this group. It appears that freemen were representative of all rungs on the social ladder. Of special note is that the step from servant to church member and freeman seems to have been short and without difficulty, testifying to the broad social representation in political affairs. For example, Francis Dowse in 1639, ‘servant to our brother George Burdon,’ became an inhabitant of the town and a freeman a year later.²⁹⁷ Another example is Thomas Joanes, ‘servant to Will[iam] Richardson’ who was given liberty to dispose of himself and was then made a freeman.²⁹⁸ Finally, in October of 1639, John Robinson, ‘late servant to our brother Mr. Newgate’ was granted a house plot and became a freeman within two years.²⁹⁹

There is other evidence to suggest that freemanship was not restricted to a single social or economic class. John Martin, a ship-carpenter, and John Palmer, another town carpenter, became freemen soon after becoming inhabitants of the town.³⁰⁰ Nor was carpentry considered a prestigious occupation in Puritan Boston. Contrarily, Winthrop noted in his journal that one gentleman from Watertown, ‘a rich man, a tanner,’ lost 200 pounds worth of goods when his barn burned

²⁹⁴ Boston Records, *supra* note 293, 140. See also Rutman, *Winthrop's Boston*, above n 72, 161.

²⁹⁵ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 366-79; Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (II), above n 285, 291-295.

²⁹⁶ Brown, ‘Freemanship in Puritan Massachusetts’, above n 145, 871-872.

²⁹⁷ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 366-79.

²⁹⁸ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (II), above n 285, 127, 294.

²⁹⁹ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (I), above n 130, 378.

³⁰⁰ *Ibid* 376, 378.

down.³⁰¹ This gentleman was neither a church member nor a freeman, and wrote a pamphlet objecting to the support of ministers by taxation.³⁰² Thus, the fact that servants and carpenters could become freemen, while a rich gentleman was excluded from such privileges, suggests that freemanship was not socially restrictive.

That freemanship had a large democratic component was noted in a famous letter by Nathaniel Ward, author of the *Body of Liberties*, to Winthrop. Believing the freemen to be too numerous and powerful, Ward, in 1639 asked:

That you would please to advise thoroughly with the counsel, whether it will not be of ill consequence to send the Court business to the common consideration of the freemen. I fear it will too much excoriate the power of that Court to prostrate matters in that manner. I suspect both Commonwealth and Churches have descended to low already; I see the spirits of people run high and what they get they hold. They may not be denied their proper and lawful liberties, but I question whether it be of God to interest the inferior sort in that which should be reserved *inter optimates penes quo est sancire leges*.³⁰³

Ward's primary concern was the great power and relatively low social status of the freemen, not the non-freemen. In addition, the fact that he uses the term 'people' synonymously with 'freemen,' suggests a broad suffrage. The General Court seemed to agree with Ward when, two years later, it contemplated a new order in elections because the freemen had grown 'to so great a multitude as will be overburdensome to the country'.³⁰⁴

Perhaps the General Court, as well as others, had become increasingly sensitive to greater political participation by the populace because of the growing hazy distinction between the rights and privileges of town inhabitants as distinguished from *bona fide* freemen. This failure to demarcate the free from the non-free was illustrated by the General Courts' penalizing of townsmen for illegally participating in elections. While there was no record of Boston being fined, even though the town appears to have violated the division between free and non-free, Newbury's freemen were fined in 1636 'for choosing and sending to this Court a deputy which was no freeman'.³⁰⁵ Concord was likewise fined in 1638 and the General

³⁰¹ John Winthrop, *The History of New England*, vol 2, above n 111, 88-91.

³⁰² *Ibid* 88-91.

³⁰³ Brown, 'Freemanship in Puritan Massachusetts', above n 145, 874.

³⁰⁴ Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 333.

³⁰⁵ *Ibid* 174.

Court eventually established a law to impose a standard fine upon ‘any man that is not free, putting in any vote’ for ‘the choice of any officer’.³⁰⁶

It seems that being closer to the inhabitants, the godly freemen would deem most non-freemen as worthy town members entitled to participate in the direction of town affairs, even insofar as the election of deputies to the General Court. However, the commonwealth government, for the time being, clung to the narrower definition of citizenship in terms of the church and attempted to enforce the laws which limited the franchise and political office to the freemen.

The tide and the practices with the inhabitants of the towns in the commonwealth were clearly flowing against the wishes of the General Court. This was illustrated by the case of George Bowers. This resident of Cambridge was hailed before the General Court ‘for putting in a vote on the day of election for Governor (he being no freeman),’ and was quick to admit his guilt, but added that he had been allowed to vote ‘every year since he came into these parts’.³⁰⁷ It was for reasons such as these that Boston social critic at the turn of the decade, Thomas Lechford, an opponent of a democratic electorate, lashed out against the ‘electoral courses’ of the commonwealth, lauding the possibilities of the privileged ‘if that poplar elections destroy us not’.³⁰⁸

Unable to control this trend, the General Court gradually codified into law the democratic practices of the towns. The *Body of Liberties*, although not altering the franchise, indicated a shift in attitude on the part of the General Court, favoring the political participation of the non-freemen. Where the Court had declared its exclusive jurisdiction in admitting freemen, it now gave this right to local courts. More importantly, the law stated that anyone ‘whether inhabitant or foreigner, free or not free’ was allowed to attend any court, council, or public meeting and propose measures ‘in a convenient time, due order, and respective manner’.³⁰⁹

Finally, in 1647, the General Court formally recognized, and even praised, the political activity of the town inhabitant. Law inevitably came to match the reality of the preceding decade: ‘[t]aking into consideration the useful abilities of divers

³⁰⁶ Ibid 221; Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (II), above n 285, 48.

³⁰⁷ Shurtleff (ed), ‘The Charter of the Colony of Massachusetts Bay in New England’ (II), above n 285, 279.

³⁰⁸ Brown, ‘Freemanship in Puritan Massachusetts’, above n 145, 874.

³⁰⁹ Ibid 870.

inhabitants amongst us, which are not freemen, which, if improved to public use, the affairs of the commonwealth may be easier carried on end, in the several towns [sic],’ the Court declared that the freemen would now be allowed to ‘make choice of such inhabitants [...] to have their vote in the choice of the selectmen for town affairs, assessment of rates, and other prudential proper,’ and to hold certain town offices, including that of selectman, with the caveat that the majority of selectmen were to be freemen.³¹⁰

Limited though the franchise may appear in theory, in practice, worthy town inhabitants were given the means to participate politically in town and even commonwealth affairs. Had the letter of the law been enforced before 1647, none but the church members in full communion who had become freemen would have been given this right. While the number of godly members of the community declined in proportion to total population, however, by mid-decade the Puritan creed was in harmony with democratic precepts to allow for new, innovative means to be utilized to include the worthy or less-than-godly in the direction of political affairs. Although this development was to lead some to complain that ‘scotch servants, Irish negers and Persons under one and twenty years’ were voting, the incorporation of worthy but less-than-godly inhabitants into the political process helped to maintain that fundamental communal unity which Winthrop envisioned aboard the *Arbella*.³¹¹ These political developments in the face of growing diversity came as an attempt by the godly to retain some semblance of that organic community which they believed all belonged ‘as members of the same body’.³¹²

H. Puritanism and the Suffrage Franchise

The values the Puritans transferred to the town of Boston and to Massachusetts Bay help to explain the relationship between culture and political behavior in the region in the 1630s. Their religion, perhaps more than anything else, structured their daily lives and shaped their institutions. No doubt, Puritans had in common certain general ideas, attitudes, and norms with other English migrants to early America. But it would be expected that their operative values were different from those that shaped social and institutional behaviour in other American colonies.

³¹⁰ Nathaniel B Shurtleff, *Massachusetts Bay in New England* (Press of William White, 1853) vol II, 197; John Winthrop, *The History of New England*, vol 2, above n 111, 163-164, 271-272.

³¹¹ Rutman, *Winthrop’s Boston*, above n 72,162.

³¹² Winthrop, ‘Reasons to be Considered for the ... Intended Plantation in New England [1629]’ above n 40, 91.

Specifically, the democracy that flourished in Boston and Massachusetts Bay in the 1630s found its source in Puritanism. A comparison of democracy in other American colonies, both Puritan and non-Puritan, therefore, should reveal the general difference that Puritanism made towards the development of democracy vis-à-vis the suffrage franchise.

According to one survey of the franchise in early colonial America, the religious qualification was peculiar to New England.³¹³ Primarily because of this reason, democracy developed differently there than in the non-Puritan colonies. In Massachusetts, from 1631 to 1664, it was required that all freemen be church members. After 1664, while membership in the church was not required, freemen were compelled to bring certificates from the ministers of their towns stating that they were orthodox in religious belief.

This pattern was mirrored in other Puritan colonies in New England. In New Haven, freemen were required to be members of an approved church; Plymouth disfranchised those who established churches without governmental approval; and Connecticut, in practice, if not in law, appeared to have enforced religious conformity.³¹⁴

In colonies outside New England, the religious requirement was nonexistent, the franchise being based on a narrower conception of political democracy. The middle and southern colonies not only required certain property qualifications for the vote, but also occasionally excluded particular religious sects from the franchise. In the mid-seventeenth century, the Quakers were outlawed in all the colonies from Virginia to Massachusetts, with the exception of Rhode Island.³¹⁵ The Baptists were treated with a little more leniency, but Jews and Catholics were disfranchised in most American colonies, in some cases, until the nineteenth century.

A variation of the religious requirement was the 'good character' qualification. Again, this peculiar Puritan requirement was most common in New England. Connecticut required candidates for freemanship to be of 'peaceable and honest conversation'. Massachusetts, in 1664, and later, New Hampshire, required non-church members applying for the franchise to be 'not vicious in life'; Plymouth

³¹³ McKinley, above n 155, 475.

³¹⁴ Ibid 475.

³¹⁵ Ibid.

disfranchised ‘liars, drunkards, swearers,’ and those refusing to take the oath of fidelity to the government; and Rhode Island required ‘obedience to the civil magistrate’ as well as ‘civil conversation’ of potential freemen.³¹⁶ Outside Puritan New England, the good character provisions were nonexistent, except for laws in Pennsylvania and Virginia that explicitly excluded convicts from the vote.³¹⁷

The franchise in American colonies was also based on a period of residence. Again, the area of Puritan New England differed in this regard. Here, owing to the homogeneity of the towns, there was rarely any formal term of residence required for the franchise. All one had to do to establish residency was gain the consent of the town and this only required that one be relatively orthodox in religious beliefs. In contrast, in the colonies to the south of New England, where persons were more transitory and the societal composition more heterogeneous, it was more necessary that a term of residence be established before one was allowed the vote.³¹⁸

The franchise in the militia of Massachusetts Bay also reveals their proclivity towards democracy. Not only did they make no attempt to exclude persons from service because they were poor or because they were servants, but the Puritan militia represented a broader cross section of society than did their English counterparts.³¹⁹ And like their churches and the political structure of Massachusetts Bay, the militia was a covenanted organization based on voluntarism. As Thomas Hooker insisted, a man who desired to enter a group had to ‘willingly bind and engage himself to each member of that society [...] or else a member actually he is not’.³²⁰

Within a few years after the original settlement, the colonists aspired neither to create a professional officer corps nor copy the system they had known in England. Instead, they advocated a new kind of militia that allowed for popular participation in the selection of leaders. As Winthrop declared in 1632, ‘[a] proposition was made by the people, that every company of trained men might choose their own captain and officers’.³²¹ Freemen, and eventually non-freemen who had taken the residents’ oath, were allowed to participate in trainband

³¹⁶ Ibid 476.

³¹⁷ Ibid 477.

³¹⁸ Ibid.

³¹⁹ Breen, above n 6, 34.

³²⁰ Ibid 34.

³²¹ John Winthrop, *The History of New England*, vol 1, above n 152, 79.

nominations. The only qualification to this rule was that the nominees had to be members of a church.³²²

In this unprecedented way, the Puritans of Massachusetts Bay again broke with tradition because of their fear of arbitrary power. The freemen of Charlestown thus declared that the free choice of leaders in civil, religious, and military affairs, 'hath rendered us the most happy people that we know of in the world'.³²³ Indeed, all the Puritan colonies, with the exception of New Haven, soon granted wide privileges in the choice of militia officers. However, this tradition did not begin to seep into the southern colonies until the last quarter of the seventeenth century.³²⁴

As for property qualifications, during the seventeenth century this was implied, if not stated, in the laws of every colony, except for the territory dominated by Massachusetts Bay until 1664.³²⁵ At that date, Stuart commissioners were sent to New England in an attempt to uniformly limit the franchise to property owners. A subsequent letter by the King to the New England colonies required all freemen to be persons of 'competent estates'.³²⁶ Other colonies were likewise warned by the Crown to 'take care that the members of the assembly be elected only by freeholders, as being more agreeable to the custome of England'.³²⁷

Clearly, towards the end of the seventeenth century Puritanism in Massachusetts had begun to decline. Perhaps it was this eventual transformation that led remaining Puritans, such as Increase Mather, to declare in his jeremiad of 1676 that he was witnessing 'a great and visible decay of the power of Godliness' in Massachusetts.³²⁸ By the eighteenth century, a franchise based on a narrower property qualification, was universal in America. At this late date the Puritan ideal of an organic godly community with a place for all men, had been superseded by a society based on property-holding and non-property-holding classes.

CONCLUSION

³²² Shurtleff (ed), 'The Charter of the Colony of Massachusetts Bay in New England' (I), above n 130, 187-188.

³²³ Breen, above n 6, 35.

³²⁴ McKinley, above n 155, 33, 201, 204, 365.

³²⁵ Ibid 478.

³²⁶ Ibid.

³²⁷ Ibid 34.

³²⁸ Perry Miller, 'Declension in a Bible Commonwealth', in Sydney V James, (ed), *The New England Puritans* (Harper and Row, 1968) 130, 140.

This examination of the historical record reveals that the Puritans of Massachusetts Bay and Boston had godliness as their primary guiding ethic, and this inadvertently fostered democratic and republican values. This was achieved principally by the use of the franchise in which property and social status were excluded as qualifications. This allowed for the admission of the lower social ranks into the political affairs of the town and commonwealth, broadening political participation. It also introduced a levelling tendency in the colony, for it accustomed the godly to participate in religious and political spheres with men from different social classes.

Because the franchise requirement did not depend on economic or social criteria, the right to vote became linked to individual worth. To the Puritans, a godly or virtuous person might be borne by either a poor or rich family. This godly ideal of the equality of souls had imparted to the Puritans a deep moral fibre that became evident in the political affairs of Massachusetts Bay. In such an environment, even a certain degree of imposed authority did not breed subservience, nor was it ever incompatible with a large degree of essential equality and individual self-respect.

Perhaps it was this Puritan humanism that lay at the heart of their godly ideal. From their recorded statements it seems clear that they had a tendency to accentuate the element of rationalism, and to enlarge the sphere of competence of natural reason even to those not inspired by God's special grace. As John Cotton noted, man learns much by experience and education, 'yet there is also an essential wisdom in us, namely, our Reason which is natural'.³²⁹

Like Cotton, most Puritans believed that man, however depraved by sin and passion, was essentially a rational and responsible being, capable of learning, and requiring only godliness to bring him to ultimate salvation. Every man, regardless of his material worth, was, therefore, considered competent to judge on the basis of his innate reason, free to choose between good and evil, and naturally imbued with at least a semblance of some higher principles. Translated into the political sphere, such a conception of man lent itself easily to democratic ideals.

However, if the Puritans have been hailed as the forerunners of American democracy because of their attitudes towards religion and political participation, this was not their intention. To interpret an event by what it ultimately became is a dangerous reading of history. Preconceptions about Puritanism that have been

³²⁹ Miller and Johnson (eds), *The Puritans*, above n 24, 25.

established in later times must be discarded, and Puritanism must be approached with a view to its own context.

While an understanding of New England Puritanism may be conceded to have some significance for the understanding of American political culture, the unqualified use of such terms as ‘democratic,’ ‘oligarchic,’ or ‘theocratic’ is inadequate. If the Puritans were ‘democratic,’ there is a failure to explain why only the godly were allowed the suffrage franchise, to the exclusion of others. If Massachusetts Bay was a ‘theocracy,’ why was there a division between the functions of church and state as well as between magistrate and minister? As for Puritan Massachusetts being an ‘oligarchy,’ this fails to account for the electoral responsibility of the Commonwealths’ ruling officials and the limitations placed on their possessing broad, discretionary, powers. Finally, if Puritan Massachusetts simply imitated English precedents, it does not explain the rise of unique political and ecclesiastical institutions in New England, especially the revolutionary Puritan conception of the franchise, based, not on property, but on godliness.

The focus on godliness has, hopefully, helped to extricate one from interpretations that have been read into Puritanism from hypotheses that appear to be inherently enigmatic. In contrast, the godliness hypothesis places emphasis on explication instead of on prevailing or traditional conceptions regarding Puritanism. This use of an explicative hypothesis thus becomes akin to the use of multiple hypotheses, for it introduces, in the words of Clifford Geertz, a cultural anthropologist, ‘a multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another,’ which *prima facie* seem ‘at once strange, irregular, and inexplicit’.³³⁰ The advantage with this approach is that one can strive for a meaningful level of generality that will illuminate but not oversimplify.

The godliness hypothesis, therefore, is not only a theoretical proposition, but is a methodological tool of analysis to the extent that it reveals an underlying multiplicity of complex structures within Puritanism. This multidisciplinary approach and the parallel use of multiple sources of evidence allows for the addressing of a broader range of historical, attitudinal, and observational issues. However, the most important advantage presented with this hypothesis and the concomitant technique, is the development of converging lines of inquiry.

³³⁰ Clifford Geertz, *The Interpretation of Cultures* (Basic Books Inc, 1973) 10.
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Specifically, the godliness hypothesis synthesizes traditional webs of interpretation, which have equated Puritanism with democracy, theocracy, oligarchy, or English traditions. In this way, the godliness hypothesis provides a comprehensive and multiple explanation of the political events that took place in Massachusetts Bay. It does this by following a corroboratory mode, integrating various facts and previous interpretations in an attempt to provide a meaningful explanation as to how a religious ideal played a role in shaping political institutions and practices in Massachusetts Bay.

One primary finding with this approach is that the political character of the godly community cannot be so easily labelled. The Puritan desire to create a holy polis did not immediately translate into a democracy any more than it translated into a theocracy, or oligarchy; nor did it simply mirror English political institutions and practices. All that can be stated with any degree of certainty is that soon after the arrival of the Puritans, their community of visible saints quickly evolved into a cohesive political unit and centered itself around democratic precepts.

For this reason, the godliness hypothesis is closest to the view that equates Puritanism with democracy. But there is an essential difference. The godly ideal led to the acceptance and development of certain democratic and republican practices within the context of a relatively closed, corporate, religious community, where deference to authority was usually tolerated. Godliness explains the emergence of democracy, therefore, only as an indirect or secondary product of Puritanism, needing time to develop.

I. Speculations

If specific political attitudes and practices were derived from the ideal of godliness, the unanswered question is to what extent were these values propagated for the use of future Americans? That is, what is the relationship between Puritanism and the larger American culture? While a definitive answer to this question is beyond the scope of this paper, one can speculate that Puritanism and its component parts amounted to a formative ideology in the new world. Because their convictions had consequences in an ideologically-free environment, Puritan ideals and practices must have been of primary importance in the shaping and perpetuation of a coherent set of political ideas and practices. Consider that scholars have documented how established value systems can persist for generations, even

through revolutionary change.³³¹ Indeed, that Puritan values may have been transmitted, to some extent, is plausible when note is taken, for example, that all Founding Fathers of the United States were reared either in Massachusetts or Virginia.³³²

One scholar, Bernard Bailyn, noted that Puritan thought provided ‘the Revolutionary generation’ with a ‘major source of ideas and attitudes,’ in particular, the ideas associated with the covenant.³³³ To Bailyn, the elaborate system of Puritan thought erected in New England beginning in 1630, had been ‘consolidated and amplified’ by numerous writers throughout the seventeenth century, and was ‘channelled into the main stream of eighteenth-century political and social thinking’.³³⁴ In this sense, it is possible that Americans became products of their history, where ideology and institutions were neither entirely lost nor entirely new. In the words of Samuel Eliot Morison, ‘the institutions that the Puritans founded, Church, Commonwealth, Town, College, were so firmly established as to outlast the purposes for which they were intended. Church and College and Commonwealth have been patched and altered again and again, without losing all their original character’.³³⁵

To Bailyn and Morison, as well as others, Puritanism was clearly a formative ideology that was perpetuated for generations, if not centuries. However, the importance of Puritanism lies not in generalizations drawn from a broad historical situation, but in the comprehension of the complex practices, ideals, and institutions of Puritan society, as elucidated through a narrow focus. For it is only with a micro perspective that one can begin to discover the very essence of Puritanism as it affected the political culture of early Massachusetts Bay.

³³¹ Breen, above n 6, xvi.

³³² Baltzell, above n 4, 7.

³³³ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press, 1980) 32-33.

³³⁴ *Ibid* 32.

³³⁵ Quoted in Baltzell, above n 4, 7.

HOLMES AND DISSENT

Allen Mendenhall

Holmes saw the dissent as a mechanism to advance and preserve arguments and as a pageant for wordplay. Dissents, for Holmes, occupied an interstitial space between law and non-law. The thought and theory of pragmatism allowed him to recreate the dissent as a stage for performative text, a place where signs and syntax could mimic the environment of the particular time and place and in so doing become, or strive to become, law. Holmes's dissents were sites of aesthetic adaptation. The language of his dissents was acrobatic. It acted and reacted and called attention to itself. The more provocative and aesthetic the language, the more likely it was for future judges and commentators to return to that dissent to reconsider Holmes's argument—the more likely, that is, that non-law might become law. In this sense, language for Holmes was not just a vehicle for law but also law itself. This paper argues that Holmes's dissents both reflect and revise pragmatist philosophy and that the proliferation of dissents has to do with American pragmatism. Focusing on *Lochner v. New York* (1905), *Abrams v. United States* (1919), and *Bartels v. Iowa* (1923), this paper shows that Holmes's dissents represent an aesthetic adaptation of pragmatism that allows Holmes's writing to become memorable not just for the ideas it articulates, but also for the *way in which* it articulates those ideas.

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Mark Tushnet calls Oliver Wendell Holmes Jr. a “great dissenter” in the constitutional tradition.¹ What is a great dissenter? How and why does Holmes qualify? Tushnet suggests that great dissenters are those judges whose dissenting views have been vindicated by history.² Great dissenters are also rhetoricians.³ Holmes meets both criteria. First, judges and professors of law have for generations cited Holmes’s dissents favorably, and in the coming years, according to Ariel Lief, we must “look for complete vindication of [Holmes’s] role as a dissenter.”⁴ Second, no less than Ralph Waldo Emerson or Henry James, pragmatists with whom Holmes corresponded during various stages of his life, Holmes understood the import and flexibility of language. Known for “his trenchant turn of phrase,”⁵ Holmes was a wordsmith who “crafted his opinions with great care, convinced that one day they would come under the scrutiny of legal commentators.”⁶ He gave “varied and eloquent expression to his philosophy of life and of the law.”⁷ Whereas some Supreme Court justices, most notably Chief Justice John Marshall, larded their purple prose with loose Latin and lawyerisms, Holmes hammered out succinct, hard-hitting prose that smacked of urgency and playfulness at once.

Lief would disagree with Tushnet’s characterization of Holmes as a “great dissenter.” Lief dismisses the title “great dissenter” as “a description which would grossly misrepresent [Holmes’s] position.”⁸ Holmes was not “a voice crying in the wilderness.”⁹ By this Lief means that Holmes dissented neither often nor alone.¹⁰ Holmes explained his intellectual independence, or anti-independence, in this way: “If I think that I am sitting at a table I find that the other persons present agree with me; so if I say that the sum of the angles of a triangle is equal to two right angles. If I am in a minority of one they send for a doctor or lock me up; and I

¹ Mark V. Tushnet, ed., *I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases* (Boston, Massachusetts: Beacon Press, 2008) at xi.

² *Ibid.* at xxii.

³ *Ibid.* at xxi-xxii.

⁴ Alfred Lief, *The Dissenting Opinions of Mr. Justice Holmes* (Buffalo, N.Y.: Fred B. Rothman Publications, 1999) at xi.

⁵ David Henry Burton, *Oliver Wendell Holmes, Jr.* (Boston: Twayne Publishers, 1980) at 8.

⁶ David Henry Burton, *Political Ideas of Justice Holmes* (London and Toronto: Fairleigh Dickinson University Press, 1992) at 11.

⁷ Lief, *supra* note 4 at ix.

⁸ *Ibid.* at ix-x.

⁹ *Ibid.* at x.

¹⁰ “While he has not hesitated on occasion to stand alone, this has rarely been his fate—only once, indeed, in the long period covered by this collection. In seventeen of the fifty-five cases here reported the decisions from which he dissented were reached by a bare majority of the court and in twenty others his dissent was shared by two of his colleagues.” *Ibid.* at x.

am so far able to transcend the to me convincing testimony of my senses or my reason as to recognize that if I am alone probably something is wrong with my works.”¹¹ If this sentence is representative of Holmes’s thinking, then Holmes was not a naysayer who stood by himself against other justices. Indeed, Holmes was more likely to concur than to dissent.¹² When he dissented, other justices joined his opinion even if they did not coauthor it. Lief, *contra* Tushnet, cites Holmes’s opening lines from *Northern Securities Company v. United States*, Holmes’s first dissent as a Supreme Court justice, as evidence of Holmes’s hesitance to dissent: “I think it useless and undesirable, as a rule, to express dissent, [but] I feel bound to do so in this case, and to give my reasons for it.”¹³ Despite his claim that Holmes was not a frequent or go-it-alone dissenter, Lief allows that “at the points where Holmes’ philosophy of life and of the law clashed sharply with that of the majority of his colleagues [...] [Holmes] found it necessary again and again, in many different aspects, in winged words, to expound and justify that philosophy.”¹⁴ Perhaps Lief carves out an alternate path between his and Tushnet’s position on Holmes’s dissents, one that does not essentialize Holmes as contrarian or conformist.

In what follows I will saunter down this alternate path—the path of the law?¹⁵—to arrive at a happy conclusion: that Holmes *was* a great dissenter, not because he dissented often but because he dissented well. Holmes saw the dissent as a mechanism to advance and preserve arguments and as a pageant for wordplay. Dissents, for Holmes, occupied an interstitial space between law and non-law. The thought and theory of pragmatism allowed him to recreate the dissent as a stage for performative text,¹⁶ a place where signs and syntax could mimic the environment of the particular time and place and in so doing become, or strive to become, law. The language of Holmes’s dissents was acrobatic. It acted and reacted and called attention to itself. The more provocative and aesthetic the

¹¹ Oliver Wendell Holmes Jr., “The Natural Law” (1918) 32 Harvard Law Review 40.

¹² “To make his record for non-conformity complete, it is only necessary to add the fact that the opinions in which he has concurred in its judgment of the court or in which he has concurred in its judgment far out-number, in the ratio of eight to ten to one, those in which he has felt it necessary to record his dissent.” Lief, *supra* note 4 at x.

¹³ *Ibid.* at xi. Lief abbreviates the quotation. I quote the fuller version of the sentence from the case. See *Northern Securities Co. v. U.S.*, 193 U.S. 197, 24 St.Ct. 436, 468 (1904).

¹⁴ Lief, *supra* note 4 at x-xi.

¹⁵ C.f., Oliver Wendell Holmes, “The Path of the Law” (1897) 10 Harvard Law Review 457.

¹⁶ C.f., Richard Poirier’s comment that writing “is more surely the representation of writing itself as an activity, of thinking rather than thought, a dramatization of *how* life may be created out of words.” Richard Poirier, “Why Do Pragmatists Want to Be Like Poets?” in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, ed. by Morris Dickstein (Durham, N.C.: Duke University Press, 1998) at 352.

language, the more likely it was for future judges and commentators to return to the dissent to reconsider Holmes's argument—the more likely that non-law might become law. In this sense, language is not just a vehicle for law but also law itself.¹⁷ Is it not surprising that the most memorable judicial opinions are language games—that poets and other literati influence our Supreme Court justices? The prose of Benjamin Cardozo, Holmes's poetic successor on the Supreme Court,¹⁸ echoes that of Matthew Arnold,¹⁹ and Cardozo stands as “the best writer of nineteenth century prose to sit on the Supreme Court in the twentieth century,”²⁰ or perhaps more profoundly as “The Literary Judge.”²¹ “The beauty of his language,” Arthur L. Corbin muses of Cardozo, “made it the perfect expression of his thought.”²² The pragmatist judge Richard Posner calls Holmes and Cardozo rhetoricians and poets,²³ perhaps because the good judicial opinion is a cousin²⁴ of

¹⁷ C.f. the poem of lawyer and pragmatist Wallace Stevens: “Not Ideas About the Thing But the Thing Itself,” in *Stevens: Collected Poetry & Prose* (New York, NY: The Library of America, 1997) at 451-52.

¹⁸ “We need more judges like Holmes and his equally poetic successor on the Supreme Court, Cardozo.” Daniel J. Kornstein, “The Double Life of Wallace Stevens: Is Law Ever the ‘Necessary Angel’ of Creative Art?” (1997) 41 *New York Law School L. Rev.* 1187 at 1294.

¹⁹ “Cardozo’s literary model was Matthew Arnold, the great nineteenth century poet, essayist, critic, and moralist. Matthew Arnold’s graceful and urbane manner of expressing himself had a profound appeal for Cardozo, as it did for many others, and echoes of Arnold’s Olympian prose resonate in the judicial opinions and other writings of his gifted admire, Benjamin Cardozo.” David A. Nelson, “The Nature of the Judicial Process Revisited” (1995) 22 *Northern Kentucky L. Rev.* 563 at 564.

²⁰ Nelson, *supra* note 19 at 564.

²¹ John K. Konenkamp, “The Literary Judge—Benjamin Nathan Cardozo” (2000-2001) 46 *South Dakota L. Rev.* 830. To those who would object to my characterization of law as poetic, I offer Richard Poirier’s comment that “[p]oetry must not be thought of as a mere storehouse of wisdom, a treasure trove. It is, rather, an exemplary act or instrumentality for the continuous creation of truth, an act that must be personal and private and never ending.” Poirier, “Why Do Pragmatists Want to Be Like Poets,” *supra* note 16 at 353. Poirier also says, “In the category of serious poetry I of course include prose, any kind of writing in which the words speak to one another, sometimes across great textual expanses or among several texts; they clarify, inflect, argue among themselves; they merge into metaphoric or tonal concentrations, then self-divide and branch out toward other concentrations and developments. *Ibid.* at 347.

²² Arthur L. Corbin, “The Judicial Process Revisited: Introduction” (1961) 71 *Yale L. J.* 195 at 195.

²³ Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago, IL: University of Chicago Press, 1990) at 56-57.

²⁴ “The judicial opinion and the poem, at first blush, may appear mutually contrary: the judicial opinion asserts itself as stoic, conclusory and unyielding; the poem evolves as ethereal, non-committal and vulnerable. Readers of both may (justifiably) believe these opposing qualities define each genre. However, an alternative perspective exists of the (arguably) unlikely relationship between the judicial opinion and the poem.” Alyson Sprafkin, “Language Strategy and Scrutiny in the Judicial Opinion and the Poem” (2001) 13 *Cardozo Studies in Law and Literature* 271 at 271.

the good poem. And today Justice Antonin Scalia²⁵ has “perfected the ‘opinion as attack ad’ rhetoric, offering quotable criticisms that writers of op ed pieces can incorporate into their work without saying anything new.”²⁶ The function of language is interactive with law; judges like Holmes who realize this symbiotic relationship can harness the one to advance the other.

Because this essay relies on slippery signifiers—“dissent,” “pragmatism”—I will take pains to provide context and definition. This essay will describe the form and function of dissents and show how and why Holmes devised new ways of dissenting. During Holmes’s tenure on the Supreme Court, new technology and shifting social circumstances demanded that old legal concepts and frameworks adapt to the environment. Holmes sought to preserve familiar doctrines but to invest them with modified applicability. He sought continuity not only with the past but also with the future, inflecting his jurisprudence in clever ways. I hope that this essay itself inflects pragmatism in Holmesian fashion.

This essay focuses on three landmark dissents: *Lochner v. New York* (1905), *Abrams v. United States* (1919), and *Bartels v. Iowa* (1923). These dissents appear late in Holmes’s career and are representative of Holmes’s corpus, methodology, and jurisprudence. Interpreting the language of these dissents is tricky, for, as Thomas C. Grey notes, “all commentators agree [on] Holmes’ greatness as a prose stylist,” but when “combined with the range of competing interpretations of his work, even the brilliance of his prose suggests another unflattering account—Holmes the eclectic aphorist, whose purely literary talent for glittering phrases conceals a muddle of mutually inconsistent ideas.”²⁷ Grey’s claim notwithstanding, consistency is not part of Holmes’s jurisprudence, which is consistently inconsistent. “It was Holmes’s genius as a philosopher,” Louis Menand reminds us, “to see that the law has no essential aspect.”²⁸

²⁵ At least one writer has gone to great lengths to demonstrate the parallels between Holmes and Scalia. See Thomas F. Shea, “Great Dissenters: Parallel Currents In Holmes and Scalia” (1997) 67 Miss. L. J. 397.

²⁶ Tushnet, *supra* note 1 at xxii.

²⁷ Thomas C. Grey, “Holmes and Legal Pragmatism” (1989) 41 Stanford L. Rev. 787. Poirier levels this same charge against Emerson: “[T]he ‘Emerson’ who is said to have had such enormous influence on American life and American thinking is the aphoristic Emerson, which is not Emerson at all as I am able to understand him.” Poirier, “Why Do Pragmatists Want to Be Like Poets?” *supra* note 16 at 355.

²⁸ Louis Menand, *The Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001) at 339.

Loosed from the moorings of sectaries and sycophants, Holmes's jurisprudence privileges the practical and experiential over the ideological. Grey himself hints at this point when he declares that "while there are indeed multiple and apparently clashing strands in Holmes' thought, most of them weave together reasonably well when seen as the jurisprudential development of certain central tenets of American pragmatism."²⁹ Holmes's pragmatism anticipates and perhaps even activates the incipient anti-foundationalism that would come to mark legal studies well after Holmes's death. It has everything to do with William James's assertion that a "pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action, and towards power."³⁰ Holmes is part of an anti-dogmatic³¹ tradition "held together by its aversion to absolutes and foundationalism, its fascination with contingency and process, its emphasis on the relationality of the real, its respect for the ordinary, and its delight in moments when the ordinary becomes 'other' and the habitual suddenly unfamiliar."³² In short, Holmes mediates between ideological extremes and prizes workaday practice over epistemological or ethical foundations.

American pragmatism was for Holmes the linchpin between fixity and flexibility. It was the consistent application (fixity) of the rule of adaptability (flexibility): a forward-looking program of determining law and policy based on the consequences of previous actions and the predicted utility of future actions. It was a contextual and responsive exercise in probability. It induced cooperation and diplomacy rather than moving people toward some preordained canon or rule. In that sense it jettisoned claims of objective or absolute truth and so disregarded abstract standards for the constitution and validity of law. Law for Holmes is not a metaphysical certainty—it is whatever works. It is also language: that medium of symbols which is always contingent. Holmes once pronounced that "word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color

²⁹ Ibid.

³⁰ William James, *Pragmatism* (Cambridge: Harvard University Press, 1975) at 31.

³¹ Cf. this quote by Holmes: "What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism." Holmes, "The Natural Law," *supra* note 11 at 41.

³² Giles Gunn, "Religion and the Recent Revival of Pragmatism," in *The Revival of Pragmatism*, Morris Dickstein, ed. (Duke University Press, 2008) at 411-12.

and content according to the circumstances and time in which it is used.”³³ This attention to language is crucial to our understanding of Holmes’s pragmatism and his dissents.

PART ONE: PRAGMATISM AND ITS DISCONTENTS³⁴

Pragmatism is about filtering theory, investing old syntax with new semantics, and recontextualizing paradigms to fit more recent—perhaps more practical—networks of discourse. Theory, for the pragmatist, is organic. It adopts and adapts to its sociopolitical environment as an organism evolves through natural selection. Because “pragmatism” is a slippery signifier, the meaning of which is contentious and contextual, I should clarify how I use the term vis-à-vis Holmes. I mean “pragmatism” to refer to legal pragmatism, which includes several loose tenets: that laws are never *faits accomplis* but relational strategies for negotiating social relations; that truth—and true law—is not absolute but provisional and reflective of human limitations that stand “in quantitatively fixed relations to earlier phenomena”;³⁵ that pieties of human perfectibility and moral certainty are dispensable;³⁶ that social law does not exist apart from human promulgation;³⁷ and that commonsense rather than formalistic and formulaic guidelines ought to motivate judges.³⁸ I take these tenets as given. I do not question their validity—at least not here. This essay is not an occasion for undoing or fine-tuning our understanding of legal pragmatism.

³³ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

³⁴ With apologies to Freud.

³⁵ Oliver Wendell Holmes Jr., “Ideals and Doubts,” in Louis Menand, *Pragmatism: A Reader* (New York: Vintage Books, 1997) at 170. C.f. Oliver Wendell Holmes Jr., “The Path of the Law,” in *The Essential Holmes*, Richard Posner, ed. (Chicago, IL: The University of Chicago Press, 1992) (“The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations”).

³⁶ Legal pragmatism’s “core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans. Among the pieties rejected is the idea of human perfectibility; the pragmatist’s conception of human nature is unillusioned. Among the conceptualisms rejected are moral, legal, and political theory when offered to guide legal and other official decisionmaking.” Richard Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) at 3.

³⁷ “It is the merit of the common law that it decides the case first and determines the principle afterwards.” Oliver Wendell Holmes Jr., “Codes, and the Arrangement of the Law” (1870) 5 *Am. Law Review* 1, reprinted in Sheldon M. Novick, ed, *The Collected Works of Justice Holmes*, Vol. 1 (Chicago, IL: University of Chicago Press, 1995) at 212. See also Louis Menand, *The Metaphysical Club*, *supra* note 28 at 338.

³⁸ Posner, *Law, Pragmatism, and Democracy*, *supra* note 36 at 49-52.

The term “pragmatism” was not in circulation during the early years of Holmes’s long career. A young Holmes would not have declared himself a pragmatist.³⁹ Nevertheless, the term “pragmatism” gained purchase as Holmes aged, partially because of the fame (or notoriety) of such pragmatist thinkers as Charles Sanders Peirce,⁴⁰ William James, John Dewey, Jane Addams, and George Herbert Mead. Writers on Holmes, most notably Richard Posner,⁴¹ have assigned this signifier—“pragmatist”—to Holmes’s methodology. That is in part because Holmes, a habitué of the Metaphysical Club, hobnobbed with eminent pragmatists who appear to have influenced him. He befriended Henry James and Henry Adams and knew Ralph Waldo Emerson—to whom the future justice remarked, “If I ever do anything, I shall owe a great deal to you.”⁴² For a time Holmes admired William James,⁴³ although their relationship was strained because Holmes and James shared affections for the woman whom Holmes would later marry. Holmes came to appreciate John Dewey⁴⁴ and George Santayana.⁴⁵ All of these men and women paved the way for legal pragmatism because they influenced Holmes.

³⁹ Louis Menand, *Pragmatism*, *supra* note 35 at xix-xx.

⁴⁰ For a comparison of Holmes and Peirce and their commitment to pragmatism, see generally Cathrine Wells Hantzis, “Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.” (1988) 82 Nw. U. L. Rev. 541.

⁴¹ Posner submits that Holmes’s works *The Common Law* and “The Path of the Law” “supplied the leading ideas for the legal-realist movement (more accurately, the legal-pragmatist movement)—the most influential school of twentieth-century American legal thought and practice.” Richard Posner, “Introduction,” *The Essential Holmes*, *supra* note 35 at xi.

⁴² Holmes to Patrick Augustine Sheehan, Oct. 27, 1912, *Holmes-Sheehan Correspondence*, David Henry Burton, ed. (Port Washington, N.Y., 1976) at 51.

⁴³ “The friendship between Oliver Wendell Holmes and William James began to unravel in the 1870s, not long after the Metaphysical Club ended its brief life. In part the unraveling was just the ordinary weakening of the bonds of young male attraction in the presence of a different kind of attraction. Holmes married Fanny Dixwell in 1872; James married Alice Gibbens in 1878. But in part it was the consequence of a decision by each of the friends that what seemed a stimulating difference of opinion was also a personal difference deep enough to make for incompatibility. In the dispute between James and Chauncey Wright—the dispute over whether our wishes and desires have any effect on the business of the universe—Holmes sided, unequivocally, with Wright. He came to think James incurably soft-hearted, and James, in response, came to think Holmes repellently hard-headed.” Louis Menand, *The Metaphysical Club*, *supra* note 28 at 337.

⁴⁴ “Holmes did not discover Dewey until the latter’s *Experience and Nature* was recommended to him by a young Chinese friend. He began it skeptically; it seemed to be so badly written. But he read it twice in the winter of 1926-27, and wrote his impressions in five letters over a period of a year and a half. ‘He seems to me,’ Holmes said, ‘to have more of our cosmos in his head than any philosopher I have read.’ Holmes reread the book in 1929 when a second edition appeared, and recommended it to Sir Frederick Pollock. The only clearly intelligible sentences Pollock professed to find in it were the two pages Dewey had quoted from Holmes.” Max Harold Fisch, *Classic American Philosophers: Peirce, James, Royce, Santayana, Dewey, Whitehead*, 2nd ed. (Fordham University Press, 1996) at 8.

Holmes's personality advertised pragmatism. He despised the pieties of human perfectibility and certainty not just because they offered precarious justifications for legal policy—and they did and often do—but because he “was privately dismissive of people whose views he found sentimental or pious.”⁴⁶ Holmes could be downright obnoxious in these prejudices. James Bradley Taylor wrote that Holmes was “with all his attractive qualities and solid merits, wanting sadly in the noblest region of human character—selfish, vain, thoughtless of others.”⁴⁷ These qualities have nothing to do with pragmatism, but they call attention to Holmes's dismissiveness of individuals who, to him, represented absolutism. Holmes did not just reject abstractions and truth claims; he made a display of doing so. His at times flamboyant personality publicized pragmatism as he made sure, through behavior and not just writing, that his posterity would remember what he said and where he stood.

Holmes's pragmatism is controversial⁴⁸ because it is so unlike that of his counterparts: Dewey, Peirce, and James. Grey problematizes our thinking about Holmes as a pragmatist by calling attention to Holmes's own ambivalence about landmark pragmatists:

[W]hile Holmes did express admiration for Dewey, he never made clear what it was that he admired. And his more specific remarks about pragmatism and the other well-known pragmatists were critical, often harshly so. He condemned James' version of pragmatism as ‘humbug’; and while he apparently knew little of Peirce's ideas, he did not think highly of what he knew. In the end, what Holmes said directly about pragmatism and its exponents does not by itself support placing him in the pragmatist camp.⁴⁹

⁴⁵ See, e.g., Roger Kimball, “The Contribution of George Santayana,” in *The Genteel Tradition in American Philosophy and Character and Opinion in the United States*, James Seaton, ed. (New Haven, CT: Yale University Press) at 190.

⁴⁶ Louis Menand, *The Metaphysical Club*, *supra* note 28 at 338.

⁴⁷ *Ibid.* at 347 (citing James Bradley Thayer, Memoranda book D, James Bradley Thayer Papers, Harvard Law School Library, L MS 2148, vol. 3, 144).

⁴⁸ Those unversed in the history and theory of pragmatism—i.e., most of the legal community—are likely to be stumped by Holmes's antifoundationalism. As Gary Minda notes, “[T]here is much about Holmes that we still do not understand. We are still trying to figure out why Holmes is such an important figure in the development of American law. We are still trying to make sense of the cryptic nature of Holmes's legal theory. We are still struggling to appreciate the significance of Holmes's role in the development of American jurisprudence.” Gary Minda, “Commentary: The Dragon in the Cave” (1997) 63 *Brooklyn L. Rev.* 129.

⁴⁹ Grey, *supra* note 27 at 788.

I do not have the space and time to tease out Grey's comments⁵⁰ or to unpack the differences between legal pragmatism and its non-legal variants. Holmes's legal pragmatism overlaps with so-called philosophical pragmatism such that discussing one is fruitless without discussing the other; a thoughtful treatment of Holmes must attend to multiple conceptions of pragmatism. Whatever Holmes took pragmatism to mean, his application of this methodology supports Richard Rorty's later claim that pragmatists "do not think inquiry can put us more in touch with non-human reality than we have always been, for the only sense of 'being in touch' they recognize is causal interaction (as opposed to accurate representation)."⁵¹

Contra philosophical pragmatism, which Posner deems "orthodox" pragmatism,⁵² legal pragmatism regulates social relations and focuses on the everyday. "Everyday pragmatists," Posner clarifies in his characteristically roundabout way, "tend to be 'dry,' no-nonsense types"⁵³—presumably the types who regard "adherence to past decisions as a (qualified) necessity rather than as an ethical duty."⁵⁴ Judges who ascribe their *modus operandi* to such anti-foundational and precedent-based techniques can transform the useful or convenient into the legal or operative. "An everyday-pragmatist judge," Posner submits, "wants to know what is at stake in a practical sense in deciding a case one way or another. . . . [He] does not deny the standard rule-of-law virtues of generality, predictability, and impartiality, which generally favor a stand-pat approach to novel legal disputes. He just refuses to reify or sacralize those virtues. He dares to balance them against the adaptationist virtues of deciding the case at hand in a way that produces the best consequences for the parties and those similarly circumstanced."⁵⁵ A pragmatist judge might dissent on the grounds that the majority opinion abstracts into airy flourishes

⁵⁰ I will, however, provide these telling lines by Posner: "One reason for the disconnect between philosophical pragmatism and legal and political practice is that the propositions that define pragmatism are propositions of academic philosophy, a field that has essentially no audience among judges and lawyers—let alone among politicians—even when philosophy is taken up by law professors (some of whom have a Ph.D. in philosophy) who think it *should* influence law. This gap between theory and practice might be thought to imply that judges should be educated in philosophy—with emphasis on pragmatism! I doubt that that is a good idea, even if judges are considered, as politicians would not be, educable in philosophy." Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 11.

⁵¹ Richard Rorty, "Pragmatism as Anti-Authoritarianism," in *A Companion to Pragmatism*, Vol. 32, John R. Shook & Joseph Margolis, eds. (Malden, MA; Oxford; and Victoria, Australia: Blackwell Publishing Ltd., 2006) at 263.

⁵² Posner submits that "orthodox pragmatism has little to contribute to law at the operational level. It has become a part of technical philosophy, in which few judges or practicing lawyers take any interest." Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 41.

⁵³ Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 12.

⁵⁴ Posner, *Law, Pragmatism, and Democracy*, supra note 36 at 60.

⁵⁵ *Ibid.* at 12.

about “justice,” “rights,” and “equity.” Opinions that turn on such loaded terminology reveal more about judges’ personal ideologies than about the “meaning” of the terminology.

Dissents are not products of pragmatism, but they are conducive to pragmatism.⁵⁶ They emphasize the fallibility of law by suggesting that the majority or plurality opinion does not embody absolute or perfect legal principles. By conserving rules and practices that, although rejected in the case at hand, might prove workable in the future, dissents treat law as meliorative: a medium through which data and experience are transmitted, tested, preserved, revised, adjusted, and modified. If judicial opinions are the praxis—the locus where theory and practice converge—then dissents are where theory and policy collapse into a state of possibility.⁵⁷

⁵⁶ “Every judicial opinion misreads past precedent. No judge or group of judges can state unequivocally and without distortion the holding of a prior case or the precise rule to be applied in the case at hand. To find and apply a rule of law requires interpretation of past precedent, and the act of interpretation necessarily involves some degree of misreading. Antithetical criticism therefore should be applicable to all opinions—unanimous, majority, plurality, concurring, and dissenting.

Dissents are nonetheless an especially appropriate focus for antithetical analysis. The agonistic struggle by definition involves a certain element of isolation, because insofar as we are defined and determined by our predecessor's influence, we must, as part of the creative moment, separate our sense of identity from the past that constitutes our present. Breaking from the tradition, we find ourselves alone. This suggests that while both the majority and the dissent will misread precedent, the dissent will often present the more extreme misreading. In dissent, the Justice stands apart; similarly, in concurrence his theory will be his own, even while he agrees with the result.

It is possible, but less likely, that a majority opinion will advance a more radical misreading than a dissent, or even that a unanimous opinion, when viewed against its precedential background, will constitute a strong misreading. Collective misreadings do occur—the American Revolution, the Constitution, and several of the Amendments constitute strong collective misreadings on a grand scale—but they are much more difficult and consequently much less frequent. To be valued as great, one must stand out; while collective bodies do at times stand out as great, both the requirement of a radical break and the inherent exclusivity of the term suggest that ‘greatness’ will be found more often in an individual than in a committee. If the antithetical theory holds, then, revisions in the law will often surface initially in dissenting or concurring opinions, and only later, if they are truly strong, will they be incorporated into the mainstream.” David Cole, “Agon at Agora: Creative Misreadings in the First Amendment Tradition” (1986) 95 *Yale L. Journal* 857 at 869-70.

⁵⁷ “The use of a dissenting opinion as if it were a canonical authority indicates that the constitutional canon must be open to revision. After all, dissenting opinions could not possibly always have been authoritative. They must have been rejected positions at first and then at some later point found their way into a revisable canon. The fact that positions once rejected can sometimes become canonical raises the question of what distinguishes redeemed and redeemable rejected positions from rejected positions that never become authoritative. That question has been a popular one, and there is a profusion of literature on how and why certain dissents have become canonical. Most of those writings seek to identify formal, procedural, or circumstantial factors that contribute to the redemption and canonization of dissents. Moreover, they seek those factors in the texts or circumstances of the dissents themselves, assuming them to be properties of their

Holmes used dissents to refine and exposit legal pragmatism. Unlike most poets, whose writing does not automatically generate social change, Holmes's "poetry" automatically enacted social change. The medium through which Holmes expressed his "poetry" affected public policy.

Commentators have emphasized various aspects of Holmes's poetic pragmatism, including its prediction theory of law (in particular the "bad man theory"),⁵⁸ which entailed the divorce of morality from law; its utilitarianism,⁵⁹ which derived from the Englishmen Jeremy Bentham and John Austin;⁶⁰ its analytical positivism, which assailed purely notional theories of natural law;⁶¹ its consequentialism, which dovetailed with Benthamite utilitarianism;⁶² and its realism that couched law in terms of indeterminacy and arbitrariness.⁶³ A substantial body of law review articles has addressed these and other aspects of Holmes's pragmatism. Despite this attention, however, scholarship about Holmes's pragmatism has not satisfied scholars who cannot seem to reconcile Holmes's writings with the pragmatism of other self-proclaimed pragmatists (those whom Posner calls "orthodox"). *À la*

language, immanent ideas, or circumstances of authorship." Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *supra* note 57 at 244.

⁵⁸ "Holmes is often called a legal pragmatist on the basis of his "prediction theory" and his emphasis on experience in the evolution of law." Rand Rosenblatt, "Holmes, Peirce, and Legal Pragmatism" (1975) 84 *Yale L. Journal* 1123 at 1124.

⁵⁹ Holmes treated law as "a utilitarian instrument for the satisfaction of human desires." Grey, *supra* note 27 at 788.

⁶⁰ Holmes's "legal thought fit in with the utilitarian analytical jurisprudence of Bentham and Austin—the branch of nineteenth-century scientific positivism. But while ideas such as these are consistent with pragmatism, they are in no way distinctive to it." *Ibid.* at 795.

⁶¹ "Holmes's consequentialism contributed to the shift from a largely retrospective view of the judicial process to a more prospective view, and Holmes, more than anyone else, led the revolt against natural law." Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 103 (Chicago, IL: University of Chicago Press, 2000).

⁶² "[P]ragmatists applied the utilitarian test of consequences to theories, as well as to rules for action, on the ground that all beliefs were, directly or indirectly action-guiding and, accordingly, should be judged by their efficacy in leading the agent through experience successfully." Grey, *supra* note 27 at 803.

⁶³ "[I]t is true that Holmes was a central figure in the American movement known as Legal Realism, and it is true that that movement influenced the development of Critical Legal Studies (CLS)." Tim Griffin, "Introduction," in Oliver Wendell Holmes, Jr., *The Common Law* xxiv (Brunswick, NJ: Transaction Publishers, 2005).

Posner,⁶⁴ this essay about dissents does not try to prove or disprove strains of pragmatist thinking.

Dissents clarify not only how Holmes's pragmatism functions but also how it relates to networks of discourse. The contiguity between dissent and its opposite—consent or agreement—opens up a space for possibility. Holmes often situated himself in this liminal space. From here he could receive and transmit doctrine and cue judges to transform potentiality into actuality. He could even preserve that which was not doctrine but which might become doctrine. In a recent Supreme Court decision,⁶⁵ for example, both the majority and the dissent cite Holmes's dissents.⁶⁶ This intertextuality suggests that Holmes's dissents remain influential—so much so that they have become “law” decades after their authoring. Holmes appears to have realized how literary flair could call attention to dissents, increasing the likelihood that future judges would revisit dissents. If dissents could become theaters of performative text—a space of dramatic language—they could draw spectators. Dissents that rose to the level of literature could inspire and sustain re-readings. Law, especially case or judge-made law, is shaped by language, often the language of dissent or exception.⁶⁷ The more acrobatic the language of a dissent, the more likely that language will generate or become future law. Legal opinions congeal into canons just as literature congeals into canons.⁶⁸ To ensure their place in the canon, to preserve their argument for

⁶⁴ Posner says, “I couldn’t prove or disprove them if I tried, and . . . if one may judge by the interminability of philosophical debate, no one could.” Posner, *Law, Pragmatism, and Democracy*, *supra* note 36 at 10-11.

⁶⁵ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁶⁶ Writing for the majority, Justice John Paul Stephens cites to both an opinion and a dissent authored by Holmes. See *Kelo*, *supra* note 65 at 480 [citing Holmes’s opinion in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1931) (“the inadequacy of use by the general public as a universal test”)]; see also *Kelo*, *supra* note 65 at 487 [citing Holmes’s dissent in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (“The power to tax is not the power to destroy while this Court sits”). In *Kelo*, Thomas, dissenting, cites Holmes’s dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (“enact[s] Mr. Herbert Spencer’s Social Statistics”).

⁶⁷ C.f., Giorgio Agamben, *Homo Saver* (Stanford, California: Stanford University Press, 1998) at 1-29. This text interrogates Carl Schmitt’s notion of the state of exception.

⁶⁸ “In recent years, the constitutional canon has been a subject of growing interest and controversy among theorists as notable and diverse as Bruce Ackerman, Jack Balkin, Sanford Levinson, Philip Bobbit, William Rich, Richard Primus, and Suzanna Sherry. The thought, crudely put, is that there are certain texts apart from the Constitution—some are directly derivative, others are not—which resound so powerfully in our constitutional ear that they have hardened, in incompletely defined ways, into part of the fundamental law itself. This idea, in all of its permutations, is profoundly important for constitutional lawyers, particularly as our constitutional culture continues to quake, erupt, and reform along unforeseen and unforeseeable technological and communicative fault lines. After all, it is largely through the ongoing construction and reconstruction of the canon—the reconfiguration of Wittgenstein’s ‘fluid’ and ‘hardened’ propositions—that we accomplish modern

future judges, judges can write in a way that appeals to readers' sensation. Judges can disrupt habits and commonplaces of reading by stimulating sensation.

Arguing that fine, lasting art is what remains useful for future generations because of its "successive consequences" that are "indefinitely instrumental to *new* satisfying events," John Dewey posits that when art loses its utility or instrumentality, it is "quickly exhausted and satiety sets in."⁶⁹ The same can be said of dissents, which can be art: as soon as they lose their utility or instrumentality, dissents exhaust themselves and their potential to become law.⁷⁰ To avoid exhausting themselves, art and dissents must retain a sense of moving tendencies. This sense "supplies thrill, stimulation, [and] excitation" while maintaining a sense of completion, which "affords composure, form, measure, and composition."⁷¹ Just as works of art become classics that retain the "power to generate enjoyed perception or appreciation," so dissents become classics that attract judges and scholars.⁷² Dewey tends to speak of art narrowly in its capacity to bring about pleasure to particular individuals. But what happens when art is transmitted via media—legal opinions or dissents—that operate to control social relations and impact entire nations?

The meliorative processes of *stare decises* and the common law lend themselves to preserving and revising form, but only literary judges like Holmes can endow form

constitutional reform; or something akin to the five-staged 'constitutional moments' that Ackerman has so insightfully identified. And, as our discourse evolves to incorporate terms like 'superprecedent' and 'landmark statute,' it is critical that we continue to work towards a coherent theory of the canon and its function in constitutional practice." Ian Bartrum, "Constitutional Canon as Argumentative Metonymy," 18 William and Mary Bill of Rights Journal 327, 327-28 (2009).

⁶⁹ John Dewey, *Experience and Nature* (Mineola, N.Y.: Dover Publications, 1958) at 365.

⁷⁰ Dewey speaks of laws that become mere matters of form because they lose their ability to excite the reader: "Acts originally performed in connection with, say, the exchange of property, performed as part of the dramatic ceremony of taking possession of land, were not treated as mere evidences of title, but as having a mystic power to confer title.

"Later, when such things lose their original power and become 'mere matters of form,' they may still be essential to the legal force of a transaction, as seals have had to be affixed to a contract to give it force, even though there was no longer sense or reason in their use." Dewey, *Ibid.* at 376. The activities meant to appeal to the sensorial to illuminate law become merely vacant-seeming symbols once those activities become routine. Holmes's literary flair affords him wide latitude to prevent his dissents from become routine. His writing will not become a vacant-seeming symbol lost to history because it continues to be useful and instrumental: it continues to excite and provoke.

⁷¹ *Ibid.* at 376.

⁷² *Ibid.*

with a function: to excite or provoke. On this score, it bears quoting Dewey on form and art as if he were referring to judicial dissents: “‘Forms’ are not the peculiar property or creation of the esthetic and artistic; they are characters in virtue of which anything meets the requirements of an enjoyable perception. ‘Art’ does not create the forms; it is their selection and organization in such ways as to enhance, prolong and purify the perceptual experience.”⁷³ Holmes did not choose the form and framework of dissent, but he chose how to express himself within that form and framework. He selected and organized his syntax to arouse what Dewey calls perceptual satisfactions.⁷⁴ Holmes’s dissents are more than mere writing: they are stimuli. That is why they are canonized and occasionally become law.

PART TWO: THE DISSENT

A. BEAUTIFUL PARADOXES⁷⁵

Dissents are non-binding legal opinions written by judges who wish to register their disapproval of a majority or plurality opinion.⁷⁶ They define their content against some standard—the majority or plurality opinion—and announce themselves as exceptions.⁷⁷ Exceptions confirm and authorize rules at the same time that they call rules into question.⁷⁸ Although always part of the document proper—the decision as recorded on paper—dissents stand outside the law. They do not contain law except by reference to “the opinion.” They are not law but

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ “In the hierarchical world of legal authority, the notion of dissenting opinions as thus influential is at once paradoxical and intriguing. It raises numerous questions such as how particular dissents came to be renowned, why others were not, and what role the canonization of dissents has played in the development of American constitutional law. Yet the legal literature contains surprisingly little on the phenomenon of canonical dissents or dissenters.” Anita S. Krishnakumar, “On the Evolution of the Canonical Dissent” (2000) 52 Rutgers L. Rev. 781 at 783.

⁷⁶ “The practice of dissent in the Supreme Court dates back almost to the Constitution’s ratification, and judicial reversals of decisions issued over dissent surfaced as early as the mid-1800s. Yet, no dissents became canonized until the twentieth century.” Krishnakumar, *supra* note 75 at 783-84.

⁷⁷ “The canonicity of a dissent is not a function of the dissent itself but of the later court or courts that redeem it and make it canonical. [...]The canonization of dissent is largely a product of later courts’ normative approval; the courts that revise the canon by redeeming dissents do so chiefly on the basis of their view of the substantive merits of those dissents.” Primus, *supra* note 57 at 247-248.

⁷⁸ C.f., Agamben, *supra* note 67 at 1-29.

may and often become law.⁷⁹ Lawyers frequently cite dissenting opinions to distinguish their positions or to support a change in law; judges, likewise, frequently extract law from dissenting opinions.⁸⁰

Dissents are beautiful paradoxes. They acknowledge and defy the official decision while conserving arguments that supposedly have lost their practical bearing. Variations of these arguments are not yet, or may once have been, law. The paradox of a dissent is that it both reinforces and undermines the rule, the law. It is at once law and not law, suspended in a state of potentiality. From this potentiality—this liminality—springs forth the rhetoric necessary to maintain an illusion of legitimacy should a previous position, recorded in a dissent, become viable or desirable and eventually legal. In the common law tradition, putatively at least, all rules must derive from other rules, must have as their *telos* something more than human whim. Laws that do not maintain an illusion of legitimacy—that reduce law to the fashions and fancies of judges—lose credibility in the mind of the *polis*. Illegitimate laws are difficult to enforce without resort to tyranny. The *polis* does not respect illegitimate rules, and law is in a sense whatever the *polis* accepts, though custom and prescription, as law. If anything, the *polis* fears illegitimate rules, the enforcement of which entails force, fear, and violence. The *polis* resists illegitimate rules by the same mechanisms—force, fear, and violence—that the state employs to maintain supremacy. At first blush, dissents would seem to fly in the face of a legal system that prizes foundations. But what happens when foundations give way? What happens when the *polis* no longer accepts a supposed principle of law? What happens when the *polis* no longer believes in the

⁷⁹ “Prior to the New Deal, the Supreme Court was extremely reluctant to admit judicial error, let alone to overturn its earlier decisions. Indeed, it feared that doing either would undermine its legitimacy as final arbiter of the nation's law. The Court's unwillingness to impugn its earlier judgments in turn left little room for the vindication or subsequent canonization of its dissents. In fact, on the few pre-New Deal occasions where the resurrection of dissenting opinions might have been appropriate, the Court instead struggled so assiduously to distinguish its prior caselaw—dissents and all—that it eschewed association with dissenting opinions from the past.” Krishnakumar, *supra* note 75 at 785. Nevertheless, dissent came to be viewed differently after the New Deal: “The New Deal [...] forever changed the landscape against which dissenting opinions operated. As with the *Hepburn-Knox* and *Slaughter-House-Lochner* turnabouts, the New Deal Court's “switch in time” effected substantial constitutional change absent any formal amendment. This time, however, the change was preceded by a pronounced public and political rejection of the Old Court's economic rights jurisprudence that forced the recognition of past judicial error, and paved the way for the exaltation of those who had seen it coming.” *Ibid.* at 788.

⁸⁰ “[E]ver since the New Deal made possible the canonization of dissenting opinions, Justices who differ from the majority have had an incentive to dissent rather than compromise, in the hope that their vision might someday be vindicated or immortalized.” Krishnakumar, *supra* note 75 at 825.

efficacy of decisions like *Dred Scott v. Sanford*,⁸¹ *Plessy v. Ferguson*,⁸² or *Korematsu v. U.S.*?⁸³ Either the *polis* reasons that such decisions perverted or else mistook the proper foundations and principles, or the *polis* rejects foundations and principles as illusory. Holmes favors the latter position insofar as he pooh-poohs law as a metaphysical essence. He employs dissent as a strategy to destabilize efforts to essentialize law.

Dissents are like hyphens: in-between spaces where legality is uncertain. Dissents bridge law and non-law. They are the threshold of authority and legitimacy—two mutually reinforcing if not interchangeable concepts. They are, then, the ever-prospective crux of legality. Tushnet submits that judges dissent because other judges “were vindicated by history,” because the “nation came to see the wisdom of *their* [the judges’] constitutional views, and the errors of the majorities that temporarily prevailed.”⁸⁴ Accordingly, dissents are aspirational and precedential, rooted as they are in a history of un-rootedness.⁸⁵ Tushnet adds that “[o]nce we realize, as we must, that some dissenters were wrong at the moment they dissented and wrong thereafter, the story about dissent, and about how history decides who is the winner and who the loser, becomes more complicated.”⁸⁶ But complicated how? Because some dissents languish in a juridical purgatory, waiting to be admitted as law? In a way, yes. “[P]ublishing a dissent,” Tushnet claims, “might be damaging to the law itself” (and therefore complicated) because the “mere existence of a published dissent will give some people—those who agree with the losing side, for example—one reason to hold on to their belief about what the law

⁸¹ 60 U.S. 393 (1857) (holding that Congress did not have the power to create citizenship for slaves; that free slaves were not citizens as contemplated by the Federal or Missouri Constitutions; that the Missouri Compromise was unconstitutional; and that the right of property in slaves is affirmed in the Federal Constitution).

⁸² 163 U.S. 537 (1896) (holding constitutional the state mandate that private services that were “separate but equal” met the requirements of equal protection).

⁸³ 323 U.S. 214 (1944) (holding constitutional the exclusion order leading to the internment of the Japanese on American soil).

⁸⁴ Tushnet, *supra* note 1 at xi.

⁸⁵ “Redeemability [of a dissent] is better understood as a status conferred retrospectively by the later courts that restructure the constitutional canon by reversing yoked pairs. The yoked-pairs model implies that the possibility of redemption is built into the structure of dissents and of the constitutional canon. Reversing a set of yoked pairs involves a reimagining of the constitutional tradition. When such a reversal involves the redemption and canonization of a dissent, it often involves the reimagining of dissenting opinions and of the Justices who authored them. By reimagining a dissenting Justice and presenting him as a heroic figure, and by simultaneously reimagining the meaning of that Justice’s dissenting opinions, courts reshape the constitutional canon and construct authorities on which they can then rely in cases before them.” Primus, *supra* note 57 at 251.

⁸⁶ *Ibid.*

really is.”⁸⁷ Similarly, the appearance of disunity among judges weakens the import and impact of law as set down by the majority, especially if “at least some dissents may be explained as signals from judges to litigants about how to frame future similar cases to increase the chance of success for the argument the dissenting judge supports.”⁸⁸

The dissent is often a laboratory for experimentation, a place where new ideas (or creative insistences upon old ideas) are proposed and documented but not necessarily released upon the *polis*. Dissents are available to the *polis* in that they are public record, but they do not obtain to the *polis*, which may disregard them if it so pleases. Dissents, then, are mouthpieces for change, sometimes forward-looking change, sometimes backward-looking change. In either case, they point beyond themselves and toward the future, sometimes, if not always, incorporating the past. They represent what Rorty calls the accomplishment of pragmatism: the turn of human focus from eternity to futurity.⁸⁹ The implication of dissents is that law is a linguistic game subject to change; law is not a divination of God’s will or else the majority or plurality opinion would not be law.

Dissents are not static but always already in a state of “becoming,” although what they are becoming (perhaps irrelevant, perhaps legal) is always unknown. They toy with sameness and difference: they are like but not like law. Always understood in relation to similar networks of meaning—sedimentary case precedent, controlling statutes, influential law reviews, and the like—dissents imitate and transform the received discourse and ceremonial protocols⁹⁰ of judicial decision-making. They demand different levels of comprehension from different audiences: journalists, law professors, judges, lawyers, law students, and so on. Their success (when they are successful) turns on their underlying cognitive dissonance, their provocativeness, and their ability to tap into sensation.⁹¹

⁸⁷ *Ibid.* at xii.

⁸⁸ Vanessa Baird and Tonja Jacobi, “How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court” (2009) 59 *Duke L.J.* 183 at 186.

⁸⁹ Richard Rorty, “Pragmatism as Anti-Authoritarianism,” *supra* note 51 at 263.

⁹⁰ Acknowledging the authors of the majority opinion, maintaining a polite or else playful stance toward that majority opinion, citing proper case law and precedent—all part of the decorum, etiquette, or procedure of dissents.

⁹¹ “Dissents become canonical for the same reasons that majority opinions become canonical, namely, because of the views that later constructors of the canon take toward the holdings which can be attributed to those earlier opinions. Cases with little abiding significance disappear from casebooks, and their majorities fade as well as their dissents. And where opinions have continuing

Justice Clarence Thomas dissented in *Kelo v. City of New London* on the grounds that the majority had either misconstrued or misread “public use” to mean “public purpose,”⁹² two terms that, although similar in sound, evoke very different meanings that, when applied to actual people and situations, have very different consequences. My point in referencing Thomas (who cites Holmes!) is to suggest that judges are chronically aware of the nuances and implications language. Dissenting judges realize the import and impact of language upon jurisprudence; the more intelligent ones know that aestheticized dissents are likelier to remain in the public purview for years if not decades to come. The author of a dissent ensures—or could ensure—by way of language, what Joan Richardson calls “the successful survival of [text] by making it pleasurable.”⁹³ If dissents represent dead law, then poetry can reanimate the dead and bring old principles back to life. The more pleasurable a dissent, the more memorable it is; the more memorable a dissent, the more likely it will *prehend* law.

B. HOLMES’S DISSENTS AND HISTORICAL CONTEXT

“Each age knows its own ills,” Dewey declares, “and seeks its own remedies.”⁹⁴ The operative word here is “remedies.” Holmes felt that the remedy for social ills, which resulted in legal disputation, was experience—a word “with a number of associations,” but used by Holmes “in a particular sense.”⁹⁵ Holmes meant experience as “the name for everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, prejudices—what he called ‘the felt necessities of the time.’”⁹⁶ So cast, experience is the guiding organ of law, which is evolutionary. Law addresses or ought to address everyday human habits that correspond with future outcomes—that bring about predictable results. What is predictable for one generation is not predictable for the next because habits change over time.

importance, the canonical and the anti-canonical are both preserved, each drawing its significance from the other.” Primus, *supra* note 57 at 302-303.

⁹² *Kelo*, *supra* note 65.

⁹³ Joan Richardson, “Recombinant ANW: Appetites of Words” (2005) 13 *Configurations* 117 at 130. Richardson’s reference is to Darwin, who sought to make *The Origin of Species* a lasting text.

⁹⁴ John Dewey, “The Need for a Recovery of Philosophy,” in *The Essential Dewey: Pragmatism, Education, Democracy*, Larry A. Hickman and Thomas M. Alexander, eds. (Bloomington, IN: Indiana University Press, 1998) at 68.

⁹⁵ Menand, *The Metaphysical Club*, *supra* note 28 at 341.

⁹⁶ *Ibid.* (citing Holmes, “The Common Law” (1881), in *The Collected Works of Justice Holmes*, Vol. 3 at 115).

Holmes realized this fact all too well. During the course of his career both on and off the bench, he saw America through Civil War and Reconstruction, the opening of the transcontinental railroad, the admission of fourteen states into the Union, the invention of the Ford Model T, the assassination of two presidents, the implementation of suffrage for all citizens, Prohibition and its repeal, WWI, and on and on. Add to these the momentous events of Holmes's boyhood, and Holmes's life begins to seem representative of the life of post-Revolutionary and pre-modern America. Who better than Holmes to argue that changes in environment necessitate changes in law? Who better than Holmes to maintain that law is not fixed—that it is, was, and always will be developing according to sociopolitical settings? For Holmes, law at any given time is or ought to be a cumulative system of rules and regulations subject to the tendencies of an ethos or era. Law is based in experience; it is a constantly mutating organism.

Holmes's pragmatism has to do in part with Dewey's "never-ending quest to resolve the various tensions that intermittently threaten to disrupt the harmony of the individual's life career with those broader social conditions."⁹⁷ His pragmatism troped Emerson⁹⁸ by looking to history to resolve binary tensions and seeking third-ways between divergent paths.⁹⁹ Because law is not tied to some *telos* towards which society must work, it ought to be a lubricant for social relations: a mechanism facilitating as much cooperation and as little friction as possible. Law is negotiation and compromise occasioned by passing social circumstances. It is in this way provisional, an interim authority or place-marker. Those, like Thomas Jefferson¹⁰⁰ or William Blackstone, who purport that law is the complete grasp of absolute truth or the application of universal realities to human society not only

⁹⁷ Philip W. Jackson, "John Dewey," in *A Companion to Pragmatism*, John R. Shook and Joseph Margolis, eds. (Malden, MA: Blackwell, 2009) at 64.

⁹⁸ "The contextualist and anti-foundationalist aspects of American pragmatism have their roots in Emersonian thought. Emerson emphasized the need for American intellectuals to critically recreate*110 America through discourse and action. Emersonian thought emphasizes the importance of having a sense of historical consciousness which prefigures the contextual and anti-foundational aspects of pragmatism." Erin Rahne Kidwell, "The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review" (1998) 62 Alb. L. Rev. 91 at 109-110.

⁹⁹ "Ample evidence exists that Holmes favored the application of this pragmatic middle-road between conflicting paradigms of legal thought." Kidwell, *supra* note 98 at 98.

¹⁰⁰ See, e.g., Allen Mendenhall, "Jefferson's 'Laws of Nature': Newtonian Influence and the Dual Valence of Jurisprudence and Science" (2010), 23 The Canadian Journal of Law & Jurisprudence 319 (2010).

miss the mark but also the opportunity—the opportunity to improve, smooth, and pacify human interaction.¹⁰¹

Holmes worked at the nexus of practice and theory, law and art. His jurisprudence departed from received precedents and canons without dismissing the notions of precedent and canonicity, upon which all dissents—especially his—depend.¹⁰² A dissent that is not aesthetic is likely to be exhausted. Holmes, in keeping with his Darwinian worldview, poeticized the language of dissent to ensure that his arguments were not exhausted.

“[T]he aesthetic has a structure,” and this structure “is identical to whatever is meant by thinking during a particular historical moment, even if at the time it is initially encountered it is not recognized as thinking, but rather cast as a form of feeling in opposition to or in contrast to what is then commonly accepted as thinking.”¹⁰³ Joan Richardson, with Darwin, claims that the work of poetry “is to accommodate human beings to their creaturely actuality, stretching the perpetual vocabulary to provide space and form for the animal, for feeling, the aleatory, accidental, irrational element.”¹⁰⁴ Just as law is organic, molding and shaping at the same time it is molded and shaped, so poetry is organic—and more successful “the more it focuses attention [...] to enable its integration and expression within the *pitch/time* grid of a culture.”¹⁰⁵

Wallace Stevens, a lawyer-poet-pragmatist, spells out Richardson’s argument in the modernist American context. “It is,” he says, “one of the peculiarities of the imagination that it is always at the end of an era” because “it is always attaching

¹⁰¹ C.f., Rorty’s suggestion that if Dewey had read Freud, he would have seen Freud as “helpful in forcing us to stop looking outside the human community for salvation, and making us instead explore the possibilities offered by social cooperation.” Rorty, “Pragmatism as Anti-Authoritarianism,” *supra* note 51 at 265.

¹⁰² “Canonical texts, which we might see as having ‘hardened’ in the Wittgensteinian sense, make up the channels through which more ‘fluid’ propositions of constitutional meaning then flow. But precisely because these texts function as metonyms—not as narrow or literal statements of law—their propositional content will change as the associated concepts they connote are realigned within constitutional culture and practice. It is thus ever a two-way street: the canon channels the practice, but, in turn, the practice reshapes the canon. And, of real significance for practitioners, a deeper understanding of these processes may provide more sophisticated tools with which to exercise long-term influence on constitutional meanings.” Bartrum, *supra* note 68 at 329.

¹⁰³ Joan Richardson, *A Natural History of Pragmatism* (Cambridge University Press, 2007) at 224.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

itself to a new reality, and adhering to it.”¹⁰⁶ He adds, “It is not that there is a new imagination but that there is a new reality. . . . It exists for individuals according to the circumstances of their lives or according to the characteristics of their minds.”¹⁰⁷ For Stevens, the role of the poet “is not to be found in morals”;¹⁰⁸ likewise, for Holmes the role of the judge is not to be found in morality. Perhaps the role of pragmatist-poets, among whom I would number Holmes and Stevens, is to be anti-foundational; for Richard Poirier claims that “the central task of the pragmatist-poet [is] to ‘turn away from’” familiar and knowable forms of life and “even from your *own* creations, your *own* ‘facts,’ for fear that these, too, will become fixed and fixing.”¹⁰⁹ The antifoundationalist approach allows law to be an ongoing, constant corrective, just as poetry is always responsive and never unmediated by the social. Consider these telling words that follow the claim that judges can be poets:

In an age where the lines between poetry and literary interpretation are increasingly deconstructed, and in a legal culture that has seen Legal Realism evolve into Critical Legal Studies, it is not implausible to claim that Supreme Court Justices are creative. At a minimum, the Justices are creative insofar as the situations they face demand that a standing body of law be consistently reinterpreted and tailored to novel facts. It may often be impossible simply to fit the facts before them into the puzzle of the Constitution and case law; in landmark cases, it is clear, the Justices alter the puzzle itself and create law. Thus, while judicial legitimacy requires faithful adherence to precedent, legal development turns on creative acts. As a result, we call judges who follow precedent legitimate, but those who successfully break from it great.¹¹⁰

Holmes was great because he employed antifoundationalism as he exercised poetry in his legal positions—which were themselves pragmatic and responsive to community discourse—and called attention to dissent, which preserves arguments that otherwise would become exhausted. His dissents rescue arguments that could one day seem preferable to the arguments currently in force as law.

Holmes’s theories were tied to practice. That is to say, practice and theory were, for him, mutually reinforcing concepts. Holmes did not seek to marry theory and practice but to suggest that the two are always already one in the same. One might

¹⁰⁶ Wallace Stevens, “The Noble Rider and the Sound of Words,” in *Stevens: Collected Poetry & Prose*, *supra* note 17 at 656.

¹⁰⁷ *Ibid.*

¹⁰⁸ Stevens, *supra* note 17 at 660.

¹⁰⁹ Richard Poirier, “Why Do Pragmatists Want to Be Like Poets?” *supra* note 16 at 354.

¹¹⁰ David Cole, “Agon at Agora: Creative Misreadings in the First Amendment Tradition” *supra* note 56 at 858-59. Cole basis his entire article in the theory of Harold Bloom, who was himself influenced by pragmatism.

say of Holmes's "law" what Philip W. Jackson says of Dewey's "truth": "for the pragmatist, truth [law] is prospective. It lies in the future. It awaits verification. It is something [like the proposition in a dissent!] to be discovered through experimentation, not an empirical fact that is already established."¹¹¹ Dewey's brand of pragmatism is like Holmes's in that it is an open system, a process, a disciplined inquiry—an acknowledgment that things past determine things present, that neither past nor present stands outside time and space. Law, like language, is not constant or *a priori*. Nor does it spring out of a vacuum. It is "simply and empirically judicial behavior" insofar as "what judges *say* is law."¹¹² Put another way: "A rule may be written down, it may express the will of the sovereign, it may be justified by logic or approved by custom; but if courts will not enforce it, it is not the law, and lawyers who bet their cases on it will lose."¹¹³

Holmes's theories, as manifest in his legal opinions, demand classification because they are espoused in a methodology that refuses ideological or metaphysical stability. Holmes's methodology consistently rejects consistency. It resists claims to absolute truth and goes about its business as a scientist: diligent and thorough, testing what works and disregarding or postponing what does not. Writing is the judge's craft and industry. It is the tool by which he or she articulates policy and shapes or responds to social conflict. For Holmes, law, like language, is a social construction meant for use and application.¹¹⁴ Law is not preordained or immanent in the universe; it is plastic and posited and made up of words. As a linguistic construct, it is not a hidden absolute waiting to be discovered. After all, he who seeks finds—and finds what he wants. Judges purporting to excavate natural law principles from divine or moral order are really imposing legitimizing theories onto biases and preconceptions. Menand hones this point: "Holmes thought that learning the abstract legal doctrines on which judicial decisions are expressly based—what used to be called 'black letter law'—was therefore poor training for a lawyer. Judges do invoke these doctrines when they are explaining their decision, but (as Holmes was pointing out when he volunteered to use the same principle to decide a given case either way) the doctrines are never sufficient to account for the result reached."¹¹⁵ Although Holmes did not believe in doctrine

¹¹¹ Jackson, *supra* note 97 at 60.

¹¹² Menand, *The Metaphysical Club*, *supra* note 28 at 343.

¹¹³ *Ibid.*

¹¹⁴ "[L]aw, like language, is a practice, an interactive communicative enterprise that legitimizes particular acts or utterances based on their usage and acceptance within a specific community and context. It is, in other words, impossible to say what *McCulloch v. Maryland*, for example, 'means' in absolute terms; rather, to understand that text's constitutional significance we must look to how it is used in the constitutional conversation." Bartrum, *supra* note 68 at 328-29.

¹¹⁵ Menand, *The Metaphysical Club*, *supra* note 28 at 342.

as absolute truth, or perhaps *because* he did not believe in doctrine as absolute truth, he used dissents to store ideas that might become useful in the future. A later judge, looking for a convenient, practical, or uncontroversial way to decide the case at hand, might look to Holmes's stock of dissents to find an alternative solution. The judge would then trope Holmes's tropes, which are tropes of other tropes—and all of this troping would address current social conflicts whose resolution requires new prescriptions.

The remaining sections of this essay contextualize three landmark dissents according to their time and place in American history. These dissents show how Holmes's pragmatism relates to the dissent as a rhetorical medium. They show how Holmes enacts law with poetry, how his diction and syntax have the mechanical impact of exciting readers while at the same time signaling particular legal positions. Holmes writes to vast audiences—to those who have and those who have not been initiated into legal discourse. But his language is coded to appeal to specific groups and interests: judges, intellectuals, editors, men of industry, society women, and on and on. These appeals represent an “Emersonian vision of creative democracy,”¹¹⁶ a “constitutional experiment in popular sovereignty that is America.”¹¹⁷

The following dissents also evidence what Menand says of the word: “Each time it is used in a new sentence, each time it appears in the company of different other words, a word strikes out in a new semantic direction, but it also pushes off, so to speak, from the accumulated history of previous uses generated by its presence in the company of previous words.”¹¹⁸ Legal language carries heavy political freight in American law with its etymologies dating back to Roman law, British common law, and the New World judicial culture in which previously unthought-of disputes required resolution through Old World paradigms. The history and etymology of jurisprudence in America demonstrate that at some point language can graduate into law—but only when used by judges and others with coercive powers bestowed by the sovereign. The quality of words “constitutes a kind of energy, which the poet,” or the poetic judge, “with effort and vigilance, can harness, or channel, by making a composition of words that is alive to all the ways in which bits of language can hitch up to other bits of language, and also to the ways in which the hitching and unhitching alters the directions and the energies of all the

¹¹⁶ Kidwell, *supra* note 98 at 93.

¹¹⁷ *Ibid.*

¹¹⁸ Louis Menand, “Pragmatists and Poets: A Response to Richard Poirier,” in *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture* (Duke University Press, 2008) at 362.

bits involved.”¹¹⁹ Language can be poetry; poetry can be political; poetry can manipulate or persuade. Words are problematic; they can constitute law or command. Poetry can conceal the coercive nature of commands and beatify that which is not always beautiful.

PART THREE: A TRIAD¹²⁰ OF DISSENT

A. LOCHNER V. NEW YORK (1905)

Lochner is among the most famous if not most formative cases in American legal history.¹²¹ It is what “blissfully unversed” lawyers associate with “unbridled

¹¹⁹ Louis Menand, “Pragmatists and Poets: A Response to Richard Poirier,” *supra* note 118 at 362. Menand goes on to say the following: “The trap is the belief that by harnessing words in this sense you can get something out of them; or rather, that you can get out of them something you intended to get or wanted to get out of them, when in fact the more tightly your harness, the more it is the case that the words are getting something out of you instead. The danger, in short, is that you will invest, in the *form*, rather than in the process, of your writing, your sense of your self. There is a point at which you will be tempted to step back from the canvas, and in that moment of self-satisfaction, you will mistake as final and determinate what can only be indeterminate and forever vulnerable to future hitchings and unhitchings. And as with words, so with selves. Words have this duplicity because they cannot come to rest on some point of referential relation, on a relation to something that is not another word. And because no word is exempt from this condition, because there can be no word to serve as the anchor for other words, linguistic relations are irremediably unstable. You can see how it is that this way of thinking about poetry can be called pragmatist.” *Ibid.* at 362-63.

¹²⁰ I have very deliberately reserved this discussion for section three, which is itself divided into three parts, because of Charles Sanders Peirce’s attention to triads. Of this attention, Rorty claims, “[Peirce’s] God was a finite deity who is somehow identical with an evolutionary process which he called ‘the growth of Thirdness.’ This quaint term signifies the gradual linking of everything up with everything else through triadic relationships. Rather strangely, and without much in the way of argument, Peirce took all triadic relationships to be sign-relations, and vice versa. His philosophy of language was intertwined with a quasi-idealistic metaphysics.” Rorty, “Pragmatism as Anti-Authoritarianism,” *supra* note 51 at 259. Rorty adds that “James and Dewey both admired Peirce, and shared his sense that philosophy must come to terms with Darwin. But they sensibly paid little attention to his metaphysics of Thirdness.” *Ibid.*

¹²¹ “[I]t is perhaps true that no case illustrates the metonymic nature of the constitutional canon better than *Lochner*. It has lent its name to an entire chapter of constitutional history: the so-called *Lochner* Era. But what exactly are the associated meanings to which the metonym points us? What do we mean when we accuse someone of ‘Lochnering’? Some modern commentators have suggested that the case’s metonymic meaning remains unclear; that it is difficult to say with any certainty what is wrong with *Lochner*. But this confusion is, I think, rhetorical, as scholars struggle to draw a principled distinction between the Court’s efforts to protect the liberty of contract in the early twentieth century, and its determination to enforce civil and reproductive rights under Earl Warren and Warren Burger. I suggest that, in truth, all of these uncertainties—the revilement, the

judicial activism.”¹²² It is “a shorthand description of a court overreaching its constitutional authority and thwarting a majority will as represented in the legislature.”¹²³ Holmes positions himself—his dissent—against this so-called judicial activism and alongside the majority will. For that reason, the blissfully unversed legal community has always tried to tie Holmes to some label—conservative, progressive, and so on—to make sense of his dissent.¹²⁴ Putative “progressives” laud Holmes’s dissent for challenging the interests of big-business and industry and for sticking up for the “little guy” or the “worker,”¹²⁵ whereas putative “conservatives” celebrate Holmes’s dissent for its rejection of judicial activism and its deference to the legislature.¹²⁶ Self-described progressives and self-described conservatives are wrong on this score; in their attempts to appropriate Holmes to fit their particular causes, they miss the mark but enable the

revision, the distinctions, and the clarifications—are simply part of an ongoing battle to distill *Lochner*’s metonymic meanings within constitutional practice. They are a manifestation of the continuing struggle to reclaim or refine the ‘hard’ spot the case occupies in the constitutional riverbank; the perpetual effort to define what *Lochner* stands for, or, more importantly, what it stands against.” Bartrum, *supra* note 68 at 347.

¹²² Bartrum, *supra* note 68 at 348.

¹²³ *Ibid.*

¹²⁴ “First, there is the problem of assessing Holmes’s popularity and the meaning to be attributed to his famous dissent in *Lochner v. New York*. Is the orthodox wisdom about Holmes’s dissent correct in portraying Holmes as an enemy of substantive due process? Was Holmes a modernist hero who helped to push us into the twentieth century, or was Holmes a troubled modernist thinker who was still caught up in the nineteenth century jurisprudence of his day? What explains the popularity of Holmes’s *Lochner* dissent in the progressive era, and why did it take so long for Holmes to be lionized?” Minda, *supra* note 48 at 129-30.

¹²⁵ “Professor Felix Frankfurter was the first to praise Holmes, with a eulogistic essay in the *Harvard Law Review* entitled *The Constitutional Opinions of Justice Holmes*. It took some time for others to follow suit, but during the late 1920s and early 1930s, a series of articles appeared in the *New Republic* and other progressive New Deal magazines hailing Holmes as the ‘idol’ of the progressive movement and casting him as ‘the great dissenter.’ The authors of these articles were members of the liberal elite who sought to promote the New Deal and embraced Holmes’s methodology as a means of reversing the Old Court’s jurisprudence and ushering in President Roosevelt’s reforms. It was this conscious desire to elevate Holmes that led Frankfurter to compare Holmes’s reasoning to John Marshall’s in one of his eulogistic *Harvard Law Review* essays about the Justice—for such comparison lent legitimacy to the progressives’ project to convince the nation and the Court of the New Deal’s consonance with the Constitution. Similarly, others praised Holmes’s ‘faith that ... our social system is one of experimentation subject to the ordeal of experienced consequences,’ and commented that ‘no judge who has sat upon the bench has ever been more progressive in his attitude.’” Krishnakumar, *supra* note 75 at 792-793.

¹²⁶ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* 45 (New York: Free Press, 1990).

canonization of Holmes's dissent—the first such dissent to become canonized in American jurisprudence.¹²⁷

Lochner reached the Supreme Court as an appeal of a ruling by the Court of Appeals of New York, which held that an employer had violated a New York labor statute prohibiting employers from allowing employee bakers to work more than 60 hours per week or 10 hours per day.¹²⁸ The employer owned a biscuit, bread, and cake bakery, and he allowed—indeed required—a certain baker to work more than 60 hours in one week.¹²⁹ The employer was convicted of violating the labor statute.¹³⁰ He filed suit in the County Court of Oneida County, lost, appealed to the New York Supreme Court, lost, appealed to the New York Court of Appeals, lost, and then appealed to the U.S. Supreme Court.¹³¹ At the Supreme Court level, Justice Peckham, writing for the majority and reversing the New York decisions, held in favor of the employer. He reasoned that the right to contract free of government interference was a protected liberty under the Fourteenth Amendment,¹³² that the labor statute was not necessary to ensure the health and welfare of bakers,¹³³ that bakers' tasks were not so dangerous or unhealthy as to justify the legislature's interference with them,¹³⁴ and that restricting bakers' working hours had little relation to the statute's alleged purpose of enhancing the quality of bread.¹³⁵ Therefore, the labor statute disrupted the liberty to contract and impeded business activities in violation of the U.S. Constitution.

¹²⁷ Krishnakumar, *supra* note 75 at 788.

¹²⁸ *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905).

¹²⁹ *Ibid.* at 46-47.

¹³⁰ *Ibid.* at 47.

¹³¹ *Ibid.* at 47-51.

¹³² *Ibid.* at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution”).

¹³³ *Ibid.* at 58 (“There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker”).

¹³⁴ *Ibid.* at 59 (“We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee”).

¹³⁵ “It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to

Holmes disagreed with the majority. “This case is decided upon an economic theory which a large part of the country does not entertain,” he said.¹³⁶ Ever the pragmatist, he declared that he would not decide whether he agrees with the statute but that, if forced to do so, he would “desire to study it further and long before making up my mind.”¹³⁷ This comment, the pragmatist significance of which is lost on many legal commentators, is clearly a gesture towards Peirce, James, Dewey and their various inquiry-based methodologies. Critical of abstractions and ideological absolutes, Holmes “strongly believes that my agreement or disagreement has nothing to do with the *right* of a majority to embody their opinions in law.”¹³⁸ Because “rights” are for Holmes vague pieties with no corresponding substance or matter, their existence cannot be proved and thus reliance on them is both strange and revealing of judges’ predispositions. If a thing cannot be said to exist, and that thing determines the way a judge rules, then that judge owes decisions to a foundation that is ontologically and therefore logically suspect.

Holmes goes to great lengths to portray the Constitution as organic, responsive, and contingent, and to point out the flaws of claiming the Constitution as representative of any particular ideological schema. He says, for instance, that

a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.¹³⁹

The Constitution, so interpreted, is adaptive, meliorating, and accommodating. It does not service the sociopolitical fetishes of particular groups but addresses and applies to all groups irrespective of ideology. It is, in short, an umbrella document that facilitates compromise. Therefore, Holmes explains that “[g]eneral propositions do not decide concrete cases” because decisions depend on “a judgment or intuition more subtle than any articulate major premise.”¹⁴⁰ Decisions, then, are not tied to grand ideological programs but to sensation and experience; and to the extent that sensation and experience are inadequate criteria

the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.” *Ibid.* at 64.

¹³⁶ *Ibid.* at 75.

¹³⁷ *Ibid.* at 75.

¹³⁸ *Ibid.* at 75, emphasis added.

¹³⁹ *Ibid.* at 75-76.

¹⁴⁰ *Ibid.* at 76.

for judgment, judges should rule so as not to “prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”¹⁴¹ Here we can see the influence of Dewey’s democratic impulse.

Aware that the labor statute had origins in other, similar historical paradigms, Holmes directs readers’ attention to the fact that this statute is simply the latest in a long line of precedent from ancient Sunday and usury laws to more modern prohibitions on lotteries.¹⁴² A proper court opinion would revise and extend these antecedents to fit the contemporary industrial and economic context. A proper court opinion would also look to received models and patterns rather than making up untested rules anchored in improvable and improbable chimera like “rights.”

What did it mean for Holmes’s generation that America had long adhered to rules and regulations that stand in contradistinction to the majority’s newfound principle of liberty? Holmes states that the “liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by law schools, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”¹⁴³ Holmes seems to be suggesting that the colorful principle of liberty that the majority discovered seemingly out of thin air actually contradicts many laws and institutions of the workaday world. If the majority’s discovery is a true first principle, an absolute foundation, then business relations as we know them must be revamped, dismantled, and rewritten, for they adhere to false principles and non-foundations. Holmes, in other words, informs the majority that its ruling would, if taken to its logical ends, mean the total collapse of life in America.

In what is perhaps the most famous and quoted line of the *Lochner* dissent, Holmes announces that the “14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”¹⁴⁴ I can think of few Supreme Court phrases that so locate readers in a particular ethos or era. Having contextualized the labor statute within an historical framework, Holmes launches into this remark about Spencer as if to trumpet the situational nature of the case. Holmes appears to have *prehended* later courts’ citations to his dissent “not as a justification for overturning the Old

¹⁴¹ Ibid.

¹⁴² Ibid. at 75.

¹⁴³ Ibid. at 75.

¹⁴⁴ Ibid.

Court's established line of precedent, but in recognition of its ultimate vindication and as an admonition against repeating the egregious mistakes of the *Lochner* era."¹⁴⁵ Holmes's dissent effectively canonized the pragmatist idea that "judges should not measure the constitutionality of legislation based on their agreement or disagreement with its substance."¹⁴⁶ Holmes, who, more than other justices, understood the varieties of American experience, realized how temporary were the fashions and fancies of the day; he anticipated both the canonization of his dissent as a "judicial reaction to the country's lived experience" as well as the changing times that would demonstrate "the vicissitudes of *Lochner*-style jurisprudence," which later courts rejected in an effort to follow Holmes and "guard against analogous mistakes in the future."¹⁴⁷ Holmes's attention to the experiential leads him down the path toward a Deweyian majoritarianism holding that "the majority have the right to 'rule' because their majority is not the mere sign of a surplus in numbers, but is the manifestation of the purpose of the social organism."¹⁴⁸ This attention to the experiential is not only a major mark of Holmes's pragmatism but also part of what makes the *Lochner* dissent "politically convenient for later generations of lawyers and judges" who use the case to attack both progressive and conservative policies.¹⁴⁹

Another mark of Holmes's pragmatism is his simultaneously diplomatic and poetic language. Aware of the sheer power of written words, Holmes remarks, profoundly if passingly, "Every opinion tends to become a law."¹⁵⁰ Words on a page, in other words, can come to control what the *polis* can or cannot do. It would seem to follow that dissents, which do not count as opinions, would secure for themselves the possibility of becoming law (or opinions) by appealing to the eye and the ear and therefore to the intellect. Holmes's most diplomatic sentences are those with qualifiers—"If it were a question whether I agreed," "or if you like as tyrannical," "may not," "some"—exhibited so that they signaled and reflected the process that Dewey would later, in a book Holmes often recommended,¹⁵¹ call a "tendency."¹⁵²

¹⁴⁵ Krishnakumar, *supra* note 75 at 789-90.

¹⁴⁶ *Ibid.* at 790.

¹⁴⁷ *Ibid.*

¹⁴⁸ JOHN DEWEY, 1 THE EARLY WORKS OF JOHN DEWEY, 1882-1898 234 (Jo Ann Boydston, ed.) (Southern Illinois University Press, 1969).

¹⁴⁹ Howard Gillmore, "De-Lochnerizing *Lochner*" (2005) 85 Boston Univ. L. Rev. 859 at 861.

¹⁵⁰ *Lochner* at 76.

¹⁵¹ See footnote 44.

¹⁵² Dewey, Experience and Nature, *supra* note 69 at 373.

“The idea of tendency,” Dewey explains, “unites in itself exclusion of prior design and inclusion of movement in a particular direction, a direction that may be either furthered or counteracted or frustrated, but which is intrinsic.”¹⁵³ Holmes’s discounting of a prior design for law represents itself in syntax that insists on rolling and tumbling forward as if toward some particular direction—but not a direction necessarily involving a “point or goal or culminating stoppage.”¹⁵⁴ Instead, Holmes’s aim seems to be the “perception of meanings such as flexibly directs a forward movement.”¹⁵⁵ Holmes follows his four long opening sentences, for instance, with diction that pitches headlong across the page, tripping over commas and at last running into a period: “It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.”¹⁵⁶ With impeccable timing, he then offers this short, clipped statement: “A more modern one is the prohibition of lotteries.”¹⁵⁷ This syntax variation results in a footstep-like rhythm supplemented by the regulated succession of “s” and “th” sounds: “settled,” “various,” “decisions,” “*this*,” “*that*,” “constitutions,” “state,” “laws,” “ways,” “as,” “legislators,” “*think*,” “as,” “injudicious,” “as,” “*as this*,” “*with this*,” “*with*,” “*the*.” Add to this alliteration the other alliterative combinations—“l” as in “laws,” “life,” “legislators,” “like,” “liberty”; “t” as in “It,” “court,” “state,” “constitutions,” “state,” “regulate,” “might,” “contract”; “r” as in “various,” “court,” “regulate,” “contract”; “w” as in “ways,” “which,” “we,” “which,” “with,” “with”—and this sentence begins to seem like poetry. Many rhymes and near rhymes—“ways” and “laws,” “with” and “this” and “injudicious,” “state” and “regulate,” “tyrannical” and “liberty”—complement this impression. The poetry itself seems to enact on the page what Dewey treats as the alternative to a complete stoppage: the end that is “an end-in-view and is in constant and cumulative reenactment at each stage of forward movement,” the end that is “no longer a terminal point, external to conditions that have led up to it,” the end that is “the continually developing meaning of present tendencies—the very things which as directed we call ‘means.’”¹⁵⁸ The poetry seems to draw attention to an end that is not an end at all. This is the process of “art and its product,” and at any given stage of the process, the elements of the process represent “a work of art.”¹⁵⁹ By saying things like “[t]he other day we sustained the Massachusetts vaccination law,”¹⁶⁰ Holmes

¹⁵³ *Ibid.* at 373.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Lochner* at 75.

¹⁵⁷ *Lochner* at 75.

¹⁵⁸ Dewey, *Experience and Nature*, *supra* note 69 at 373.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Lochner* at 75.

reminds his readers that this work of art is not some magisterial phenomenon sprung from the mind of a Romantic genius; rather, it is the product of the quotidian functions of ordinary business.

The beat and tempo of Holmes's sentences here testify to Jacques Lenoble's assessment of the musical metaphor in the pragmatist jurisprudential context: "Comme l'atteste la métaphor musicale, la qualité des variations s'exprime lorsque, au départ d'un theme connu, ells ouvrent sur des interpretations stimulantes et meme parfois déstabilisantes, révélant ainsi un visage nouveau de ce qui semblait déjà trop connu ("As evidenced by the musical metaphor, the quality of variation is expressed when, departing from a familiar theme, they open to the stimulating interpretations and even sometimes destabilizing [interpretations], thus revealing a new face of what seemed already too well known").¹⁶¹ Just as a particular piece of music borrows from and mimics other movements and sequences while enacting movements and sequences of its own, so Holmes's dissent refers to other laws while readjusting them to fit his particular time and place—except that Holmes's musicality occurs in the medium of dissent. His words dance across the page as if to a rhythm. It is this musicality that makes his dissent something besides mere objection: something likely to become law.

Lochner is memorable not, as one would expect, because of its holding, but because of its anti-holding or dissent.¹⁶² The dissent confirms that Holmes "served less as prophet or as conscience of the Court and more as the greatest—or only—literary figure of the *Lochner* Court" because he "used his words as weapons to puncture platitudes, expose the empty lawyers' rhetoric [...], and [...] clarify the true stakes and motives driving the justices' opinions."¹⁶³ His dissent is especially resonant in light of Tushnet's and Lief's remarks (cited at the beginning of this essay) about "great dissenters" and "vindication"; for Anita S. Krishnakumar calls this dissent "thoroughly vindicated."¹⁶⁴ Without becoming a work of art, without its musicality, this dissent probably would not have become the canonized text that it became.

¹⁶¹ Jacques Lenoble, "Au-delà du Juge: Des Approches Herméneutique et Pragmatiste à une Approche Génétique du Concept de Droit" (2007) 1 *European Journal of Law & Society* 1 [available at <http://www.ejls.eu/2/33FR.pdf>].

¹⁶² *Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor." Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *supra* note 57 at 244.

¹⁶³ Gerald Leonard, "Holmes on the *Lochner* Court" (2005) 85 *Boston Univ. L. Rev.* 1001 at 1003.

¹⁶⁴ Krishnakumar, *supra* note 75 at 789.

B. ABRAMS V. UNITED STATES (1919)

The *Abrams* dissent is another of Holmes's vindicated texts.¹⁶⁵ The facts of *Abrams* are less business-as-usual than the facts of *Lochner* because of their implications for a nation at war. The defendants, five Russian-born individuals, three of whom considered themselves rebels, revolutionists, or anarchists, were charged with conspiring to violate the Espionage Act of Congress when they published statements deemed disloyal to the United States, which, at the time of publication, was at war with Germany.¹⁶⁶ The defendants argued that the prosecution lacked the evidence needed to convict them of inciting resistance to the war and of curtailing the production of ammunition.¹⁶⁷ More broadly, the defendants argued that the Espionage Act was unconstitutional because it conflicted with the First Amendment.¹⁶⁸ Writing for the majority, Justice John Hessin Clarke employed the "bad tendency" test rather than the "clear and present danger" test, thereby holding that substantial evidence supported the finding that defendants incited violence and curtailed ammunition,¹⁶⁹ that the Court did not have to evaluate the sufficiency of the evidence as to each count,¹⁷⁰ and that the defendants had not convinced the court that their pamphlets merely intended to thwart setbacks to the Russian cause.¹⁷¹ Accordingly, the Court upheld the defendants' conviction.

Holmes dissented in what was later called "as strong a self-revision as American legal culture has known."¹⁷² The only sitting justice to have fought in the Civil War, the bloodiest of all America's conflicts, Holmes wrote with an uncommon authority on martial matters. Furthermore, his understanding of Peirce's essays on pragmatism may have influenced his writings about free speech, which conjure up associations with social Darwinism.¹⁷³ Because modern warfare was dangerously

¹⁶⁵ "Years later, a majority of justices vindicated Holmes's minority position, and free expression became a constitutional 'lodestar.'" Stephen M. Feldman, "Free Speech, World War I, and Republican Democracy: The Internal and External Holmes" (2008) 6 First Amend. L. Rev. 192.

¹⁶⁶ *Abrams v. U.S.*, 250 U.S. 616, 40 S. Ct. 17 (1919).

¹⁶⁷ *Ibid.* at 619.

¹⁶⁸ *Ibid.* at 618-19.

¹⁶⁹ *Ibid.* at 623.

¹⁷⁰ *Ibid.* at 624.

¹⁷¹ *Ibid.*

¹⁷² Cole, *supra* note 56 at 882.

¹⁷³ "The pragmatist view of free speech, if one could call it that, was set out in an essay written by Peirce entitled 'The Fixation of Belief,' to which Holmes was apparently exposed while in the Club. Peirce examined and rejected several ways in which an idea or belief could become accepted as true, including what he called the method of authority—namely, through 'an institution . . . which shall have for its object to keep correct doctrines before the attention of the people . . . having at the same time power to prevent contrary doctrines from being taught, advocated, or

new, and because communicative media had become more advanced, Holmes's dissent in *Abrams* seems to reflect new social circumstances. That Holmes dissented here is especially remarkable because in two previous decisions—*Schenck v. United States*¹⁷⁴ and *Debs v. United States*¹⁷⁵—Holmes affirmed convictions under the Espionage Act. Both mimetic and groundbreaking, his dissent is an exercise in fallibilism. “By dissenting in *Abrams*,” submits one law professor, “Holmes not only argued that the Constitution tolerated dissent, he also exemplified the dissent.”¹⁷⁶ Yielding to the pressures of the moment, adapting his thinking to placate critics of his earlier decisions,¹⁷⁷ Holmes nevertheless maintained extant legal propositions while revising¹⁷⁸ and repackaging them to suit the exigencies of the case at hand.¹⁷⁹ Indeed, Holmes's entire career was chameleon-like when it

expressed.’ Peirce preferred ‘the method of science.’ Applied to ideas, this method would begin with doubt about the validity of a certain idea; this would be followed by a period of testing and experimentation, what Peirce termed ‘the struggle to attain belief,’ and would only end when doubt was laid to rest, at least until some new information was presented that would cause new doubt.

One can easily see the parallel between Peirce's period of experimentation and Mill's belief that free speech was necessary to allow correction of wrong opinions and ideas, a parallel Holmes surely recognized. Another philosophical view that was closely related to Peirce's pragmatism, and which can easily be adapted to support free speech, is that of Social Darwinism, the belief that the superior cultural, social or ideological system is that which, like the biological species in Darwin's work, survives the struggle for life. This adaptation of Darwin's theory, like Peirce's pragmatism, had its roots in the scientific revolution of the late nineteenth century; both were attempts to transfer the perceived superiorities of the scientific method to the search for philosophical truth. Social Darwinism, like pragmatism, can be used to buttress the argument for free speech—ideas, like biological entities, should be free to struggle, unfettered by suppression, in the community, with those ideas that gain popular acceptance deemed to be the ‘survivors’ and thus superior. That Holmes was strongly influenced by Darwinist thought during the period is beyond doubt.” David S. Bogen, “The Free Speech Metamorphosis of Mr. Justice Holmes” (1982) 11 Hofstra L. Rev. 97 at 120-21.

¹⁷⁴ 249 U.S. 47 (1919).

¹⁷⁵ 249 U.S. 211 (1919).

¹⁷⁶ Robert Cover, “The Left, the Right, and the First Amendment: 1918-1928” (1981) 95 Md. L. Rev. 349 at 373.

¹⁷⁷ See, e.g., Fred D. Ragan, “Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and The Clear and Present Danger Test for Free Speech: The First Year, 1919” (1971) 58 J. Am. Hist. 24 (submitting that criticism during the *Debs* decision caused Holmes to change his mind). See also Stephen M. Feldman, *supra* note 165 at 229-234.

¹⁷⁸ In the dissent, Holmes “revised the test he had enunciated in *Schenck* by elaborating on the elements of proximity and degree.” Cover, *supra* note 176 at 884.

¹⁷⁹ “[T]he different tone of the *Abrams* dissent is not evidence of a marked change in Holmes' view of free speech, but is rather the product of Holmes' frustration at what he considered the misreading by critics and the public of his position in *Schenck*. The same constitutional standard that Holmes urged in *Abrams* to protect the defendant's speech was consistently applied in upholding the convictions in *Schenck*, *Frohwerk* and *Debs*. Tracing the development of Holmes' view of free speech throughout his legal career will demonstrate both that the major step was taken in *Schenck* and that the seeds of what became the “clear and present danger” doctrine were planted

came to interpreting the First Amendment.¹⁸⁰ Rather than belaboring the legal technicalities of the case, we will look chiefly at those moments of the dissent that smack of pragmatism.

Holmes describes each count against the defendants and then undertakes a close reading of the leaflets that brought about the defendants' conviction. The leaflets are no doubt provocative; as propaganda, though, they are not unpredictable. That Holmes attends closely to these texts might have something to do with his Dewey-like valuing of "speech for its role in a dynamic process in which shifting interest groups are vying for dominance in a continually changing world,"¹⁸¹ or it might simply be a response to the majority opinion that also undertakes a close reading. In either case, it is revealing that Holmes cloaks his commentary about truth in terms of language, especially in light of his closing paragraph professing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."¹⁸² This line echoes Peirce and James and their treatment of human faculty as pure matter capable of ascertaining truth, which "is only the expedient in our way of thinking."¹⁸³ Another of Holmes's echoes of Peirce and James is couched in the vocabulary of epistemology: "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."¹⁸⁴ Recalling Jonathan Edwards,¹⁸⁵ Emerson,¹⁸⁶ James,¹⁸⁷ and *prebending* Stevens, Holmes here "distinguishes between an external reality, which humans are unable to understand (although the aspiration to understand the universe is a quintessential human characteristic), and a much more pragmatic notion of truth in the context of societal decision-making."¹⁸⁸ Holmes's assertion that truth is the valued currency of the "speech market" recalls James's belief that

early in Holmes' life, though Holmes' skepticism and his reluctance to depart from prevailing legal doctrine combined to prevent those seeds from bearing fruit until his seventies." Bogen, *supra* note 173 at 99.

¹⁸⁰ Bogen's article is remarkable in its breadth and attention to Holmes's biography as a catalyst for his decision-making. See generally Bogan, *supra* note 173.

¹⁸¹ Irene M. Ten Cate, "Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses" (2010) 22 *Yale Journal of L. and the Humanities* 35 at 39.

¹⁸² Abrams at 630.

¹⁸³ William James, *Pragmatism: A New Name for Some Hold Ways of Thinking, Popular Lectures in Philosophy* (New York: Longmans, Green, and Company: 1907) at 222.

¹⁸⁴ Abrams at 630.

¹⁸⁵ See Richardson, *supra* note 103 at 24-61.

¹⁸⁶ *Ibid.* at 62-97.

¹⁸⁷ *Ibid.* at 98-136.

¹⁸⁸ Cate, *supra* note 190 at 40.

truth “happens to an idea” and “*becomes* true, is *made* true by events,” and it affirms James’s claim that truth’s verity “*is* in fact an event, a process: the process namely of its verifying itself, its veri-fication.”¹⁸⁹ Truth, like currency, is evaluated by its ability to function in the marketplace and to become acceptable as a unit of exchange. The meaning of truth, like the meaning of currency, is always embedded in a seemingly endless chain of signification. Coins and bills are not value but metaphors for value. Standing in place of the *res*, always subject to appreciation and depreciation, they are ideas about worth but not worth itself.

Holmes’s references to truth are “best read as referring to choices made by majorities or dominant forces in response to internal and external challenges to the status quo,” and are best understood as “based primarily on [their] role in safeguarding a process by which decision-making factions can be formed.”¹⁹⁰ Accepting an idea in the marketplace means that a majority considers that the idea is acceptable and practical. An idea about truth *is* truth to the extent that it becomes legal tender. Whatever most people¹⁹¹ think is true at any given time is temporarily true. Put this way, Holmes’s take on an un-essentialized truth seems rather Deweyian because of the emphases on majoritarianism. Apropos this connection, we should consider the democratic overtones in Holmes’s proposition that “the expression of deviating opinions and ideas, no matter how objectionable they are believed to be, deserves protection because of the role of such speech in the pursuit of truth.”¹⁹² Looking at truth through a Deweyian democratic lens allows us to sidestep designs of general principles, just as Holmes does when he declares that “time has upset many fighting faiths” and “we have to wager our salvation upon some prophecy based upon imperfect knowledge.”¹⁹³ It allows us, furthermore, to see Holmes as keen on the idea that, in Dewey’s words, “a democratic society must, in consistency with its ideal, allow for intellectual freedom and the play of diverse gifts and interests in its educational measures.”¹⁹⁴

¹⁸⁹ William James, *The Meaning of Truth: A Sequel to Pragmatism* (New York, London, Bombay & Calcutta: Longmans, Green, and Co., 1914) at vi.

¹⁹⁰ Irene M. Ten Cate, “Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses” (2010) 22 *Yale Journal of L. and the Humanities* 35.

¹⁹¹ “One of Holmes’s guiding convictions was that the dominant forces in the society are entitled to have their way.” Vincent Blasi, “Reading Holmes Through the Lens of Schauer: The Abrams Dissent” (1997) 72 *Notre Dame L. Rev.* 1343 at 30.

¹⁹² Cate, *supra* note 190 at 36.

¹⁹³ *Abrams* at 630.

¹⁹⁴ John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Macmillan Company, 1916) at 357.

That truth is contingent¹⁹⁵ upon time, place, and popular will means that we do not have to be unconditionally bound to ideas that have become irrelevant or harmful.¹⁹⁶ It also means that we do not necessarily measure truth based on external *res* but on how well “truth” works. If it does not work, then it is not true and thus is not “it”; if it is not true and thus is not “it,” then it does not work. Certain things work in some contexts but not in others. When they work, they are true; when they do not work, they are not true. But we cannot know what works and what does not work unless we “come to believe even more than [we] believe the very foundations of [our] conduct that the ultimate good desired is better reached in free trade in ideas.”¹⁹⁷ Saying that ideas should compete in a marketplace is akin to saying that our knowledge of truth is incomplete and so needs constant updating and refining and weeding out of the practicable from the impracticable.¹⁹⁸ The opposite of a competitive marketplace would be a space where a truth claim has attained monopoly status such that all inquiry ceases. A Darwinian might say that this space lacks the requisite variation necessary to evolve.¹⁹⁹ In a competitive marketplace of ideas, no knowledge or truth is fixed.

¹⁹⁵ “Meaning and truth are dependent on experience and driven by the future, not the past. Whether the sun truly rises in the east and sets in the west is not determined and definitively answered by contemplating some “ideal” solar system beyond our capacity to experience. The answer begins in our prior experiences of sunrises and sunsets. Its confirmation only comes with the dawning of each new day.” Kidwell, *supra* note 98 at 96.

¹⁹⁶ “Thought, both analytical and intuitive, is seen as a perpetual dynamic of doubt and belief. It is a continuum of seeking and finding, testing and verification. The ideal of foundational knowledge, firm, fixed and immutable, is a mythical construct of humanity’s hubris and folly. What everyone truly gets by on, from the simplest to the genius, are reasonably grounded beliefs. These must be confirmed and reconfirmed, consciously and subconsciously, individually and communally. This process takes place wholly within the continuum of experience. Repeated verification of the “facts” of existence through experienceable phenomenon is required to maintain such reasonable systems of belief. This is so whether the system encompasses science, religion, law, ethics, aesthetics, or any other aspect of our individual and communal existence.” Kidwell, *supra* note 98 at 96-97.

¹⁹⁷ *Abrams* at 630.

¹⁹⁸ “An unregulated marketplace of ideas encourages free thought not so much by determining the equilibrium of the moment as by keeping low the barriers to entry, barriers that take the form not only of coercive sanctions but also social and intellectual peer pressures toward conformity. The sheer proliferation of ideas in a free market complicates perceptions in a manner that helps to weaken such barriers. In addition, the market metaphor makes a statement about the dynamic and chronically incomplete character of understanding and the value of intellectual contest and innovation.” Blasi, *supra* note 191 at 27.

¹⁹⁹ “The constructive, urgent role that speech can play in the evolution of beliefs under a pragmatist conception of truth insulates Holmes’s market metaphor from some of the standard criticisms to which it is subjected. The value of free trade in ideas does not depend on the assumption that there is an objective, perdurable truth to be discovered. It does not depend on the claim that personal beliefs are more or less independent of the believer’s social position, psychological propensities and needs, adventitious experiences, and ideological inheritance. Those assumptions might be implicit in a market metaphor that evoked a finely calibrated measurement of the equilibrium of well-

All thought is tested and tried. Its validity must be proven by practice—hence Holmes’s claim in *Abrams* that the Constitution “is an experiment, as all life is an experiment.”²⁰⁰

In “Natural Law,” Holmes opines that there “is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk,” and he adds that “this demand is at the bottom of the philosopher’s effort to prove that truth is absolute and of the jurist’s search for criteria of universal validity which he collects under the head of natural law.”²⁰¹ Holmes recalls these lines in the *Abrams* dissent when he submits, “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition” because to “allow opposition by speech seems to indicate that you think the speech impotent.”²⁰² These words, besides poking fun at cocksure deontologists, call for embracing ideas with practical bearing and for rejecting ideas requiring or purporting to know absolute certainty. According to these words, then, judges ought to reject teleological principles maintaining that law is readily and conclusively knowable; rather, judges ought to treat law as an experiment constantly in need of improvement. Judges ought to look to the consequences of judicial decisions as instructive about future action and not as constitutive of meaning or revelatory about law. Law is neither definite nor secure; it is tentative and malleable. For that reason, we “should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”²⁰³

Holmes refers to “free trade,”²⁰⁴ “competition of the market,”²⁰⁵ and “wager,”²⁰⁶ signifiers of business and enterprise. These references stand out because they are juxtaposed with the defendants’ leaflets fulminating about the evils of capitalism. These references also exemplify how Holmes, like James and Emerson, had been,

grounded rational beliefs. They are not implicit in Holmes’s Darwinist invocation of ‘the competition of the market.’” *Ibid.* at 29-30.

²⁰⁰ *Abrams* at 630.

²⁰¹ Holmes, “Natural Law,” *supra* note 11 at 40.

²⁰² *Abrams* at 630.

²⁰³ *Abrams* at 630.

²⁰⁴ *Abrams* at 630.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

in Poirier's words, "thoroughly corrupted by the discursive modes of American corporate capitalism."²⁰⁷ "Corrupted" is too harsh and too tendentious a word, but the point is that just as James employs vocabulary such as "cash-value," so Holmes employs vocabulary that appeals to the discursive community with which he wishes to communicate: intellectuals,²⁰⁸ editors,²⁰⁹ and more importantly working class Americans curious about a high-profile Supreme Court case. We could remark of Holmes what Poirier remarks of James: "He is trying to sound like the readers he meantime wants to convert; to sound as if he's closer to the average guy than to the strong poet or philosopher."²¹⁰ Or instead we could remark of Holmes what Poirier remarks of Richard Rorty: "[H]e chooses, in the interest of social persuasion and social self-protection, to hint at strengths *other* than those of a strong poet or an appreciative reader of poetry. [...] He would rather imagine an audience not of writers or readers merely but of men active in the world, captains of finance, explorers, warriors, and the like."²¹¹ Holmes, being a justice on the U.S. Supreme Court, *would* have had all of these figures as his audience. More than Whitman, who purported to speak to and through the *polis*, Holmes had a truly vast and multitudinous (to borrow Whitman's wording) readership. Even those who did not read Holmes's dissent would have been affected by it because law, controlling and coercive by function, affects social relations, and because dissents always hover in the national state of exception.

²⁰⁷ Richard Poirier, "Why Do Pragmatists Want to Be Like Poets?" *supra* note 16 at 355.

²⁰⁸ "[T]he issue of free speech itself, which prior to World War I had not been a conspicuous feature of reform politics, began to galvanize the attention of progressive intellectuals during and after the war, as progressive journals such as *The New Republic* took up the cause of free speech. Earlier arguments conceptualizing speech as a constitutionally protected "liberty," which had previously been confined to specialist circles, widened in their reach and were reformulated. At the same time scholarship on the history and theory of the First Amendment began to surface more widely, most conspicuously in Zechariah Chafee's *Freedom of Speech*, a synthesis of earlier essays that was published in 1920.

[...] [S]everal individuals who were particularly interested in free speech issues communicated their views to Holmes in the years between 1918 and 1920. These individuals included Learned Hand, then a federal district judge, Zechariah Chafee, an assistant professor at Harvard Law School, and John Wigmore, the Dean of Northwestern University School of Law, who had been a longtime correspondent of Holmes'. Holmes *397 also began to discuss free speech issues with his regular correspondents, writing letters to Frederick Pollock and Harold Laski about First Amendment cases that had come before the Supreme Court." G. Edward White, "Justice Holmes and the Modernization of Free Speech Jurisprudence" (1992) 80 Cal. L. Rev. 391 at 396-97.

²⁰⁹ The most notable critique of Holmes's First Amendment jurisprudence prior to *Abrams* appeared in an article by Ernst Freund in *The New Republic*. See Freund, *The Debs Case and Freedom of Speech*, 19 *New Republic* 13 (1919), *reprinted in* 40 U. Chi. L. Rev. 239 (1973).

²¹⁰ Richard Poirier, "Why Do Pragmatists Want to Be Like Poets?" *supra* note 16 at 356.

²¹¹ *Ibid.* at 356.

A passing look at a few lines in the *Abrams* dissent demonstrates Holmes's poetic facility, to say nothing of his pragmatist interest in knowledge, intent, actions, and consequences. For instance, Holmes alternates between varying iambic and trochaic patterns in the following passage:

I am aware of course that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.²¹²

The iambic phrasing in particular—"I am aware," "the word intent as vaguely used," "means no more than knowledge at the time," "said to be intended will ensue," "Even less than that," "A man may have to pay," "may be sent to prison," "if at the time," and on and on—generates a rhythm (da-DUM-da-DUM-da-DUM-da-DUM) that calls attention to the philosophical labor taking place here. Discussions of acts, knowledge, and consequences, common to all criminal treatises, usually do not display the aphoristic flair displayed in these lines. The alliteration, rhymes, and near-rhymes—"man may have to pay," "at the time of his act he knew facts," "when words," "deed is not done," "does not do the act," "produce...proximate"—make Holmes's phrases more memorable, and memorability is essential to "the continuity of successful forms of expression in the evolution of thinking" and to the "context of language as an organic form."²¹³ One may be tempted here to recall a stanza by Emily Dickinson that uses iambic meter to make a point about dissent:

Great streets of silence led away
To neighborhoods of pause —
Here was no notice — no dissent —
No universe — no laws.²¹⁴

²¹² *Abrams*, 626-627.

²¹³ Richardson, *supra* note 103 at 6.

²¹⁴ Emily Dickenson, "Void," in *The Selected Poems of Emily Dickenson* 171 (Hertfordshire, UK: Wordsworth Editions, Ltd. 1994).

I risk overstating the point. But is it not remarkable that Holmes's choice of meter reflects Dickenson's lines about dissent and laws? Is it not remarkable that in Dickenson's poem stasis corresponds with a lack of law, and in Holmes's dissent, activity and competition—the opposite of stasis—correspond with would-be law? Perhaps these connections are coincidental. If so, they are no less remarkable. Indeed, they are more remarkable because they tap into some sensorial register that associates stasis with lawlessness or void and mobility with order or rulemaking. At the very least, Holmes's passage validates the thesis that he, like other pragmatist writers, “built an aesthetic outpost” in the pragmatist tradition and performed “in language the ritual responses requisite to keeping a community together, an aspect distinguishing [the pragmatist] line of American literary experiment.”²¹⁵

Holmes's discussion of truth in the *Abrams* dissent elides two enunciations of pragmatism: the epistemological and metaphysical which emanate from Peirce and James and which Stevens took up later, and the sociological and political which emanate from Dewey and Randolph Bourne and which Rorty took up later. Holmes's dissent brings together aspects of a philosophy that seems at times splintered. On the one hand, he signals a psychological and spiritual inheritance; on the other hand, he signals an anti-foundationalist sociopolitical inheritance. He “stresses the uncertainty of human knowledge and suggests that our system of government, and particularly the First Amendment, was devised to take that uncertainty into account by allowing freedom to change”; therefore, he also “indirectly rationalizes” his move “to a dissenting position from the unanimity of the previous majorities.”²¹⁶ His powerfully poetic rhetoric presents “something new and original—Holmes' vision of free speech—in terms that are established and accepted—the Constitution, and laissez-faire economics.”²¹⁷ In short, Holmes achieves a compelling synthesis of pragmatist thought while using the dissent to ensure that the legal profession is always “perfecting its literary forms, sloughing at length its metaphysics, and, by virtue of the untirable patience which is often a compensation, attaining great excellence in every branch of mental acquirement.”²¹⁸

Because of its rhetorical pageantry, the *Abrams* dissent demonstrates the power of language to graduate into law. This dissent “not only breaks from and misreads the authority of precedent, it ultimately becomes the authoritative precedent

²¹⁵ Richardson, *supra* note 103 at 3.

²¹⁶ Cole, *supra* note 56 at 886.

²¹⁷ *Ibid.*

²¹⁸ Charles Sanders Peirce, *Collected Papers* Vol. 4 (Cambridge, Mass.: Harvard University Press, 1934) at 251.

itself’—and not just any authoritative precedent but one that “gains more precedential power than the three unanimous opinions that preceded it.”²¹⁹ Indeed, quoting the “stirring” final paragraph of this dissent has become a “time-honored ritual.”²²⁰ It is the pragmatist emphasis on growth and change, presented in memorable diction and syntax, which succeeded in preserving the ideas of this dissent.

C. BARTELS V. IOWA (1923)

As far as Supreme Court opinions go, *Bartels v. Iowa*²²¹ is short and to-the-point, extending and confirming the principles released by the Court that very day in *Meyer v. Nebraska*,²²² a companion case to *Bartels* that is also short and to-the-point. In *Meyer*, the Court struck down a Nebraska law restricting the teaching of modern foreign-languages to students ranging from kindergarten to eighth grade. The majority in *Meyer* found that the law violated the Due Process clause of the Fourteenth Amendment because it infringed upon the liberty interests of teachers, who have a right to practice their profession without the state’s interfering in their business decisions that do not undermine the decisions of the state.²²³ There was, the Court reasoned, no link between the putative purpose of the law—to protect the welfare of children—and a threat to the public interest.²²⁴ Put another way, the law was arbitrary and not reasonably related to a legitimate state interest. It was

²¹⁹ Cole, *supra* note 56 at 887.

²²⁰ Blasi, *supra* note 191 at 1343.

²²¹ 262 U.S. 404, 43 S.Ct. 628 (1923).

²²² 262 U.S. 390, 43 S.Ct. 625 (1923).

²²³ “As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.” *Meyers* at 403.

²²⁴ “The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.” *Ibid.*

therefore unconstitutional. Holmes reserved his *Meyers* dissent—which maintained that this Nebraska law was constitutional—for the *Bartels* opinion. The Court in *Bartels*, addressing an Iowa law akin to the Nebraska law, reversed an Iowa Supreme Court decision upholding the criminal conviction of a teacher who taught German to his students.²²⁵ Holmes’s dissent, a response to both *Meyers* and *Bartels*, is a curious case of intertextuality: a rhetorically charged paragraph that applies with equal weight to two different cases simultaneously. The dissent is further refracted because it exhibits Holmes’s language-games within (and without) a decision about language.

“We all agree, I take it,” Holmes begins, “that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.”²²⁶ The pronoun “we” seems unsettling because of its lack of a clear referent. Does Holmes mean “we” justices or “we” Americans, for example? A look at various opinions during Holmes’s era would suggest that “we” is widely and fluidly used to signify the assembled judges on the bench, but this is not a decisive or necessary reading of the phrase. Holmes then acknowledges an assumption on his part—“I take it”—thereby narrowing his audience to an even more particular set of people: those who agree with him or “us.” Because dissents are always in conversation with the majority or plurality opinion, we may, I think, suppose that Holmes’s “we” refers to the other justices and himself. But the qualifier “I take it” remains troubling. It cues the reader to assume the role of sympathizer and swiftly dismisses as irrelevant those who disagree with the law’s premise. This move makes sense if Holmes’s audience comprises the other justices, but if his audience is broader than that—the document is, after all, public record—then Holmes has strategically leapfrogged over a controversial issue, his excuse being that that issue is beside-the-point.

Having allowed himself freedom of entry and exit, Holmes claims that the “only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment.”²²⁷ In other words, Holmes’s self-assigned responsibility is to interpret and to apply the Constitution but not to determine the virtues or vices of laws subject to the Constitution. His dissent will not pivot on the aims or intent of the Nebraska or Iowa law because these *moral* concerns are irrelevant to the Fourteenth Amendment. Judges, for Holmes, should not impose their ethics upon law but should merely determine whether laws comport with

²²⁵ *Bartels* at 630.

²²⁶ *Bartels* at 412.

²²⁷ *Ibid.*

practicality and precedent. His dissent, then, will not address whether the Iowa law is good or bad—only whether it violates the Fourteenth Amendment. Holmes constructs himself as a neutral interpreter who *may* “appreciate the objection to the law”²²⁸ (“I think I appreciate the objection to the law”²²⁹) but who does not believe the judge’s role is to take sides on political or ethical issues “upon which men reasonably might differ.”²³⁰ If law is what judges want it to be, and if judges insist that law is a principle that, when applied, disrupts the *polis*, then law loses the respect of the *polis* and loses authority, which is another way of saying that it ceases to be law. A more chestnut way of stating this proposition is that law is in force only so long as the *polis* willingly submits to its authority. (This proposition bears a striking similarity to James’s comments on God.)

Holmes distances himself from the discursive communities enabling the language laws of Nebraska and Iowa and yet allows that he understands, or at least will not condemn, those communities’ shared values and beliefs. He refuses to claim privileged knowledge about what is morally right or wrong, perhaps because, as he wrote elsewhere, “Certitude is not the test of certainty. We have been cock-sure of many things that were not so.”²³¹ Holmes therefore situates himself between, on the one hand, the Supreme Court justices, and, on the other, the voters and legislatures of Nebraska and Iowa. Holmes becomes, in this way, a mediating figure who departs from the majority (whom he dubs “my brethren”²³²) with “hesitation”²³³ and “unwillingness,”²³⁴ but who also cannot bring his mind “to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching a desired result.”²³⁵ In contemporary legal parlance we might say that the law was narrowly tailored to serve a legitimate state interest.

Why might Holmes consider this statute narrowly tailored? First, because the statute “deals with the teaching of children,”²³⁶ and second because youth “is the time when familiarity with language is established.” Therefore, language is particularly important to the developing child or youth, and the state has an

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Holmes, “The Natural Law,” *supra* note 11 at 40.

²³² *Bartels* at 412.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

interest in the welfare of developing (double meaning intended) children and youths. If that proposition is true, as Holmes assumes it is, then cannot we, Holmes implies, imagine a situation where it would be reasonable to ensure that children learn English, lest they dislocate themselves from local cultures and communities or fall beneath national literacy standards? Is it conceivable that there is a reasonable purpose to pass such a statute?

Holmes's dissent turns on this concept: reasonability. "I am not prepared to say that it is unreasonable," Holmes submits, "to provide that in his early years he shall hear and speak only English at school."²³⁷ If it is not unreasonable, it might be reasonable, and "if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar."²³⁸ Holmes casts this statement as a double-negative probably because saying "it is not unreasonable" is less aggressive than saying "it is reasonable," especially since the implication of the latter phrasing—"it is reasonable"—is that the other justices are not reasonable enough to notice the reasonability of the law. Holmes, then, refuses to label either the judges or the Nebraskans and Iowans as unreasonable; for to say that this law exceeds the bounds of reason is to say that the voters and legislatures of Nebraska and Iowa are, all of them, unreasonable.

Holmes realizes the danger and difficulty, political or otherwise, inherent in a system where well-educated, politically connected judges in faraway courts relegate other communities—such as the citizens of Nebraska and Iowa—to a floating status outside the bounds of reason. The trouble with the majority opinion is, for him, the willingness of the other judges to dismiss as unreasonable the mores, cultures, and conventions of a particular set of people. Holmes may have had in mind James's criticism of a "monistic" form of government that adheres to "philosophy of the absolute."²³⁹ He may have recalled James's celebration of the "pluralistic form" or "radical empiricism" that refuses to treat populations as an "absolute totality" and instead "allows that the absolute sum-total of things may never be actually experienced or realized."²⁴⁰ The pluralism championed by James and Bourne²⁴¹ and associated with pragmatist thought could not possibly flourish or proliferate in a space where a centralized authority imposed purportedly universal principles onto communities lacking the agency to dissent. Where those communities lack such agency, Holmes supplies it—in *his* dissents.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ William James, *A Pluralistic Universe* (New York: Longmans, Green, and Co, 1909) at 43.

²⁴⁰ *Ibid.* at 43-44.

²⁴¹ See Randolph Bourne, "Trans-national America" (1916) 118 *The Atlantic Monthly* 86-97.

The *Bartels* dissent is an example of the fluidity of Holmes's ideas. His dissent takes the shape of the ethos of the heartland. The ethical consensus among Iowans and Nebraskans (and most non-New Englanders) that English language acquisition was fundamental to childhood education formed a reservoir of thought toward which the tributaries of Holmes's thought ran their course. The dissent exemplifies a diplomatic compromise between the elite communities represented by the Supreme Court justices, and the general heartland represented by the state statutes.²⁴² In a civil way, Holmes declines to side with the justices, conceding that he can "appreciate [their] objection to the law."²⁴³ He seems to suggest that he agrees with them but will not solemnize that agreement. Unwilling to let an elite minority dictate moral imperatives to a less power populace, Holmes allows that he is "unable to say that the Constitution of the United States prevents the experiment being tried."²⁴⁴

Here he gestures towards Emersonian creative democracy,²⁴⁵ his fidelity to experimentation and instrumentalism seems to involve an Emersonian "contemplative reflection"—as evidenced by his apparent vacillation between the justices' position and the position of the state legislatures—as well as "personal integrity and individual conscience as ameliorative agents for diminishing the effect of potential majoritarian abuses arising out of activist democracy."²⁴⁶ Holmes will not let personal opinions get in the way of a democracy "not seen as a fixed and immutable system" but as "being in flux, allowing for both regression and progress."²⁴⁷ He recognizes that the trouble with a judicial opinion is that "it is

²⁴² "The ameliorative aspect of pragmatism encourages and facilitates discourse between advocates of diametrically opposed modes of thought. The contextualist aspect acknowledges that all human inquiry and action is socio-culturally situated. The anti-foundationalist aspect rejects the notion that this socio-cultural context needs to be stripped away in order to firmly fix knowledge in a logical and ordered structure. These three aspects of pragmatism should not be thought of as separate and discrete elements. They intertwine, serving the larger purpose of fueling human inquiry and action." Kidwell, *supra* note 98 at 99.

²⁴³ *Bartels* at 412.

²⁴⁴ *Bartels* at 412.

²⁴⁵ "To speak then of an Emersonian culture of creative democracy is to speak of a society and culture where politically adjudicated forms of knowledge are produced in which human participation is encouraged and for which human personalities are enhanced. Social experimentation is the basic norm, yet it is operative only when those who must suffer the consequences have effective control over the institutions that yield the consequences, i.e., access to decision-making processes." Cornel West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* 213 (Madison, Wisc.: The University of Wisconsin Press, 1989).

²⁴⁶ Kidwell, *supra* note 98 at 111-112.

²⁴⁷ *Ibid.* at 112

made by an individual but stakes a claim valid for everyone,²⁴⁸ unlike the dissent that ensures the perpetuation of inquiry. By turning his opinion on vocabulary such as “reasonable” and “experiment,” Holmes is himself experimenting. We continue to read the *Bartels* dissent for many reasons, one of which undoubtedly is its insistence on experiment in an experimental medium.

CONCLUSION

Three lines²⁴⁹ of pragmatist thought intersect in Holmes’s *oeuvre*. One marks thought as an organic form that develops over time and in response to changing environments and majority will; another marks truth as contingent and foundations as illusory; still another marks dissents as sites of aesthetic adaptation, places where the new is prehended and apprehended. Understanding the rhetorical nature of dissents is part of understanding dissents as adaptive organisms. Menand tells us that “Holmes spent much of his life trying to figure out where, if it wasn’t general principles, the judge’s decisions did come from.”²⁵⁰ He adds that Holmes “thought that this was a question it was impossible to answer, because in the end, we do not know, in any determinate way, where our judgments come from,” and finally that “[a]ll we can say is that we seem to have, as naturally associated beings, a powerful social incentive to rationalize and justify the choices we make.”²⁵¹

Menand is right: reason is a human impulse. Yet kinds of reasoning are habits that can be disrupted by aesthetic stimuli. The way we read dissents is important; we must ask what they do and not just what they mean.²⁵² To the extent that what they do is related to the steady accumulation of case precedent, we cannot say what these dissents will do to future readers living in different times and spaces.

The pragmatist claims not to know much about what is purported to be known by others. That is why he knows so much. In knowing that he does not and cannot fully know, he winds up knowing more than most. Holmes was a pragmatist. He claimed that he did not know what law was, and in not knowing he knew a great deal more than most. His stylistic and syntactical versatility—as manifest in the three dissents above—had the effect of enacting on the page the modifications

²⁴⁸ Dmitri N. Shalin, “Legal Pragmatism, an Ideal Speech Situation, and the Fully Embodied Democratic Process” (2004-05) 5 Nevada L. J. 433 at 439-440.

²⁴⁹ Recall the importance of triads to Peirce’s thought. See *supra* note 120.

²⁵⁰ Menand, “Pragmatism and Poets,” *supra* note 118 at 369.

²⁵¹ *Ibid.*

²⁵² This is Nicholas M. Gaskill’s recommended interpretive strategy in “Experience and Signs: Towards a Pragmatist Literary Criticism” (2008) 39 New Literary History 165-183.

that he proposed in the law. His texts performed what they codified, or sought to codify, as law. Holmes was not unique among pragmatists in his linguistic facility or syntactical strategy. He belongs to a tradition beginning with Jonathan Edwards and moving through Emerson, William James, Henry James, Wallace Stevens, and Gertrude Stein.²⁵³ Holmes's dissents continue to be cited and revisited despite the many changes that have taken place since he lived and wrote. By understanding Holmes's pragmatism, we may better understand the emerging legal principles owing to his vindicated dissents.

²⁵³ See generally Richardson, *supra* note 103.

**ACT, CIRCUMSTANCE, AND EVENT:
AUSTINIAN ACTION THEORY UNDER THE GRIFFITH CRIMINAL CODE**

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“Considerable confusion reigns, both in ordinary and in legal speech, on what is meant by an act, or a voluntary act. The most acceptable language is to say that an act means a willed bodily movement...”¹

ABSTRACT: Legal history and Sir Samuel Griffith’s *Criminal Code* do not always sit comfortably together. This is due in a substantial degree to accepted doctrine concerning the interpretation of the Griffith *Code* (the *Brennan-Vagliano* rule²), which deflects attention away from the *Code*’s historical antecedents, and instead concentrates focus upon the terms of the *Code* to the general exclusion of that history. Only in “exceptional circumstances” should the Court resort to pre-*Code* law in interpreting the provisions of the *Code*. It is arguable that this canon of interpretation somewhat over-simplifies what is in reality a substantially more complex question. This short paper does not, however, enter into the broader question of interpretation of the *Code* generally, but confines itself instead to one narrow issue: the significance of the words “act or omission”, an expression which appears in the *Code*, in that form, on numerous occasions, and which represents one of the foundation stones upon which the *Code* was erected. The expression, it is suggested, has a substantial historical pedigree, an appreciation of which can only assist to advance the modern articulation of criminal law theory under the *Code*. “Act” has long been recognised as an inherently ambiguous term³; but it is probable that, by the time Griffith came to write the *Code*, “act”, as a juristic concept, had taken on a recognised content based predominantly upon Austin’s simple action theory. The accurate determination of this original meaning takes on an added significance when, as is the case with the *Code*, the term in question underpins fundamental concepts of liability, in respect of which even a minor shift in meaning may substantially impact upon the daily application of basic tenets of criminal responsibility.

¹ Glanville Williams, *Textbook of Criminal Law* (1978) p 33.

² This expression is used as a convenient shorthand description of the rule (or set of rules) on the interpretation of “codes” laid down in *Brennan v R* (1936) 55 CLR 253, and *Bank of England v Vagliano Brothers* [1891] AC 107.

³ J W Salmond, *Jurisprudence* (1902) p 399; The Right Honourable Sir Harry Gibbs, “Queensland Criminal Code: From Italy to Zanzibar” (2003) 77 *ALJ* 232, 236.

In 1961, the High Court of Australia had occasion, for the first time, to carefully consider the General Part of Sir Samuel Griffith's *Criminal Code*. The case⁴ arose under section 13 of Tasmania's *Criminal Code*, a provision which, in concept, closely resembled Griffith's original section 23 of Queensland's *Code*⁵. Central to the Court's consideration was the word "act", in the context of the expression "act or omission" in section 13. The precise difficulty to be resolved was the content of the word "act". The case involved an unlawful wounding caused by the discharge of a projectile from an air rifle: was the "act" in question the discharging of the air rifle; or was it the wider transaction, inclusive of the wounding of the victim?

In the course of his judgment, Sir Owen Dixon CJ⁶ proffered an observation on the General Part of the Griffith *Code* which is familiar to all students of the *Code*⁷:

⁴ *Vallance v R* (1961) 108 CLR 56.

⁵ Gibbs J (as his Honour then was) in *Kaporonovski v R* (1973) 133 CLR 209 at 229, perceived no real difference between the sections such as might affect the interpretation of "act".

⁶ 108 CLR at 58. In his speech upon the occasion of his retirement as Chief Justice of Australia, Dixon CJ revisited his recollections of Griffith: "...he was a dominant legal mind. To my way of thinking, it was a legal mind of the Austinian age, representing the thoughts and learning of a period which had gone, but it was dominant and decisive. His mind was clearly of that caliber; he did not hesitate, he just felt that he knew; and that what he knew was right": 110 CLR v, xi (13/04/64); reprinted *Jesting Pilate* (1965) p 258. In *Timbu Kolian v R* (1968) 119 CLR 47 at 61, Windeyer J noted that s.23 of the Queensland *Code* (as applied to Papua New Guinea) used "the language of analytical jurisprudence". In *R v Kaporonovski* [1972] Qd R 465, 498G-499E, 503C, Justice Graham Hart considered that s.23 used Austinian concepts.

⁷ Dixon CJ's Austinian reference demonstrated his awareness of Austin's theories as they pertained to criminal law. Having recognised their potential influence, however, he chose to pursue it no further in his judgment. By mid-1961, when *Vallance* was decided, many of Austin's theories were generally taken to be outdated. His action theory was said by H L A Hart to be "an out-dated fiction – a piece of eighteenth-century psychology which has no real application to human conduct": "Acts of Will and Responsibility", in *Punishment and Responsibility* (1970) p 101. Hart's essay, in which he gave voice to this opinion, was first published in 1960, and at the time was described as "a frontal attack" upon Austin: Book Review (1961) 6 *JSP TL* 93 (J A Coutts). Whether Dixon CJ was aware of Hart's criticism of Austin at the time of *Vallance* is unknown, but Windeyer J, in the later case of *Timbu Kolian v R* (1968) 119 CLR 47, at 64-65, specifically referred to Hart's paper, and declined to apply Austin's conception of "act" to section 23. It has been cited more recently, again in reference to section 23, by Gummow and Hayne JJ in *Murray v R* (2002) 211 CLR 193, at 209. Hart rested his argument on two grounds: (i) that "act", in the sense of a muscular contraction, could not properly include an omission; and (ii) that Austin's narrow definition of an "act" was inconsistent with the common usage of the term. As to the first point, Austin did not maintain that an "act" included an omission: see *eg* R F Stalley, "Austin's Account of Action" (1980) 18 (4) *Jnl Hist Phil* 448, 449. In fact, Austin's Notes for a Criminal Code (discussed further below) used "act or omission" in the exculpatory provisions of its General Part. In respect of the second objection, the fact that most people, when thinking of an "act", do not think of it in terms of a muscular contraction (or even a bodily movement), is not really to the point (see also K W Saunders, "Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence

“The difficulty may lie in the use in the introductory part of the Code of wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do.”

If Dixon’s characterization was accurate, and if Griffith was indeed a “dedicated Austinian”⁸, an important question is posed as to the extent that his *Code* may have been drafted, at least in part, upon Austinian principles. That Austin’s influence upon 19th century criminal law may have outlasted his influence upon general jurisprudence has already been noticed⁹. At the very least, there is a case for exploring the possibility that some of Austin’s basic ideas about criminal law, and of his vision for criminal codification, made the transition from theory to reality through the medium of Sir James Fitzjames Stephen¹⁰.

The vehicle for this exploration is the expression “act or omission”. From occasional appearances in the early 19th century, “act or omission” became the choice of codifiers to denote the unit of liability in both positive and negative aspects: *positive* by denoting an “act or omission” as constituting an offence under circumstances defined in the Special Part; or *negative*, by exculpation from liability

of Volition” (1987-88) 49 *U Pitts LR* 443). Austin sought to analyse human conduct, to jurisprudential ends, by reference to its constituent parts. Where human conduct entails legal consequences, analysis of that conduct is unavoidable: common usage may refer to an “agreement”, rather than characterizing the conduct in terms of offer, and acceptance; or, in the case of a motor accident, a claim that one party was “in the wrong”, or “at fault”, does not excuse a court from examining the transaction by reference to the elements of duty, breach, causation, and damage. Depending upon the circumstances under consideration, and what is in dispute, the criminal law may similarly demand elemental analysis of a transaction. Austin identified the basic tools to undertake that task.

⁸ W L Morison, *John Austin* (1982) p 135.

⁹ J E Stannard, “A Tale of Four Codes: John Austin and the Criminal Law” (1990) 41 *NILQ* 293.

¹⁰ Stephen was an admirer of Austin: Morison *op cit* pp 148-151. Along with others, he was consulted by Sarah Austin with respect to the editing of her late husband’s unpublished manuscripts: L & J Hamburger, *Troubled Lives: John and Sarah Austin* (1985) p 195; “In his [Stephen’s] first principles he was an unhesitating disciple of Bentham and Austin”: Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) p 204. It is even possible to draw a direct line of descent from Austin to Griffith, *via* Starkie (and the Criminal Law Commissioners), and on to Sir James Fitzjames Stephen who, with his fellow Commissioners of 1879 (Blackburn LJ, and Barry and Lush JJ), referred back to the Reports of the Criminal Law Commissioners in preparing their Draft Code of 1879 (see *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences* (1879) p 6); in its turn, the Draft of 1879 provided the basis for the Bill of 1880, upon which Griffith drew so heavily in the course of preparing the Queensland *Code*.

where the “act or omission” fell within a justification or excuse contained in the General Part¹¹.

“act or omission” under the Griffith Code:

The most significant use of “act or omission” is to be found in the General Part of the *Code*. Of the forty-eight uses of “act or omission” throughout the *Code*, twenty-four occur within these first five chapters. The purpose of provisions in a General Part - to govern the operation of all offences – can only be achieved if a feature, common to every offence, can be identified. It is upon this common feature that the general provisions will operate. Griffith located this common foundation in the requirement that an offence be premised upon an “act” or an “omission”¹²:

“An act or omission which renders the person doing the act or making the omission liable to punishment is called an offence.

¹¹ This is not to suggest that the use of “act or omission” was confined to criminal codification. Sir Frederick Pollock used the expression to encompass the physical element in his *Draft of a Civil Wrongs Bill prepared for the Government of India* (completed *circa* 1886), and appended to *The Law of Torts* (1887) pp 517 *et seq.* see *eg* section 10, and compare with sections 6 and 9. Pollock also recognised, within his Bill, distinct “General” and “Special” Parts.

¹² *Code* section 2. Contrary to some views, this does not penalize an “act or omission” standing alone, but only where the circumstances or consequences of the “act or omission” are such as to engage an offence provision within the Special Part of the *Code*. If this section is read with section 36, the combined effect is that *all* offences *should* be premised upon an “act” or an “omission”, in order to receive the benefit of the exculpatory rules in Chapter 5. Under the criminal law of Queensland, there is no “act requirement” as it is popularly referred to. The expression “act or omission”, in section 2 and in other sections in the General Part, places “act” and “omission” on an apparently-equal footing insofar as their status as constituent elements of an offence is concerned, with no obvious preference that an “act” be present, rather than an “omission”. Further, it is open to the Queensland Parliament to create offences based upon *any* criteria, whether or not they include an act or an omission, and there is no fundamental or “constitutional” quality about section 2 of the *Code* which would prevent such offence creation. Implied departure from section 2’s principle may be evidenced simply by a later inconsistent statute. There is a stronger argument for asserting that Queensland law *does* recognize a “voluntariness” requirement, as laid down in the first limb of section 23 which, although still defeasible, will be held to apply in the absence of very clear indications to the contrary: *eg* *Hunt v Maloney* [1959] Qd R 164.

Although the Stephen draft codes did not include a counterpart to section 2 of the Griffith *Code*, it is clear that Stephen followed the same line of reasoning: “I suppose that in strict theory it would be impossible to define a crime otherwise than as an act or omission punished by law....: J F Stephen, “The Criminal Code (1879)” (1880) *The Nineteenth Century* (Jan) p 136 at p 145.

The critical role played by the “act or omission” requirement is clear if one has regard to the provisions in the General Part. By way of example are sections 23 and 16 (in their original form):

Intention: Motive.

23. Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Person not to be Twice Punished for Same Offence.

16. A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

The potential application of these fundamental provisions is governed by the content to be accorded to “act or omission”, or more commonly, to “act”, a fact which underscores the primacy of clarity of meaning for “act or omission”. Far from clarifying the position, modern interpretations of “act” in section 23 caused one commentator to ask whether or not Griffith’s self-proclaimed satisfaction with Chapter 5¹³ had been wholly unfounded¹⁴. Section 16 has fared little better¹⁵.

¹³ “No part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction”: Letter of 29/10/1897, from Sir Samuel Griffith, Chief Justice, to the Attorney-General of Queensland.

¹⁴ I D Elliott, “Mistakes, Accident and the Will: The Australian Criminal Codes” (1972) 41 *ALJ* 255, 328.

¹⁵ See *R v Gordon ex parte Attorney-General* [1975] Qd R 301; *R v Tricklebank* [1994] 1 Qd R 330. It was probably the state of the decisions which caused Gaudron J to question whether section 16 had made *any* improvement over the common law: *Pearce v The Queen* [1997] HCA Trans 256 (15/08/1997) printed page 4.

Traditionally, resort to pre-*Code* sources is justified on the basis that “act”, in the context of the *Code*, is a term of uncertain import, or alternatively had acquired a technical or special meaning by the time the *Code* was enacted¹⁶. An attempt will accordingly be made to deduce, principally from the proto-legislative antecedents of the Griffith *Code*, a content for “act” which might facilitate a more logical development of the *Code* in its modern legal environment. These potential sources of information have been generally ignored in the consideration of the Griffith *Code*, yet it is clear from Griffith’s own notes that he used other codes, and in particular the Stephen-based *Criminal Code Bill 1880*, in compiling his own contribution to the closing years of the Victorian codification movement.

“act or omission” – the practical content:

The earliest use of “act or omission” in a practical and formulaic sense¹⁷ may be Thomas Starkie’s *Treatise on Criminal Pleading*¹⁸:

“The general rule has long been established, that no person can be indicted but for some specific act or omission, unless such act or omission be charged in apt and technical terms, with precision and certainty on the face of the record.”

In discussing the requirements of an indictment, Starkie undertook a basic elemental analysis¹⁹ of a criminal offence²⁰:

¹⁶ *Stuart v R* (1974) 134 CLR 426, 439 *per* Gibbs J.

¹⁷ There had been earlier occasional statutory usage: see *eg* 33 Geo III, c 75 (1793) s XIV (concerning the sewers and drains of London).

¹⁸ 1814, vol 1 at p 63 (2 vols). John Austin (1790-1859) and Thomas Starkie (1782-1849) were close contemporaries, but Starkie’s *Pleading* predated Austin’s writings. In 1814, Austin was still reading for the Bar. He was admitted in 1818, although his reading lists indicate interest in Bentham’s *Principles of Morals and Legislation* as early as 1816: Morison *op cit* pp 8-9. Both Starkie and Austin lectured at the University of London (Austin in Jurisprudence and the Law of Nations, and Starkie in Equity and Common Law) and both were destined to be appointed as Criminal Law Commissioners by Lord Brougham in 1833. Austin resigned in 1836, and was replaced by David Jardine. Starkie remained a Commissioner throughout the term of the original, as well as a later commission, until his death before the final report was submitted in 1849: R Cross, “The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853”, in P R Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (1978) pp 5-21. Starkie and colleague Henry Bellenden Ker were the main drafters of the Commissioners’ Reports: M Lobban, “How Benthamic was the Criminal Law Commission?” (2000) 18 (2) *LHR* 427, 428. It is not possible to know whether or not Griffith had reference to the Commissioners’ Reports in drafting his *Code*, although Windeyer J on one occasion assumed that he had done so: *Timbu Kolian v R* (1968) 119 CLR 47, 61.

“Of the Averment of Circumstances collateral to the Act or Omission, which render that Act or Omission criminal

“...the criminal nature of the act must appear on the face of the indictment, and ... if the act or omission be not in itself illegal, it must be shewn to be so from the particular circumstances of the case, which cannot be supplied by any intendment whatsoever. ...

The criminality of an act, in itself innocent, may arise either from the *situation* or *knowledge*, of the defendant himself, or from that of *others*, or from *other particular circumstances* contained in the definition of the offence.”

In this analysis, the “act or omission” constitutes the primary, or basic, element of the offence. Attendant circumstances, and the accused’s mental state, which make the act or omission criminal in nature, are recognised as being distinct from the “act or omission” underpinning the offence²¹.

“act or omission” – the Austinian view:

¹⁹ He appears to have been well-qualified for the task, assisted by a keen mathematical bent. Having been Senior Wrangler and Smith’s prizeman at Cambridge, he was elected a Fellow of St Catharine’s College in 1803. He was called to the bar in May 1810, after having been pupilled to the prolific legal author Joseph Chitty Snr. His *Criminal Pleading* was accordingly written early in his professional career, predating the multi-volume treatise on criminal law authored by his pupilmaster by some two years. He produced his well-known *Practical Treatise on the Law of Evidence* in 1824, and was the second Downing Professor, from 1823-1849: DNB Starkie, Thomas (1782-1849); “Mr Starkie” (1849) 10 *Law Review* 201-204. As Professor Smith has noted, Starkie was “clearly no intellectual slouch”: K J M Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957* (1998) p 127.

²⁰ *Supra* vol 1 at p 149. Bentham had considered act and omission in his *Introduction to the Principles of Morals and Legislation* (Harrison Ed, 1967) pp 190-191, but rather than “act or omission”, he used “act” to denote both, and then delineated the concepts of “positive acts” (such as consist in motion or exertion), and “negative acts” (such as consist in keeping at rest; that is, in forbearing to move or exert oneself). Any direct influence upon Starkie’s use of “act or omission” was more likely to have come from his master, Joseph Chitty, who had used “act or omission” in his *Treatise on Pleading*, in the context of actions *contra formam statuti*, some five years earlier: 1 *A Practical Treatise on Pleading and on the Parties to an Action* (1809) p 358.

²¹ Compare one of the very few judicial excursions into offence analysis by Lord Mansfield in *R v Scofield* (1784) Caldecott 397, 403, in the context of “attempt”: “So long as an act rests in bare intention, it is not punishable by our laws: but immediately when an act is done, the law judges, not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.”

A consideration of Austin's theory should be prefaced with a brief reference to Bentham's contribution. Bentham treated action in terms of "act", "circumstances" and "consequences". In *The Principles of Morals and Legislation*, Bentham discussed "Human Actions in General". Within a criminal transaction, he isolated four "articles"²²:

"In every transaction, therefore, which is examined with a view to punishment, there are four articles to be considered: 1. The *act* itself, which is done. 2. The *circumstances* in which it is done. 3. The *intentionality* that may have accompanied it. 4. The *consciousness*, or unconsciousness, or false consciousness, that may have accompanied it."

He presented here two physical elements ("act" and "circumstances"), and two mental elements ("intention" and "voluntariness"). After discussing "acts", he moved to "circumstances":

"So much with regard to acts considered in themselves: we now come to speak of the circumstances with which they may have been accompanied. These must necessarily be taken into the account before anything can be determined relative to the consequences. What the consequences of an act may be upon the whole can never otherwise be ascertained: it can never be known whether it is beneficial, or indifferent, or mischievous. In some circumstances even to kill a man may be a beneficial act: in others, to set food before him may be a pernicious one."

Thus were consequences to follow upon acts and circumstances. Bentham observed, in respect of consequences, that "the consequences of an act are events", and his use of "event" in this context brings to mind Stephen's use of "event" in his Draft Code, and Griffith's use of the same term in his own *Code* (eg sections 12 and 23). This usage is consistent with the meanings attributed to "event" during the relevant period²³. Bentham wrote, in summary²⁴:

"An act of some sort or other is necessarily included in the notion of every offence. Together with this act, under the notion of the same offence, are included certain circumstances: which circumstances enter into the essence of the offence, contribute by their conjunct influence to the production of

²² (Harrison Ed, 1967) Ch VII, p 190 *et seq.*

²³ See *eg Dr Johnson's Dictionary* (Todd Ed, 1836): "an end, issue, consequence; incident".

²⁴ At p 198.

its consequences, and in conjunction with the act are brought into view by the name by which it stands distinguished. These we shall have occasion to distinguish hereafter by the name of *criminative* circumstances.”

The expression “act or omission” finds repeated use, in the context of a criminal offence, in John Austin’s notes for a criminal code²⁵. Austin divided his Draft Code into (i) The General Part²⁶, and (ii) The Particular (or Special) Part. Within the General Part, he included such concepts as would have general application across the spectrum of criminal offences, as follows:

Part I - The General Part

Chapter 1	Chapter 2	Chapter 3	Chapter 4	Chapter 5	Chapter 6
Definition of crime, Divisions of crime	Terr. Jurisdiction, Jurisdiction based on punishment/procedure	Essentials of crime, Conditions which render an act or omission a crime, “grounds of imputation”	Consummated crimes, Attempts	Principals and Accessories	Punishments

²⁵ J Austin, 2 *Lectures on Jurisprudence* (5th Ed, 1911), “Fragments of a Scheme of a Criminal Code”, pp 1051 *et seq*, containing edited notes. These notes, in and of themselves, are but memoranda of Austin’s thoughts on criminal law, and codification. With respect to their direct influence, the most that can be said is that they were available (along with many other potential sources on codification) to any diligent codifier of the early 1890’s. The difficulty in developing any theory of potential influence is compounded by the uncertainty of the date of preparation of the subject memoranda. They may have been prepared while Austin was still a member of the Criminal Law Commission (a possibility suggested by Sarah Austin), or following his departure from the Commission, when he began work alone, suggesting he might “write a complete draft of a criminal code”: Hamburger *op cit* pp 51, 215 n70. This time frame would put the origin of the Notes *circa* 1833-1836. A little later, Austin used the “act or omission” formula in what may be the only “proto-legislation” which has come down to us of which we can say that it was “pure Austin”, namely, his draft legislation on censorship and libel for the Island of Malta, submitted in late 1838. Austin, along with his former student, and friend, (later Sir) George Cornwall Lewis, were appointed in 1836 as Commissioners to investigate and report upon matters affecting the government of Malta. The draft censorship Bill was one of the issues addressed by the Commissioners: *Draft of an Ordinance for Abolishing the Censorship, and for providing against Abuses of the consequent Liberty of Publishing*, in *Sessional Papers of the House of Lords*, vol VII, 1839.

²⁶ This might be the first English use of the term in this context.

Austin’s General Part typified the approach adopted in most criminal codification undertakings of the Victorian period²⁷. Chapter 3 contained several principles which were erected upon the basic element of an “act or omission”²⁸:

1	An <i>act or omission</i> is not a crime (or is not imputable to the party), unless the party knew, or, with due attention, might have known, that, under the circumstances of the fact, it was a crime [or, an <i>act or omission</i> is not a crime (or is not imputable to the party) unless the party subsumed the fact, or, with due attention, might have subsumed the fact, under the law]
2	An <i>act or omission</i> is not a crime, if it be purely <i>involuntary</i> ; <i>ie</i> if the not doing the act done, or the doing the act omitted, did not depend anywise on the wishes (or will) of the party.
3	Generally, an <i>act or omission</i> is not a crime, or is more or less excusable, if it proceeded from an instant and well-grounded fear stronger than the fear naturally inspired by the law.
4	An <i>act or omission</i> pursuant to a legal duty is not a crime
5	An <i>act or omission</i> pursuant to a legal right, or to a permission or licence granted or authorised by the law, is not a crime.
6	An <i>overt</i> act (or such an act, other than a confession of the party, as indicates his criminal knowledge) is of the essence of a crime by commission; also of a crime by omission accompanied with criminal knowledge.

Underpinning “act or omission” was Austin’s idea of what constituted an “act”. This was inextricably tied to his perceptions of the mental phenomena he designated as “volition” and “will”²⁹:

²⁷ Edward Livingston’s Draft Code for Louisiana: Book I (General Provisions): c.I (General Provisions relating to the Operation of the Penal Laws); c.II (General provisions relating to Prosecutions and Trials); c.III (Persons amenable to the Code, and Matters of Justification and Excuse); c.IV (Repetition of Offences); c.V (Complicity): 2 *The Complete Works of Edward Livingston on Criminal Jurisprudence* (1873); Macaulay’s *Indian Penal Code*: c.I (General Explanations, incl Definitions); c.II (Punishments); c.III (General Exceptions, Excuse *etc*); c.IV (Complicity): *A Penal Code prepared by the Indian Law Commissioners* (1838); R S Wright’s Draft Criminal Code for Jamaica: Part I (General provisions): Title I (Preliminary matters); Title II (General Explanations, incl Definitions); Title III (Punishments); Title IV (Attempts); Title V (Complicity & Conspiracy); Title VI (General Exemptions, incl Excuse); Title VII (Justifiable Force and Harm): *Criminal Code and Code of Criminal Procedure for the Island of Jamaica* (1877).

²⁸ “These six principles, which are in the nature of axioms, appear to cover all exemptions from criminal liability allowed in respect of conduct amounting outwardly to an infraction of the law”: D A Stroud, *Mens Rea, or Imputability under the Law of England* (1914) p 23. Professor Kenny described Dr Stroud as a “follower of Austin”: Book Review (1915) 31 *LQR* 451.

“Certain movements of our bodies follow invariably and *immediately* our wishes or desires for those *same* movements: Provided, that is, that the bodily organ be sane, and the desired movement be not prevented by an outward obstacle or hindrance. If my arm be free from disease, and from chains or other hindrances, my arm rises, as soon as I wish that it should. But if my arm be palsied, or fastened down to my side, my arm will not move, although I desire to move it. These antecedent wishes and these consequent movements, are human *volitions* and *acts* (strictly and properly so called). They are the only objects to which those terms will strictly and properly apply.”

After some elaboration, he continued³⁰:

“And as these are the only *volitions*; so are the bodily movements, by which they are immediately followed, the only *acts* or *actions* (properly so called). It will be admitted on the mere statement, that the only objects which can be called acts, are consequences of Volitions. A voluntary movement of my body, or a movement which follows a volition, is an *act*.

The *involuntary* movements which are the consequences of certain diseases, are *not* acts. But as the bodily movements which immediately follow volitions, are the only *ends* of volition, it follows that those bodily movements are the only objects to which the term ‘acts’ can be applied with perfect precision and propriety.”³¹

Austin himself acknowledged that this conception of “act” did not necessarily accord with what could be called common usage³²:

“The only difficulty with which the subject is beset³³, arises from the concise or abridged manner in which (generally speaking) we express the objects of our discourse.

²⁹ John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* (5th Ed, 1911 printing) (hereafter referred to as *LJ*) pp 411-412. All subsequent references are to the pagination in this edition.

³⁰ *LJ* pp 414-415.

³¹ This is particularly important, and indicates that Griffith did not apply Austin’s theory in any pedantic manner. In Austin’s view, an involuntary bodily movement was *not* an “act”; the word “act” necessarily included the idea of voluntariness. Thus, to speak of a “voluntary act”, to Austin, would present a tautology. Griffith’s use of “act”, however, refers to only the bodily movement. This is a neater formulation, which then permits of treatment of “act” from both “willed” and “unwilled” perspectives.

³² *LJ* p 415.

Most of the names which seem to be names of acts, are names of acts, *coupled with certain of their consequences*. For example, If I kill you with a gun or pistol, I *shoot* you: and the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an *act*, perpetrated by me. In truth, the only part of the train which are my act or acts, are the muscular motions by which I raise the weapon; point it at your head *or* body, and pull the trigger. These I *will*. The contact of the flint and steel; the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are *consequences* of the act which I *will*. I *will* not those consequences, although I may *intend* them.”

As if to emphasize the importance of his classification, Austin repeatedly returned to the same theme³⁴:

“The bodily movements which immediately follow our desires of them, are the only human *acts*, strictly and properly so called. For events which are not *willed* are not *acts*; and the bodily movements in question are the only events which we *will*. They are the only objects which follow our desires, without the intervention of means. . . .”

“The bodily movements which immediately follow our desires of them are *acts* (properly so called).

But every act is followed by *consequences*; and is also attended by *concomitants*, which are styled its *circumstances*.

To desire the *act* is to *will* it. To *expect* any of its *consequences*, is to *intend* those consequences.

The act itself is *intended* as well as *willed*. For every volition is accompanied by an expectation or belief, that the bodily movement wished will immediately follow the wish.

A consequence of the act is never *willed*. For none but acts themselves are the appropriate objects of volition. Nor is it always *intended*. For the party who wills the act, may not expect the consequence. If a consequence of the act be *desired*, it is probably *intended*. But (as I shall show immediately) an *intended* consequence is not always *desired*. Intentions, therefore, regard *acts* – or they regard the *consequences of acts*.”

“*act or omission*” – *the criminal codes*:

³³ A difficulty, one might observe, which also bedeviled Professors Hart and Salmond, as well as a number of members of the High Court of Australia.

³⁴ *LJ* p 419, 421.

“Act or omission” also became a familiar concept to anyone with even a passing interest in criminal codification. Its first appearances in what are recognised as the major penal codes occur in 1826 in Edward Livingston’s Benthamic³⁵ *Code of Crimes and Punishments* drafted for the State of Louisiana, and the United States. It occupies a central position in the *Code*³⁶:

“An offence is a voluntary act or omission, done or made contrary to the directions of a penal law.”

In May 1837, Thomas Macaulay completed, more or less single-handedly³⁷, the *Indian Penal Code*³⁸. Macaulay utilized the “act or omission” formula as a foundational concept in respect of offences against the “human body”³⁹.

In his Draft Code for Jamaica⁴⁰, R S Wright included an extending definition of “act”, which was to include “any act or omission, and any series of acts or series of omissions, and any combination of acts and omissions”⁴¹. Using “act” as an

³⁵ See Jerome Hall, “Edward Livingston and his Louisiana Penal Code” (1936) 22 *ABAJ* 191; E H Moore, “The Livingston Code” (1928) 19 (3) *Jnl of the American Inst of Criminal Law and Criminology* 344; for Livingston’s letter to Bentham of 10th August 1829: P Schofield and J Harris (eds), *‘Legislator of the World’: Writings on Codification, Law and Education* (1998) pp 382-384.

³⁶ *The Complete Works of Edward Livingston on Criminal Jurisprudence* (2 vols, 1873), Book I, Chap III, Art 27 (see also Book II, Title I, Chap I, Art 75) Compare section 2 of the Griffith *Code*. Other examples of usage (although by no means an exhaustive list) may be found in the Introductory Report to the *Code*; Book I, Chap I, Art 1, 2, 6; Chap III, Art 46; Book II, Title II, Chap I, Art 81; Title IV, Chap I, Art 124; Chap II, Art 131; Title VII, Chap II, Arts 230, 234; Book of Definitions. The fact that Griffith also used the *Penal Code for the State of New York* in compiling his Draft *Code* makes some brief reference to the former instrument desirable. The Draft of New York’s *Penal Code* (1865) also reveals substantial use of the “act or omission” formula: see *eg* Preliminary Note, p iv, section 2 (*Code* to be exclusive), section 3 (“A crime or public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, either of [prescribed punishments]”), section 20 (involuntary subjection), section 430 (nuisances), section 661 (violation of directors’ duties), sections 737-739 (multiple punishments), section 764 (negligence).

³⁷ *DNB* Thomas Babington Macaulay, Baron (1800-1859); Sir Rupert Cross, “The Making of English Criminal Law: Macaulay” [1978] *Crim LR* 519; K J M Smith, “Macaulay’s ‘Utilitarian’ Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law-Making”, in W M Gordon & T D Fergus (eds), *Legal History in the Making* (1991) pp 145-164.

³⁸ *A Penal Code prepared by the Indian Law Commissioners* (1838). Macaulay had to hand Livingston’s *Code*, as appears from the references to the other work in the extensive “Notes”.

³⁹ See *eg* Sections 294, 304, 308, 309, 327, 329.

⁴⁰ *Drafts of a Criminal Code and a Code of Criminal Procedure for the Island of Jamaica*, C 1893 (Presented to both Houses of Parliament August 9, 1877). The best discussion of the Wright Code is that by Dr Martin L Friedland, “R S Wright’s Model Criminal Code: A Forgotten Chapter in the History of Criminal Law” (1981) 1 *OJLS* 307; and in Friedland, *A Century of Criminal Justice* (1984) Ch 1.

⁴¹ Section 9(v).

operative element, he articulated criminal intention using the contrast between “act” and “event”⁴². Wright’s definition of a “crime” again utilized “act”⁴³:

“Any act which is punishable under this Code or which is punishable on indictment under any other law is in this Code designated as a crime.”

The provisions dealing with insanity, intoxication and mistake⁴⁴ were also to operate upon an “act”.

Sir James Fitzjames Stephen’s *Digest of the Criminal Law*, first published in 1877, is arguably the single most important document in the history of English criminal codification. Preparing it, Stephen was to say, was the hardest work he ever did⁴⁵. His purpose in compiling the *Digest* was to demonstrate the feasibility of criminal codification in England; and when he came to prepare the Draft Codes, and especially the Draft of 1878, he needed only to recast the *Digest* to produce the desired result⁴⁶. In Chapter 3 of the *Digest*, Stephen set out what he classified as “General Exceptions”. A number of these exceptions⁴⁷ were premised upon an “act”. His use of “act or omission” was generally confined to offences which could involve commission by negligence⁴⁸. This approach was largely preserved in the 1878 Draft Code⁴⁹, with the addition – necessary due to the nature of the code – of provisions as to the application of the code⁵⁰, and the place of commission of offences⁵¹.

⁴² Section 10. See also sections 11 and 12 (negligence and causation), which revolve around the “event”.

⁴³ Section 19.

⁴⁴ Sections 38, 39, 40.

⁴⁵ Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) p 377.

⁴⁶ L Stephen *op cit* at 380.

⁴⁷ Infancy (Articles 25 & 26); insanity (Art 27); drunkenness (Art 29); compulsion (Art 31); necessity (Art 32); ignorance of law (Art 33); ignorance of fact (Art 34); accidents causing bodily injury (Art 210). It also appears in his treatment of attempts (Art 49).

⁴⁸ Common nuisance (Art 176); failure to perform duty (Art 211); dangerous acts (Art 216); duties of special skill (Art 217); “killing” (Art 219); unlawful homicide (Art 222); endangering railways (Art 240).

⁴⁹ *Criminal Code (Indictable Offences) Bill*, No 178 of 1878, *House of Commons Papers* 1878-79, vol 2, p 5. A background to the Draft Codes is contained in the latter part of D H Brown’s “Abortive Attempts to Codify English Criminal Law” (1992) 11 (1) *Parliamentary History* 1-39; also *The Genesis of the Canadian Criminal Code of 1892* (1989) Ch 2.

⁵⁰ Section 3.

⁵¹ Section 4.

The Royal Commission of 1879, of which Stephen was a member, produced a further Draft Code as an Appendix to its report⁵². This Code was very similar to its predecessor. The place of commission provision, in addition to attaching jurisdiction to an “act” or “omission”, introduced the term “event”, in the sense of a happening necessary to the completion of the offence⁵³. The use of “act” in Part III (Justification and Excuse) was reduced, but “act or omission” remained pivotal in the chapter on Homicide⁵⁴.

The Criminal Code Bill of 1880⁵⁵ was the third and final Draft Code in which Stephen was directly involved. Although unsuccessful in England, it provided the impetus for codes which were to be introduced in Canada, New Zealand, and eventually Queensland. The Bill used “act or omission” to underpin its definition of an “offence”⁵⁶, and, coupled with “event”, to define jurisdiction⁵⁷. “Act or omission” also found its place in the General Part⁵⁸, and in respect of nuisances⁵⁹, and homicide⁶⁰.

Austin and pre-Code theory:

Austin’s basic theory of action was generally accepted through the second half of the nineteenth century, and into the twentieth century. At the time Griffith compiled the *Code*, it represented orthodox opinion:

“An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff’s harm is no part of it, and very generally a long train of such sequences intervenes.”⁶¹

“...law, in availing itself of the term *act*, must have recourse to some one of [the] popular meanings, and when it has selected one, it must adhere to

⁵² *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences*, Command 2345, 1879, *House of Commons Papers* 1878-1879, vol 20, p 169.

⁵³ Section 4.

⁵⁴ Part XVI.

⁵⁵ *Criminal Code Bill*, No 2 of 1880, *House of Commons Papers* 1880, vol 2, p 1.

⁵⁶ Section 2.

⁵⁷ Section 5.

⁵⁸ Sections 21, 22 (infancy) and 23 (insanity).

⁵⁹ Section 146.

⁶⁰ Sections 167, 168.

⁶¹ O W Holmes Jr, *The Common Law* (1881) p 91. This observation was made in the context of tortious liability. He perceived no distinction in respect of conduct underpinning criminal liability: see p 54.

it without deviation. The only one which is at all adapted to its purposes is that of *voluntary muscular motion*. The application of the term *act* to resolutions of the will or the conscience is unsuitable for law, because law is directly concerned only with that part of men's conduct which is exposed to the judgment of the senses. Whatever inquiry it directs to be made into states of mind and feeling is wholly subordinate and auxiliary to the inquiry into the probable consequences, and, therefore, into the true nature, of *voluntary muscular motions*.

Acts, then, in the eye of the law, are such muscular motions as are preceded by the peculiar phenomenon entitled *will*.”⁶²

“An act is the bodily movement which follows immediately upon a volition. What follows upon an act in connection with it are its consequences. It is necessary to remember this, although, in common language, we often use the word ‘act’ to express both an act and its consequences; as, for example, when we speak of an act of murder. Without a bodily movement no act can be done. A silent and motionless man can only forbear.”⁶³

Stephen, in his *General View of the Criminal Law of England*⁶⁴, refined Austin's basic proposition one step further:

“What...is an action? An action is a set of voluntary bodily motions combined by the mind in reference to a common object. This definition asserts, first, that an action is a combination of certain external motions, with certain internal sensations, the existence of which, in the person moving, is inferred from the fact that similar motions on the part of the observer are preceded and accompanied by such sensations.”

⁶² Sheldon Amos, *The Science of Law* (8th Ed, 1896) pp 100-101; DNB: 1835-1886; Professor of Jurisprudence, University of London; *The Science of Law* went through eight editions from 1874 to 1896; it was preceded in 1872 by *A Systematic View of the Science of Jurisprudence*, which expounded a similar view of “act”: see p 93.

⁶³ Sir William Markby, *Elements of Law* (6th Ed, 1905) §215; DNB: 1829-1914; *Elements of Law* underwent six editions from 1871 to 1905; as testimony to Markby's standing, “It was in Markby's rooms at All Souls that he, Thomas Erskine Holland, Frederick Pollock, James Bryce, and William Anson initiated the Law Quarterly Review...”.

⁶⁴ (1863) p 75. The second edition, of 1890, displayed only minor variation: “VOLUNTARY ACTS – A voluntary action is a group of bodily motions accompanied or preceded by volition, and directed to some object.”

By this formulation, Stephen injected a practical element, in acknowledging that most “acts” which were the concern of the law were, in fact, complex acts consisting in the co-ordination of a number of simple acts⁶⁵. For example, the shooting of a firearm requires the performance of a number of individual or simple acts, including holding the weapon, steadying the weapon, aiming the weapon, and depressing the trigger. These separate acts, as Stephen observed, are combined, by the will, to achieve the common object, namely the discharging of the weapon in the direction of a particular target. Austin’s theory remains basic to this conceptualization, in that a claim that an act was involuntary needs to be linked to one of these simple acts, *eg* that the act of depressing the trigger occurred during a struggle, or by reflex, and was not a “willed act”; or *eg* that the aiming of the weapon was not a “willed act” in that a third party, at the critical moment when the trigger was depressed by the shooter, pushed the barrel of the weapon towards a different target.

Austin and post-Code theory:

Austinian action theory continues to be relevant to the practical operation of the criminal law. It has been substantially codified in both the *Model Penal Code*⁶⁶, and in the Commonwealth *Criminal Code*⁶⁷. Modern commentary commonly acknowledges Austin’s trinity of act, circumstance, and consequence (or event), as representing the most useful analytical approach to the physical elements of a criminal offence⁶⁸. One of the leading contemporary criminal code theorists, Professor Paul Robinson, confirms this view⁶⁹:

“Writers disagree as to the precise definition of an ‘act’. Some writers define ‘act’ as simply a muscular movement. This is the most common modern usage. Others define it as a willed movement. The disagreement is

⁶⁵ Austin himself had acknowledged that it was common usage to use the term “act” to refer to such complex undertakings as shooting a weapon: *LJ* p 415. “Acts” of driving and shooting remain classic modern examples of complex acts; each may require further breakdown if, for example, it is alleged that a simple act (within the complex) was unwilled

⁶⁶ Section 1.13(9).

⁶⁷ Section 4.1.

⁶⁸ D A Stroud, *Mens Rea, or Imputability under the Law of England* (1914) p 1; S Harris, *Principles of the Criminal Law* (13th Ed, 1919) pp 9-10; Dean Roscoe Pound, 4 *Jurisprudence* (1959) Ch 26; Jerome Hall, *General Principles of Criminal Law* (2nd Ed, 1960) p 171 *et seq*; Rollin M Perkins, *Criminal Law* (2nd Ed, 1969) pp 548-549; Glanville Williams, *Textbook of Criminal Law* (1978) p 33; J C Smith & B Hogan, *Criminal Law* (4th Ed, 1978) pp 36-37; G W Paton, *A Textbook of Jurisprudence* (4th Ed, 1972) pp 310-311 (“...for the purpose of analysis, the strict use of terms is necessary...”); Joshua Dressler, *Understanding Criminal Law* (4th Ed, 2006) p 94.

⁶⁹ Paul H Robinson, *Criminal Law: Case Studies and Controversies* (2005) p 480.

not of practical importance because the act requirement is nearly always drafted to require not only an act but a *voluntary* act...

Other writers define 'act' to include the circumstances and consequences of the act. But this usage is not the modern view and, if it was adopted, it would undercut the modern offence definition system that divides the objective components of an offence into conduct, circumstance, and result elements."

Robinson also summarised the purposes to be served by a modern act requirement⁷⁰:

"...the act requirement serves to bar punishment for unexternalized thoughts, attempts to give some minimal objective confirmation that a defendant's intention does exist, provides a time and place of occurrence of an offence, offers a starting-point for resolving the thorny issue of liability and punishment for multiple related offences, and limits in a modest way governmental power to define offences."

The most influential opposing view to the Austinian concept of "act" was that expressed by Sir John Salmond⁷¹. Salmond suggested a wide view of "act", which was to include the "act" (in its Austinian sense), the circumstances, and the consequences⁷²:

"Every act is made up of three distinct factors or constituent parts. These are (1) its *origin* in some mental or bodily activity or passivity of the doer; (2) its *circumstances*; and (3) its *consequences*. Let us suppose that in practicing with a rifle I shoot some person by accident. The material elements of my act are as follows: its origin or primary stage, namely a series of muscular contractions, by which the rifle is raised and the trigger is pulled; secondly, the circumstances, the chief of which are the facts that the rifle is loaded and in working order, and that the person killed is in the line of fire;

⁷⁰ Paul H Robinson, "Should the Criminal Law Abandon the *Actus Reus* – *Mens Rea* Distinction?", in S Shute, J Gardner & J Horder, *Action and Value in Criminal Law* (1993) p 193. See also *Case Studies and Controversies*, *op cit* pp 480-483. The reference to "multiple related offences" is given in the context of s.654 of the Californian *Penal Code* which, like section 16 of the Queensland *Code*, operates upon an "act or omission".

⁷¹ The first edition of *Jurisprudence* appeared in 1902, after the Code was passed. This major treatise had been preceded, in 1893, by *The First Principles of Jurisprudence*. Salmond's treatment of "act" in this earlier work anticipated some of the ground later to be covered, *eg* the "positive" and "negative" acts (*ie* the latter including omissions), "internal" and "external" acts (the "internal" act having been rejected by Austin), and intentional and unintentional acts.

⁷² J W Salmond, *Jurisprudence* (1902) pp 401-402.

thirdly, the consequences, the chief of which are the fall of the trigger, the explosion of the powder, the discharge of the bullet, its passage through the body of the man killed, and his death. A similar analysis will apply to all acts for which a man is legally responsible.”

Salmond retained the basic three components of action identified by Austin. The difference was one of nomenclature: Austin identified the initial element as the “act”; whereas Salmond called it the “origin”, and used “act” to describe the *whole* of the transaction⁷³. Salmond was aware of the contrary view and, referring specifically to Austin and Holmes, observed⁷⁴:

“By some writers the term *act* is limited to that part of the act which we have distinguished as its origin. According to this opinion, the only acts, properly so called, are movements of the body. ‘An act’, it has been said, ‘is always a voluntary muscular contraction and nothing else’. That is to say, the circumstances and consequences of an act are not part of it, but are wholly external to it. This limitation, however, seems no less inadmissible in law than contrary to the common usage of speech. We habitually and rightly include all material and relevant circumstances and consequences under the name of the act. The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which this result is effected. To trespass on another man’s land is a wrongful act; but the act includes the circumstance that the land belongs to another man, no less than the bodily movements by which the trespasser enters upon it.”

The only ground argued for this departure in terminology was what Salmond called the “common usage of speech”⁷⁵. He did, however, add a footnote to this part of his text⁷⁶:

“It is unfortunate that there is no recognised name for the origin or initial stage of the act, as contrasted with the totality of it. Bentham calls the former the *act* and the latter the *action*... But in common usage these two

⁷³ On Salmond’s view, compare K W Saunders, “Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition” (1987-88) 49 *U Pitts LR* 443; Saunders points out that Salmond recognised that the transaction was separable into the three parts, namely origin, circumstances, and consequences, and observes, “The choice of terms is less important than the recognition of separability” (p 452).

⁷⁴ *Ibid* pp 402-403.

⁷⁵ On the “common usage” argument, see Saunders *op cit* pp 450-451.

⁷⁶ *Ibid* p 403.

terms are synonymous, and to use them in this special sense would only lead to confusion.”

Salmond’s view did attract some adherents⁷⁷, but it was not a prevailing view at the time the *Code* was constructed, and the influence it should exert upon the interpretation of “act” in its codal context is questionable⁷⁸.

Conclusions:

The implications of accepting the Austinian “act” as underpinning fundamental provisions within the Griffith *Code* are important. To step back, and to refocus upon some of the sections within the General Part of the *Code*, through “Austinian eyes”, is to see them in a quite different light. A voluntary act is no longer the inherently-ambiguous concept which generated so much divergence of opinion in the Queensland Court of Criminal Appeal, and in the High Court of Australia; it becomes, instead, the finite “willed bodily movement” of traditional criminal law theory.

Did Griffith anticipate that “act or omission”, and in particular “act”, would carry a specific meaning⁷⁹; and if he did, what was his intended content of “act”⁸⁰?

⁷⁷ See *eg* W H Hitchler, “The Physical Element of Crime” (1935) 39 *Dick LR* 95.

⁷⁸ Similarly with the chameleonic expression *actus reus*, which does not seem to have entered legal usage as a description of the physical elements of a crime until it was so used by Professor C S Kenny in the first edition of his *Outlines of Criminal Law* in 1902: see Jerome Hall, *General Principles of Criminal Law* (2nd Ed, 1960) p 222, citing a private communication with Professor J W C Turner.

Salmond’s assertion that there was “no recognised name” for his “origin” stage of action seems somewhat disingenuous, having regard to the fact that “act” had been the preferred choice of Bentham, Austin, Holmes, Sheldon Amos and Markby. It might add weight to Glanville Williams’ assertion that “Salmond’s method in writing the book [*Jurisprudence*] was to give a smooth and lucid presentation of his own point of view, mostly as though it were the only opinion in the world”. Dr Williams edited the tenth and eleventh editions of Salmond’s *Jurisprudence*: see R F V Heuston, “Sir John Salmond” (1964) 2 (2) *Adel LR* 220-225.

⁷⁹ “...Griffith, who was confident of his own opinions, would have thought that the words of s.23 [“act”] were perfectly plain...”: The Right Honourable Sir Harry Gibbs, “Queensland Criminal Code: From Italy to Zanzibar” (2003) 77 *ALJ* 232, at p 236.

⁸⁰ An important question is whether Griffith contemplated that “act or omission” would retain the same content wherever it was used in the *Code*. The traditional rule – that the same word should carry the same meaning throughout the instrument – has been described as weak or readily rebutted. Where the term is used frequently and constitutes an integral part of fundamental concepts, the presumption may be substantially stronger: compare *Clarke v Kato* [1997] 1 WLR 1647, 1659G *per* Lord Clyde, on “road” in the *Highway Act 1988*(UK). Where a code is involved, the

Griffith's former Associate, Mr Douglas Graham, provided a valuable insight into the Chief Justice's penchant for precision in language⁸¹:

“[Sir Samuel] ...had a passion for accuracy and precision of thought. Nothing irritated him as much as slovenliness or ambiguity in thought or expression. He could not abide the advocate who sought by ‘words to darken counsel’. ‘The essence of argument’, he constantly said, “is the definition of your terms’, and he added that most disputes would never come to Court if the disputants could only make sure of the meaning of the words they used.”

The brief review of other codification undertakings of the nineteenth-century set out above shows that, in failing to define “act”, or “voluntary act”, Griffith was in redoubtable company. If this failure was a shortcoming on Griffith's part, then it was one which was shared by every other potential codifier⁸². Griffith has been described by high modern authority as a “master of the criminal law”⁸³. His achievement in the *Code* justifies that description. Using the Stephen-based Bill of 1880 as his foundation, he drew ideas from selected foreign codes and, while maintaining consistency with Stephen's style and language, took his *Code* to a new level with his development of statutory replacements for *mens rea*⁸⁴.

The probability is that Griffith intended “act”, in the context of “act or omission”, to have a finite meaning. That meaning, one can be virtually certain, reflected the

assumed codal aims of clarity and certainty favour a consistent content, at least in the absence of absurdity.

⁸¹ A Douglas Graham, *The Life of the Right Honourable Sir Samuel Walker Griffith* (1939) at p 59.

⁸² Including Sir James Fitzjames Stephen.

⁸³ Sir Harry Gibbs, *Queensland Judges on the High Court* (2003) p 29. This writer would suggest that Justice (later Chief Justice) Gibbs stood second only to Griffith himself in respect of the interpretation of the *Code*: “His reasoning in *Kaporonovski* and *Stuart* should be compulsory reading for all students of the Queensland Criminal Code”: Justice G N Williams, *Queensland Judges, op cit*, at p 62.

⁸⁴ “[Sections 22, 23 and 24] embody the rule as to *mens rea*”: Sir S W Griffith, *Draft of a Code of Criminal Law* (1897) p 12 n 1. This writer would include, among Griffith's especially-notable statutory achievements, section 16 of the *Code* (double punishment). The original section, as drafted by Griffith, went directly to the core of the leading contemporary authorities of *Wemyss v Hopkins* (1875) LR 10 QB 378, and *R v Miles* (1890) 24 QBD 423. The Royal Commission on the *Code* recommended the addition of the “homicide exception” (or “delayed death exception”) to the original text, which addition accurately reflected the qualifying effect of *R v Morris* (1867) LR 1 CCR 90.

settled meaning of “act”, as a legal conception, as it stood in 1899⁸⁵. Austin’s analysis of human action was the only serious contender to this title⁸⁶. It is reasonably certain that it was *not* intended to include all the physical elements of an offence (or as sometimes called, the *actus reus*) , as Griffith made clear in his reference to what was to become section 12 of the *Code*, which was to confer jurisdiction⁸⁷:

“...in a case where several acts or events are collectively necessary to constitute an offence, and where some only of those acts or events occur within the jurisdiction, the rest occurring out of the jurisdiction...”

⁸⁵ “...and when it has selected one [meaning], it must adhere to it without deviation”: S Amos fn 62 above.

⁸⁶ A qualified view was offered by Dr E C Clark, in *An Analysis of Criminal Liability* (1880), pp 23-24, where he instanced the case of the man with a rapier, extending his arm, and thus piercing his victim’s chest. This caused him to suggest that: “Consequences very *near*, and what would be considered, in the judgment of all ordinary men, very *certain*, are taken as ‘parts of the act’: more correctly speaking, as inseparably connected with the first bodily movement...[a]cts, then, are, I believe, in the ordinary popular sense of the word, movements of the body coupled with the more immediate consequences of those movements”. This work, it has been said, was not very influential: C H S Fifoot, *Judge and Jurist in the Reign of Queen Victoria* (1959) p 124. It was this same proximity between act and consequence which challenged the High Court in *Kaporonovski*. The approach taken by Gibbs J, and that which, it is suggested with respect, was correct, was that although there might be a contemporaneity between the latter stage of the act, and the initial stage of the consequence (in that the act of thrusting the rapier continues so long as force continues to be applied, while the consequence commences immediately upon the slightest piercing of the victim’s chest) it may still be necessary (albeit in rare cases) to draw the analytical distinction between the two aspects of the transaction.

The prominence of Austin’s theory was countenanced by the inclusion of a relevant quotation in *A New Dictionary of the English Language*, vol 1, (Murray Ed, 1888), and which still finds a place in its direct descendant, the *Oxford English Dictionary*. The case of *R v Tricklebank* [1994] 1 Qd R 330 represents, so far as ascertained, the only occasion upon which Austin’s concept of “act” was possibly applied. Ironically, it was misapplied. The case concerned “act” in section 16 of the *Code*, and in the course of attributing content to “act” in the section, Demack J (at 340-341) referred to the *Oxford English Dictionary* which contained an abbreviated reference to Austin’s theory. Demack J seized upon the words “The only objects which can be called acts are the consequences of volition” in possible support of a conclusion that “being adversely affected by liquor” was an “act”. However, the quotation contained in the *OED* was abridged. Recourse to Austin’s work itself provides the full statement of principle: “...the only objects which can be called acts, are consequences of volitions. A voluntary movement of my body, or a movement which follows a volition, is an *act*. The involuntary movements which are the consequences of certain diseases, are *not* acts”: *LJ* pp 414-415. In Austinian terms, the relevant transaction would be viewed thus: the desire to drink gave rise to a volition which preceded and caused the “acts” of raising the vessel to the lips, pouring the contents into the mouth, and swallowing the beverage; the blood alcohol reading was a *consequence* of those acts. In the context of the specific offence in question, the blood alcohol reading was a *circumstance*, or *concomitant*.

⁸⁷ Letter of 29/10/1897, p 7.

Of course, the meaning of particular words in a statute may not remain constant. For example, it might be argued that the content of “act” should vary with shifts in popular meaning, or development in technological or scientific theory. Further, the potential for ambiguity of a particular term increases where the term remains undefined for the purposes of the particular instrument. This might be a deliberate policy - a “purposive ambiguity” may better serve a community where it allows that community to reflect its contemporary values⁸⁸. Should “act”, in the *Code*, enjoy the “flexibility” offered by either the “statute is always speaking” principle, or its own inherent ambiguity?

To use as an example section 23, the voluntary conduct requirement is a foundation of criminal responsibility in Queensland. What is it that must be voluntary? It is the accused’s conduct; or more precisely, the accused’s act or omission. It has been settled, as least since *Kaporonovski*⁸⁹ (and often re-affirmed⁹⁰) that it is the narrow (Austinian) concept of “act” which must be voluntary. If “act” is accorded a different content, it necessarily results in a shifting of the foundation of criminal liability; and, as is consequential upon any foundational shift, the structure which rests upon it – in this case the day-to-day administration of the criminal law – cannot but be affected. It is hard to see that a return to pre-*Kaporonovski* uncertainty as to the content of “act” is a desirable development. There are, no doubt, cases which test the theory⁹¹, but it does continue to provide the most workable basis upon which to assess the complexities of human action, as well as maintaining the consistency required by the criminal law.

Professor Fletcher⁹² has argued that basic philosophical concepts, such as action theory, should not be part of a criminal code. Rather should the drafters leave such definition to the endeavours of the scholars, drawing upon that developing body of doctrine when required to articulate an aspect of the theory for the purpose of the case at hand. Codes which allow for this assimilation of philosophical theory and “black-letter” criminal law he would describe as “deferential” codes. Codes like the *Model Penal Code* (and, one would assume, the Commonwealth’s *Criminal Code*), which purport to enter the philosophical enclave through definition of

⁸⁸ The prime example is probably “reasonable”, eg “reasonable force”, “reasonable precautions”, or “reasonable care”, “reasonably necessary” and so on.

⁸⁹ *Kaporonovski v R* (1973) 133 CLR 209, per Gibbs J.

⁹⁰ *R v Van Den Bemd* [1995] 1 Qd R 401; *R v Taiters, ex parte Attorney-General* [1997] 1 Qd R 333; *R v Condon* [2010] QCA 117.

⁹¹ An example is *Kaporonovski* itself.

⁹² G P Fletcher, “Truth in Codification” (1997-98) 31 *UC Davis LR* 745, and “Dogmas of the Model Penal Code” (1998-99) 2 *Buff Crim LR* 3.

fundamental concepts, he denoted “imperialistic”⁹³. From a practical viewpoint, the strongest objection to this course involves the necessity for doctrinal stability in the criminal law: consistency in doctrine is unattainable when it is sought to erect that doctrine upon the shifting sands of philosophical theory. Even assuming that some consensus could be reached by the action philosophers, the law is faced with the unacceptable situation of remaining uncertain pending such agreement⁹⁴.

The utility of action theory in assistance of the law depends entirely upon the task it is expected to perform. In articulating his three components of human action, Austin made it possible to assign the various rules of criminal responsibility to an appropriate place within this action paradigm. As a result, we have today a fairly clear demarcation between the phases of action, and their relevant role in assessing criminal liability: “act” (section 23(1)(a), “1st limb”), “circumstances” (sections 22(2) and 24⁹⁵), and “consequences” (or “events”) (section 23(1)(b), “2nd limb”).

If Griffith did adopt to the use of his *Code* the Austinian conception of action, one can be reasonably certain that he did so, *not* because he believed that it represented philosophical truth, but because it was calculated to perform a practical and useful function⁹⁶:

⁹³ Note Professor Robinson’s response: “In Defence of the Model Penal Code: A Reply to Professor Fletcher” (1998-99) 2 *Buff Crim LR* 25.

⁹⁴ Former Justice J B Thomas of Queensland’s Supreme Court, in both judicial and extrajudicial contexts, has argued against the introduction of action theory into the criminal law: *R v Morgan* [1999] QCA 348 para 6; “Judge Fears Potential for Disaster” (1995) *Australian Lawyer* (June) 12, and subsequent correspondence: (1995) *Australian Lawyer* (Aug) 14; (1995) *Australian Lawyer* (Oct) 6, 7. Action theory is a “highly specialized branch of philosophy”: D Husak, Review (1995) 6(2) *Criminal Law Forum* 327. Its full implications may well be beyond many lawyers (including the present writer), but there is nothing especially complex about Austin’s theory: it does no more than provide a wider theoretical basis for Gibbs J’s interpretation of “act” in *Kaporonovski v R*, which is now firmly established as the law of Queensland (see *R v Taiters* [1997] 1 Qd R 333) and guides the way for the development of the law, along the same lines, throughout the *Code*. The fact that the theory may derive from another discipline is nothing unusual in the law: “...law is often not the autonomous discipline that many of its practitioners and theorists want it to be; rather, law is a borrower – in the first instance, from ethics, and ultimately, from metaphysics. In the criminal law in particular, legal liability both does and should by-and-large track moral responsibility, making legal distinctions (like that between acts and omissions) take point and substance from underlying moral distinctions”: Professor Michael Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (2010) vii.

⁹⁵ Section 22(claim of right) is a specialized “circumstantial” exculpation, in that it applies only to the mental element attending property offences. Mental states, under the *Code* scheme, are circumstances, not “acts”. Austin had rejected the idea of mental (or internal) acts: *LJ* pp 420-421.

⁹⁶ Rollin M Perkins, *Criminal Law* (2nd Ed, 1969) pp 546 *et seq*, esp pp 548-549.

“The choice [as to which meaning of ‘act’ is selected] must be based upon convenience rather than upon philology. And, for the purposes of judicial discussion, convenience will best be served by encouraging the present trend toward the limitation of the word ‘act’ ‘to denote an external manifestation of the actor’s will’ without the inclusion of the results which follow, leaving, however, sufficient latitude to permit the word to be used, as a sort of dialectic shorthand, to express certain common and complicated manifestations of the will, such as shooting and driving.”

Any “choice”, in respect of the Queensland *Code*, was made by Sir Samuel Griffith in 1897. The result of that choice was a General Part which was, and which remains, brilliant in its sheer simplicity. Perhaps it was to this achievement that Griffith was referring when expressing his particular satisfaction with Chapter 5.