

LAW AND AUTHORITY
IN EARLY
MASSACHUSETTS

A Study in Tradition and Design

By

GEORGE LEE HASKINS

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Preface

AMERICAN legal history has only begun to receive from scholars the attention it deserves. There is no history of American law corresponding to the works of Maitland and Holdsworth for England, and this lack has long been a subject of lament on the part of those who have appreciated that our legal traditions are at least as much a part of American culture as are our political traditions. Yet only the smallest beginnings have been made toward reconstructing the story of the development of American law. Substantial materials for the undertaking are available, and the impediment is less a lack of implements than of workers. Over the course of the last thirty years important studies and monographs have appeared, but extensive gaps remain, and practically no attempt at synthesis has been made. Few historians have attempted to relate legal development to the social and economic pattern of each period; fewer still have sought to go behind the law of the early period to inquire into its sources in English and even in Continental law. In consequence, serious misconceptions about the nature of our law before 1800 continue to prevail, and concerted effort to correct them in the broad perspective of history is long overdue. Those misconceptions become significant when it is recalled that the constitutions or statutes of several states specifically incorporated the law of the colonial period into the law of their respective jurisdictions.

The beginnings of American law are to be sought in the colonial period, the formative era during which the needs of a new civiliza-

tion molded traditional ideas and practices into thirteen distinct legal systems. The search, however, is neither easy nor simple. The colonies differed greatly in background, in the conditions of settlement, and in the forms of government they adopted. Moreover, the social and political development of each proceeded, for the most part, along different lines. Hence, it is essential that the character and growth of the several colonial legal systems be studied individually and be separately described. An eminent legal historian has declared:

Not until we have a series of state histories by authors solidly grounded in English legal history and in their own state archives, and treating the history of every state with minute accuracy and exhaustiveness, can any attempt be fruitfully made to write American legal history as a whole. When each state has had its Reeves, then in the fulness of time there may come a Maitland.¹

This book is intended as an introduction to the history of Massachusetts law.

The task of the historian of law is not merely one of recounting the growth and jurisdiction of courts and legislatures or of detailing the evolution of legal rules and doctrines. It is essential that these matters be related to the political and social environments of particular times and places. Broadly conceived, legal history is concerned with determining how certain types of rules, which we call law, grew out of past social, economic, and psychological conditions, and how they accorded with or accommodated themselves thereto.² The sources of legal history therefore include not only the enactments of legislatures and the decisions of courts and other official bodies, but letters, diaries, tracts, and the almost countless varieties of documents that reveal how men lived and thought in an earlier day. Law is not simply a body of rules for the settlement of justiciable controversies; law is both a product of, and a means of classifying and bringing into order, complex social actions and interactions. As Savigny has written, the phenomena of law, language, customs, government are not separate: "There is but one force and power in a people, bound together by its nature; and only our way of thinking gives these a separate existence."³

Unfortunately the domain of the law is terrain upon which the historian without formal legal education has been reluctant to intrude. One reason for this reluctance has been the traditional isolation of the law from other disciplines as a result of the professionalization of legal study in this country. Moreover, the complexities of legal doctrine and the intricacies of legal procedure have understandably tended to deter those without professional legal training from investigating the sources and the operation of law even in a past civilization. Yet, because law is a social product, reflecting not only social organization but the incidence of political and economic pressures, the discovery of its past particularly requires the techniques and insights of the social scientist. Unhappily, as Professor Mark Howe has said, "lawyers consider the historians incompetent and irresponsible, and the historians consider the lawyers unimaginative and narrow."⁴ If the history of American law is to be written, this mutual distrust must be dispelled, and the outlooks of both disciplines combined.

It must again be emphasized that this book is intended only as an introduction to the history of Massachusetts law in the colonial period. It is confined to the first twenty years of the colony of Massachusetts Bay, from 1630 to 1650. So conceived, the present undertaking may appear narrow and limited, and it is accordingly appropriate to make some explanation for confining these studies to so short a period of time. In the first place, the initial decades of the Bay Colony's existence were the formative years during which, under the pervasive influence of Puritan doctrine, and with virtually no outside interference, the structure of the civil government took shape and was completed. Within the framework of that structure and of the social life which developed in its interstices, the laws of the colony were shaped and brought together in 1648 in a code which became the basic legislation for the remainder of the seventeenth century. During the same years, church doctrine and ecclesiastical polity, which premeated every aspect of colony life, were carefully developed and likewise codified in 1648 in the Cambridge Platform of Church Discipline, which became the constitution of the Congregational churches. In the second place, the first twenty years are relatively distinct from those which followed. During the 1640's, the colonial economy went through a drastic change,

from one that was predominantly agrarian and self-sufficient to one that came to be based to a substantial extent upon foreign trade. The early social and political structure was to endure for several decades, but it gradually crumbled as primitive zeals began to wane and the religious aspects of life were subordinated to commercial interests. Increasing wealth and a growing population forced the religiously inspired minority to retreat and to consolidate, so that after 1650 that element no longer had the same assured control; indeed, the outbreak of religious persecutions in the late 1650's should be viewed as part of an effort of that minority to reassert its position. On the legal side, a new period also began in the 1650's. Once the law had been embodied in a code, the principal problem came to be 'the enforcement of that Code by the judicial process,' with the result that the ensuing years witnessed the development of the law chiefly through the decisions of the courts rather than through legislation.

This volume seeks, first, to trace the evolution of the colony's institutions and instruments of government, and, second, to describe in broad outline certain aspects of the substantive law that developed in the first two decades. Its purpose is to emphasize, on the one hand, the role of tradition—social, political, legal, religious, and intellectual—and, on the other, the role of design, that is, the conscious effort to construct a system of government and law consonant with the purposes and ideas which had inspired the founding of the colony. The book seeks, further, to illustrate that law, in its general sense, is much more than the sum of the rules administered by the courts and that it consists of the formal and informal understandings of people as socially organized. Hence, it is concerned not only with legislation and with the decisions and orders of the courts but with such agencies of social control as the family and the church. In this way, the Massachusetts legal system emerges as a regime both for the ordering of men's lives and conduct and for securing and adjusting their competing interests.

The book is therefore not intended to present a comprehensively detailed legislative and judicial history of Massachusetts Bay between 1630 and 1650; by the same token, it does not purport to give a systematic account of the state of the law in that period. These matters will be developed in further volumes, for which

extensive materials have already been assembled, and which, with a companion study for Plymouth, will carry the legal history of Massachusetts down to the Revolution.

Consistent with the purpose and plan of this introductory volume, the opening chapters recount, first, the genesis of the Massachusetts enterprise in terms of Puritan doctrines and aspirations, and they go on to describe the institutions of central and local government, the development of civil and ecclesiastical orthodoxy, legal and political theory, and the role of the family and of the churches as sources of positive law. Much of the material upon which the first seven chapters are based will be familiar to colonial historians; to others, however, it will be *terra incognita*, and that fact of itself has seemed to justify an extended introduction. However, the material in those chapters has been developed from a standpoint entirely different from that employed in standard political and institutional histories, which have had other purposes in view. All the topics dealt with in the opening chapters are used as vehicles for tracing the sources and evolution of a substantial segment of what may be termed the public-law aspect of the colonial legal system, to the end that this area of the law may appear in the context of the social and institutional arrangements which were its matrix. Thus, these chapters provide not only the historical introduction which most readers will expect but extensive illustrations of the interplay of tradition and design in early Massachusetts law.

The last five chapters deal more particularly with substantive law, such as crime, wrongdoing, inheritance, property, domestic relations, and civil liberties. However, these topics are not treated either systematically or comprehensively, but are used to illustrate the sources from which legal rules were drawn and the conditions that developed them. Massachusetts law in the colonial period was a syncretization of biblical precedent and a complex English heritage which included not only the common law and the statutes, but practices of the church courts, of the justices of the peace, and of the local courts of manors and towns from which the colonists came. Parts of that heritage were deliberately incorporated into the colony's legal system, but other parts were rejected or adapted as Puritan ideals and the conditions of settlement might require. It is thus the purpose of the last five chapters to identify, and to demon-

strate the influence of, the varied inheritance upon which the colonists drew in developing the early legal system of Massachusetts, and also to indicate areas in which they departed from English traditions and their reasons for so doing.

The materials upon which the book is based include original English and colonial legal records, both printed and unprinted, as well as secondary texts, law reports, special studies, and papers contained in the proceedings of learned societies. Few periods of history, with the exceptions of Greece and Rome, have been the subject of so many books and monographs dealing with nearly every phase of social, political, and intellectual life as has that of colonial Massachusetts. So extensive are these sources, and so scattered, that they are seldom all accessible except in the largest libraries. It has therefore seemed desirable, for the benefit of those who are not specialists in the colonial field, to provide extensive footnote citations for statements in the text. This is especially important in the case of English legal records, which have rarely been utilized to demonstrate the extent to which the colonists drew upon practices with which they had been familiar in the localities from which they had come.⁶

It should be emphasized that particular difficulties beset anyone who attempts to utilize colonial court records before 1650. The entries are so sketchy and incomplete that they can hardly be termed case law, and next to no pleadings or other court papers survive to supplement them, with the result that even the trained lawyer is frequently at a loss to determine the final outcome of a suit. Moreover, the printed records have been prepared, condensed, and indexed chiefly from the standpoint of the interests of the social historian and the genealogist, so that from the lawyer's standpoint essential matter is often unavailable or difficult to find.

Since this book is intended only as an introduction to the early history of Massachusetts law, it is worth remarking upon a feature of that history which it has not been possible adequately to develop in these studies but which should nevertheless be borne in mind. Separate and distinct though the Massachusetts legal system was from those of other British colonies, there are numerous points of similarity among them all which are not attributable merely to their common background and heritage. Certain of these similarities were

the result of intercolonial borrowing; the extent thereof, together with the processes by which patterns of life and thought were carried from colony to colony, should not be overlooked.⁷ Other similarities appear to have been the consequence of common problems which it is a function of law to resolve. Political scientists have long been aware that the legal systems of widely differing societies and cultures have many common features, and it is beginning to be recognized that these are often associated with recurrent patterns in legal development which reflect uniformities in human drives and conduct. It has become a special function of what is called comparative jurisprudence to investigate these general patterns with a view to identifying their characteristics and, more especially, to understanding their influence at particular stages of legal growth. Recurring forms of law—for instance, codification—reflect persistences in human sentiments and attitudes which make more intelligible the course of legal development and, at the same time, help to explain some of the influences and pressures responsible for social and political growth and change within particular societies.⁸ Comparative law has thus acquired an assured and important position in jurisprudence generally and in legal history in particular. Its lessons deserve to be remembered in writing even of the first years of the legal history of Massachusetts Bay, which in several respects parallels that of the early Greek colonies in Sicily and southern Italy.⁹ Such instances of uniformities in human behavior in differing civilizations give continuing reality to history and help to reveal it as a coherent whole.

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Contents

| | |
|---------------------------------------|-----|
| PREFACE | vii |
| ACKNOWLEDGMENTS | xv |
| I THEIR HIGHEST INHERITANCE | 1 |
| II CREEDS AND PLATFORMS | 9 |
| III FOUNDATIONS OF POWER | 25 |
| IV A DUE FORM OF GOVERNMENT | 43 |
| V THE INSTRUMENTS OF CIVIL GOVERNMENT | 66 |
| VI COMMUNITIES OF VISIBLE SAINTS | 85 |
| VII THE SORTS AND CONDITIONS OF MEN | 94 |
| VIII THE PATH OF THE LAW | 113 |
| IX A RULE TO WALK BY | 141 |
| X AFTER ENGLISH WAYS | 163 |
| XI TOWARD NEW HORIZONS | 189 |
| XII OF LAW AND LIBERTY | 222 |
| NOTES | 232 |
| INDEX | 289 |

I

Their Highest Inheritance

IN A small quarter of the Western world, in the year 1630, a small Puritan community was established along the shores and tidewater in the general vicinity of what is today Boston Harbor. This was the colony of Massachusetts Bay, which within a short time became one of the most renowned of the British settlements in North America. Founded by men dedicated to ideals as exalted as any that have ever inspired those of the Christian faith, the colony began a record of accomplishments which the passing of time has never obliterated. Few others equaled its contributions to theology, letters, and education; none paralleled its early achievements in government and law. Building upon and purifying its English heritage, the colony constructed within less than two decades a commonwealth in which the religious and social goals that had inspired its founding were achieved. Those goals were realized within an impressive framework of laws and institutions created and molded to meet the needs and purposes of a new civilization.

The achievements of the Bay colonists are hardly to be measured merely in terms of their having established a permanent settlement on the bleak New England coast. The dangers and the hardships of the wilderness were many, but those adversities were not unique, and the physical courage with which they were met was not exceptional; conditions at Plymouth and in Virginia had been more severe. It was the great achievement of the colonists of Massachusetts Bay that they founded and developed a new type of com-

munity in which they were able to purify their religious and political heritage. This they accomplished under a government not only of laws but of men—men who were dedicated to live, and cause others to live, in accordance with the word of God and the teachings of Christ.

Of the colony leaders who led and inspired the enterprise it may be said without exaggeration, and in the words which Henry Adams applied to the ruling class of Virginia after the Revolution, that they "were equal to any standard of excellence known to history. Their range was narrow, but within it they were supreme."¹ If their aims in time became tarnished, their outlook intolerant, their attitudes glacialized, the greatness of their early effort remained unimpaired. In law, their accomplishments were even more enduring, for they had a continuing influence on American legal history throughout both the colonial period and that of the Republic which followed.

In 1648 the colony laws were brought together into a comprehensive legal code which was an authoritative compilation not only of constitutional guarantees, provisions for the conduct of government, trade, military affairs, and the relations between church and state, but of the substantive law of crime, tort, property, and domestic relations. The Code was no mere collection of English laws and customs, but was a fresh and considered effort to order men's lives and conduct in accordance with the religious and political ideals of Puritanism. Traditional elements there were, but these were consciously reworked into a carefully thought-out and integrated pattern. Many of its provisions were notable improvements on the law of contemporary England in the sense that judicial procedure was simplified, criminal penalties mitigated, primogeniture abolished, debtors accorded humane treatment, and rules of due process instituted to safeguard men's lives from the arbitrary exercise of governmental power. The first compilation of its kind in the English-speaking world, the Code of 1648 stands as a monument to the elements of tradition and design from which the early law of Massachusetts was fashioned.²

In 1630 Massachusetts Bay was only one of several colonies which had been planted along the shores of the western Atlantic. To the north the French had occupied parts of what is now Canada; to

the southwest the Dutch had established permanent settlements along the Hudson; and the Swedes were soon to secure footholds along the Delaware. As the century progressed, the British colonies became more numerous than those of other nations. Virginia had been founded in 1607 and Plymouth in 1620; Maryland, Connecticut, New Haven, and the plantations of Rhode Island were settled in the 1630's. Hardly less important were the island colonies of Bermuda, St. Kitts, Nevis, and Barbados, which were established before 1650. Although modern interest in the antecedent history of the United States tends to focus attention on the British colonies of the mainland, it is well to remember that the settlement of the latter was but one aspect of the vast colonizing movement which was a major event of the seventeenth century. At least as many colonists settled on the islands as on the mainland. It has been estimated that by 1640 the population of the British colonies was probably in excess of 64,000, of which more than one-half were in Bermuda and the West Indies.³ Even by that year, the fraction of those in New England appears not to have been much larger than a quarter of the whole, and of that quarter probably no more than 14,000 or 15,000 were in Massachusetts Bay.⁴

These various settlements resulted from an extensive stream of migration out of England which had begun in the reign of James I and which had had its origins in the "voyages, traffiques and discoveries" of the early navigators. Gathering momentum, the tide reached unprecedented heights in the 1630's. "Never," writes Churchill, "since the days of the Germanic invasions of Britain had such a national movement been seen."⁵ The opening up of the New World seemed to offer limitless possibilities for profit and wealth, as well as for escape from conditions in politics and religion which, under the Stuarts, had for many become intolerable. Widely differing in aims and purposes, in which the hopes of the godly and the self-interest of the materialists were nearly always commingled, the colonies were all subjected to a greater or less degree of supervision on the part of the entrepreneurs who financed them and of the crown which authorized them. Relations with the homeland were therefore in some instances close and in others distant, depending on the type of colony, the purpose of settlement, and the character of its inhabitants. For example, independence of outlook and action

was more typical of the New England than of the Middle Atlantic colonies, partly because of the primarily religious reasons which had inspired their settlement and partly because the English authorities exercised little or no supervision over them. Massachusetts Bay was accordingly freer to depart from English ways in developing its laws and instruments of government than were Maryland and Virginia.

The history of American law begins, at least in a geographic sense, with the establishment of the first permanent settlements and colonies along the Atlantic seaboard in the seventeenth century. Each of them, whatever the nationality of its inhabitants, of necessity established, or had established for it, some system of laws immediately upon settlement. This was inevitable, since the first colonies were settled not by individual frontiersmen but by groups of men and by families. No social group, not even the family unit, can long subsist without rules of some sort to order and regulate its conduct. In politically organized society those rules, which we call law, are the product of, or a response to, complex social and psychological pressures. Their purpose is to secure, limit, and adjust the commands and desires of men with respect to things, to one another, and to the community.⁶ Law, in this sense, consists partly of received precepts and ideals and partly of legislative enactments, judicial decisions, and the orders of public officials. So viewed, the law of a particular civilization is a compound of past as well as of present forces; it is both an anchor to tradition and a vehicle for change. Hence the wisdom of the ancient maxim which spoke of the law as the highest inheritance by which the people are preserved.⁷

Two distinct but related assumptions about early American law have imposed serious obstacles to a comprehensive study of its development. The first is the view, which has become encysted in the tissue of judicial precedents, that the law of the colonies was essentially the common law of England, brought over to the extent applicable to colonial conditions. As early as 1798, a United States Circuit Court announced that the colonists "brought hither, as a birth-right and inheritance, so much of the common law, as was applicable to their local situation, and change of circumstances;"⁸ and a generation later the Supreme Court stated that they brought

with them the general principles of the common law but "adopted only that portion which was applicable to their situation."⁹ More recently, it has been asserted that "As soon as the Colonies reached a stage where there was need of any developed system of law, the whole of the English law was introduced in its system of common law and equity, with exceptions that are not important."¹⁰ Nothing could be more misleading than sweeping statements of this kind, which in effect deny any native legal achievements in the colonial period. It is true, of course, that the colonial charters customarily provided that the laws established should not be contrary to the laws of England.¹¹ Those provisions undoubtedly established a standard to be observed, but what were the "laws of England" in the seventeenth century? Certainly they included more than the statutes of parliament, more than the law of the king's courts which we call the common law. In the days before the common law had achieved its later ascendancy, the laws of England included the customs of the merchants, the local and divergent customs of towns and manors, as well as the laws enforced by the ecclesiastical tribunals and by numerous other courts and commissions of specialized jurisdiction. Hence, the charters did not prescribe the wholesale introduction of any one form of English law. Indeed, they usually authorized the colony governments specifically to establish their own laws and ordinances, provided they did not violate the announced standard.¹² What constituted a departure from that standard, and what consequences resulted therefrom, depended on the administrative policies of the English government and its relationship at particular times with particular colonies. Clearly, the standard did not describe what laws were in effect in the colonies. Indeed, in Massachusetts Bay, a number of laws were enacted and remained in force which were entirely foreign to any laws known in England.

Equally misleading and inaccurate is the official theory of American courts that all English statutes enacted prior to the founding of Jamestown were in force in the colonies, and all statutes enacted thereafter were applicable only insofar as expressly extended.¹³ English statutes of both periods were in some instances rejected, in others adopted in whole or in part by colonial enactment or judicial decision.¹⁴ Whether, therefore, an English statute was part of the colony's law at a particular time is a question to be answered by

research and inquiry, not by assumptions. As the Chief Justice of Pennsylvania observed in 1813:

It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own. . . .¹⁵

The truth is that American law in the colonial period drew upon a complex legal heritage which included not only many of the English statutes and the rules applied by common-law courts but various customs of particular localities—all of which were supplemented by colonial enactments and decisions. Unquestionably, as the eighteenth century progressed, a substantial amount of English common law was absorbed into the local product as English lawbooks and reports found their way into colonial libraries and as a number of the colonists went over to the Inns of Court for legal training. Nevertheless, the extent of the reception of English law remains a fact to be proved in particular instances.¹⁶

The second mistaken assumption about early American law is an extension of the first. It presupposes that, because the law of the colonies was essentially that of England, colonial law was basically the same everywhere. This assumption is wholly without foundation. There was no uniform growth of an "American" law throughout the colonies beginning with the founding of Jamestown in 1607. On the contrary, the conditions of settlement and of development within each colony meant that each evolved its own individual legal system, just as each evolved its individual social and political system. Geographical isolation, the date and character of the several settlements, the degree or absence of outside supervision or control—all had their effect in ultimately developing thirteen separate legal systems. The divergences between English and colonial practices had become so marked by the end of the seventeenth century that an *Abridgement* was published in 1704 of the laws of several of the American settlements, including colonies on the continent of North America and in the West Indies.¹⁷ Even at the end of the eighteenth century, when there had been a substantial reception of much

common-law doctrine, Thomas Jefferson, writing in Virginia, could properly refer to the law of Massachusetts, along with that of Bermuda and Barbados, as "Foreign Law."¹⁸ Whatever the impact of Blackstone's *Commentaries*, not only in accelerating the reception of English doctrines but in helping to bring about uniformity by eliminating many local divergences fostered by independent growth, the experience of the colonial period was neither jettisoned nor forgotten. That period remains the essentially formative era of the law of the several American states.

Even among scholars who have not been misled by these two assumptions but have recognized the separate and independent legal developments of the colonies, there have arisen substantial misconceptions as to the nature and sources of their laws. This has been notably true with respect to the colony of Massachusetts Bay in the seventeenth century, which has been characterized both as "a period of rude, untechnical popular law"¹⁹ and as an era in which "the Scriptures were an infallible guide for both judge and legislator."²⁰ Neither of these positions can be sustained, and the Code of 1648 bears eloquent testimony to the developed nature of the Massachusetts legal system. Although a number of the colony's laws were based upon the Old Testament, and although several laws were enacted to meet the needs of a wilderness community, there was also a very substantial reception of various forms of English law during the early period. Yet to assert that much of the law of the colony was substantially English provides no answers to the further and vital questions: how much, of what sort, and why?

The process of importation and rejection of law and legal institutions with which the colonists had been familiar in England is illustrative of one phase of the general problem of survival and adaptation in the colonies of English patterns of thought and habits of life. The ensuing chapters emphasize how extensively the colonists drew upon their English experience in developing their political institutions, their family and social life, their institutions of government. In law, too, they availed themselves of their antecedent heritage, and a consideration of their reasons for accepting or rejecting or improving upon parts of that heritage enlarges our understanding of the alchemy of cultural transformation. More than any other as-

pect of colonial life, the Massachusetts legal system emerges as the product of tradition and of conscious design through which countless aspects of individual and social behavior were molded to comport with the conditions of settlement and, above all, to achieve the ideals which had inspired the founding of the colony.

II

Creeds and Platforms

THE Massachusetts Bay Company owed its legal existence to a royal charter which passed the seals in March, 1629.¹ The charter granted and confirmed to the company a tract of land which was bounded on the south by a line three miles south of the Charles River and on the north by a line three miles north of the Merrimack River; on the erroneous supposition of crown officials that those streams ran parallel to each other, the grant extended from the Atlantic on the east "to the south sea on the west."²

Similar in most respects to contemporary English trading organizations, and analogous to a modern business corporation, the company created was a joint stock company managed by a governor, a deputy-governor, and a board of eighteen assistants, all of whom were to be chosen annually by the stockholders, or "freemen," of the company. The board and its officers, together with the freemen, were to meet quarterly in a General Court for the purpose of admitting new members and to make laws and ordinances "for the good and welfare of the saide Company, and for the government and ordering of the saide landes and plantacion, and the people inhabiting and to inhabite the same . . . Soe as such lawes and ordinances be not contrarie or repugnant to the lawes and statutes . . . of England."³ The governor, the deputy-governor and the assistants were to meet each month, or oftener, in what may be called executive session, as a board or "court" of assistants, which

was roughly the equivalent of the board of directors of a modern business corporation.⁴

Like other trading companies of the day, the Massachusetts Company was in form, a land and trading association, organized for profit. To that end it was expected to send out colonists or "planters" who would be governed from England by the officers and shareholders. Familiar prototypes were the London Company, which governed Virginia, and the East India Company, in both of which the management remained in England distinct from the colony which it controlled. The Massachusetts Company also began in this way. Even before the charter had been procured, Captain John Endecott, a soldier from Devon, was appointed governor of the plantation and sent out with a small body of colonists, together with cattle and provisions and supplies. This group settled at what is now Salem, joining forces with the remnants of a fishing community which had been established on Cape Ann under an earlier but superseded grant.⁵

Several of the instructions which the company sent out to Endecott during 1629 related to the export of fish, or other local products, and thus suggest that the purpose of the undertaking, at its inception, was primarily commercial.⁶ Other instructions, however, referred to the work of the Lord and to the propagation of the gospel, and one letter stated that the "cheifest ayme" of the company was the glory and honor of God.⁷ Endecott was also enjoined to supervise his colonists' personal conduct,⁸ and three ministers were appointed to sit on his council of thirteen.⁹ These instructions indicate that religious purposes played at least a subsidiary part in the founding of the colony. The circumstances under which the enterprise was developed, however, provide convincing evidence that, far from being subsidiary, religious objectives were in fact paramount.

Promptly, although it may have been by financial motives, the project of establishing a colony in New England had attracted the attention of a number of prominent and well-to-do Puritans in the eastern counties of England. Much of the inspiration for the undertaking unquestionably came from one of the most powerful of Puritan divines, John White, rector of the Church of Holy Trinity at Dorchester, who had been a chief promoter of the

early colony on Cape Ann and who had continued to urge the founding of a refuge for God's oppressed people.¹⁰ One of his warm admirers, and an associate in the earlier enterprise, was John Humfry, son-in-law of the Earl of Lincoln. The earl was one of the most earnest Puritans in England, and, stirred by Humfry's interest, his household became a center for the discussion of plans for establishing in America a form of commonwealth in which the teachings of Puritanism might be fully realized. Among other Puritans to whom the project also appealed were John Winthrop, lord of the manor of Groton in Suffolk; Isaac Johnson, a wealthy landowner in Rutland and another son-in-law of the earl; Thomas Dudley, sometime steward of the earl's estates and a parishioner of the distinguished Puritan clergyman John Cotton; Richard Bellingham, recorder of Boston and another parishioner of Cotton. The latter were all ultimately to emigrate and, with the exception of Johnson, to become principal and energetic leaders in the Massachusetts Bay Colony.

These men, and others such as Sir Richard Saltonstall of London, associated themselves at one stage or another with the early entrepreneurs of the Massachusetts Company,¹¹ and in the summer of 1629 a number of them decided upon emigration to New England with a view to achieving beyond the seas religious and political objectives which seemed progressively more difficult of attainment in England. Those objectives had by then almost entirely displaced the original commercial purposes, and a plan was conceived for establishing a new type of corporate colony in which the management of the company would be transferred from London to New England and there merged with the government of the colony. Whether the plan was in fact formulated before or after the charter was obtained is not wholly clear. The fact that the charter omitted, either by design or through oversight, the usual requirement as to the residence of the corporation in England has been thought to provide evidence of an early intention to transfer the corporation itself across the Atlantic.¹² Certainly, the omission helped to overcome what would otherwise have been a serious legal obstacle. Undoubtedly, the decision to move the headquarters of the company was prompted in part by the awareness of its members of the difficulties experienced by the Virginia col-

onists, who had been continually plagued by meddlesome orders from the London Company in England and whose charter, readily accessible in London, had been revoked by the crown in 1624. In any event, the Massachusetts entrepreneurs must have realized that, with three thousand miles between the seats of the colonial and of the royal governments, they could carry out their religious mission more effectively than if the management of the corporation remained in England subject to the crown's immediate control.

The merger of the company management with the colonial government was voted at a meeting of the General Court in the summer of 1629.¹³ In October, John Winthrop, who had become associated with the company during the summer, was elected governor of both the company and the colony.¹⁴ Active preparations for emigration were immediately initiated, and arrangements were instituted for concluding the company's financial affairs in England.¹⁵ It remained only to recruit colonists, to charter vessels, to collect supplies and provisions, and to embark on the long voyage across the western sea.

The expedition was unprecedented in the history of English colonization. Neither the founding of Virginia nor that of the Pilgrim colony at Plymouth afforded a parallel. The men who carried out the Massachusetts enterprise were neither adventurers nor victims of persecution: they were persons of wealth and ability, brought together by the ties of marriage and friendship and by a sense of common purpose.¹⁶ They were energetic, resourceful, and intelligent; most of them were well educated, many of them university graduates.¹⁷ Above all, they were dedicated to the progressive, even radical, cause of Puritanism, which not only motivated the colonial undertaking but had profound consequences upon the structure and form of the colonial government which they were to establish. Accordingly, it becomes necessary to outline the main features of the Puritan doctrines to which they were committed.

Misconceptions as to who the Puritans were and what they stood for are legion, and these misconceptions have multiplied in the shadows of the ignorance or of the prejudice of later generations, prone always to reading back into history the attitudes or values of a later day. The words "Puritan" and "Puritanism" not only have, but have had, many meanings, varying with the

context in which they are used. Efforts to define those terms are complicated by the fact that Puritanism was both a religious phenomenon and a political movement. Beginning as a way of life, it became a sect and later a political party. Thus, at one stage, the Puritans were the reformers of the Anglican Church; at another, they were the makers of the Revolution of 1642. Moreover, Puritanism took various forms which passed through numerous phases in inception, growth, and decline, and those forms had at all times their right and left wings and their centers. Precise definition is accordingly impossible. Nevertheless, for present purposes, it will not be incorrect to say that, viewed in its religious aspect, Puritanism advocated replacing the ecclesiastical hierarchy of the Established Church of England with a system approximating the Reformed polity of Scotland and Geneva.¹⁸ More specifically, Puritan doctrine prescribed that God must be worshiped by inner feeling and outward conduct, not by mere ritual or doctrinal conformity. Hence, the Puritans regarded it as their mission to purge the Anglican Church of the forms and ceremonies for which they found no warrant in the Bible and which, despite the compromises of Elizabeth, had persisted from England's Catholic days.

The early Puritans were convinced that the Church should be reformed from within, rather than by separating from it. They did not, therefore, regard themselves as schismatics; indeed, they subscribed to the Elizabethan principles of enforced religious uniformity and of compulsory church attendance. Likewise, in their own eyes at least, the Puritans were not rebels against the state, and the accepted principles of political loyalty and of civil supremacy over the Church were among the essential ingredients of their creed. The difference between the Anglicans and the Puritans was therefore less a differing as to fundamental principles than it was a differing as to the application thereof. Apart from such doctrinal divergencies, they were Englishmen of their time, and their culture and thinking were primarily those of their contemporaries, with whom they shared the religious and political heritage of the Middle Ages and of the Protestant Reformation. Indeed, many attitudes and points of view which are commonly ascribed to the Puritans were essentially those of the great majority of their countrymen of the seventeenth century.

Numerous gradations and refinements grew out of the core of Puritan doctrine, and these in time became the nuclei from which various sects developed. Among the earliest of such sects was a group which coalesced in the second decade of the seventeenth century and became a principal inspiration of the leaders in the Massachusetts enterprise. That group, of whom the most important was the theologian William Ames, although advocating the reform of the Church of England from within rather than by separation from it, nevertheless espoused at least two of the major tenets of the sect which came to be known as Congregationalist and which actively supported the principle of separation.¹⁹ The first of these tenets was the belief that the national Church should not be all-inclusive but should consist only of those "visible saints" who could prove that they were redeemed; the second was the belief that each church was a self-constituted, self-sufficient unit, independent of external supervision. Both tenets ran counter to those two basic Elizabethan principles accepted by orthodox Puritan doctrine—compulsory religious uniformity and state supremacy in Church affairs. However, recognizing the ineffectiveness of Separatist Congregationalism because of the political disabilities which its doctrines entailed, the non-Separatist Puritans, instead of declaring that the Church of England was a false church, took the position that that Church was a true one but that it needed to be purged both of its ceremonies and rituals and of its extensive "reprobate" membership.²⁰ Thus, although they went beyond orthodox Puritan doctrine in condemning centralized church government, the non-Separatists did not altogether impugn the principle of uniformity, but instead asserted that it should be restricted to the elect; at the same time, they subscribed to conventional political philosophy in accepting traditional ideas of obedience to political rulers.

The close alliance of the non-Separatist movement with the Massachusetts emigration has been demonstrated by Professor Perry Miller,²¹ who has adduced convincing evidence that the removal from England was thought to provide the answer to the difficult and ambivalent position in which non-Separatists found themselves in 1629, when hopes of reform were shattered and the Puritan parliamentary cause to which they had rallied seemed to have failed. They appear to have concluded that if a group which had never

separated from the Church could remove to America, under the authority of the crown, it would be possible to realize legitimately their profound hopes for a reformed church and state which they believed could never be brought about in England.²² The bitter disillusionments which had accompanied over fifty years of controversy would thus be dispelled by constructive achievement made possible by setting open a "wide doore . . . of liberty."²³

Although the leaders in the Winthrop group, both lay and clerical, professed to be intent upon reformation without separation,²⁴ careful analysis of their writings supports the conclusion that, in fact, a chief reason why they decided to emigrate to Massachusetts was put into effect certain of the teachings of Congregationalism.²⁵ That conclusion is further demonstrated not only by their adoption in New England of the ecclesiastical discipline of the schismatics but by the form and organization of government which they established in the colony upon their arrival. The fact that the leading men in the company sought out as ministers for the colony churches such men as John Cotton, Thomas Hooker, and Hugh Peter provides additional evidence of their strong Congregationalist leanings.²⁶ This alliance between members of the Congregational clergy and such laymen as Winthrop, Dudley, and others is basic to understanding the purposes of emigration and the reasons for establishing the colony. Their wish to realize many of the creeds and platforms of Congregationalism helps to explain why they believed it advantageous that the usual clause prescribing the residence of the company in England had been omitted from their charter. Without that provision, they were in a position to remove the seat of government to New England with formal legality and there elude the watchful eye of crown officials and ecclesiastical authorities. In New England, as Professor Miller has said, they were convinced that they could perform all the acts pertaining to a commonwealth and an established church, maintain orthodox uniformity, and at the same time define heresy to suit themselves. This reasoning "may have been sophistry, but Massachusetts was founded on it."²⁷ Proclaiming that they were His Majesty's loyal subjects, and professing that they were not schismatics but only departing from the corruptions of the English churches, Winthrop and his associates could plausibly assert that the churches of Massachusetts

were legitimate offshoots of the Church of England.²⁸ From a political standpoint, this position was astute, for, by emphasizing the legitimacy of their undertaking, the Winthrop group could differentiate themselves from acknowledged Separatists like the Pilgrims, who, lacking legal standing in England, had been harried out of the land and had ultimately settled at Plymouth in 1620.

It must be emphasized that Puritanism involved more than mere opposition to the forms, rituals, and ceremonies of the ecclesiastical hierarchy which had survived from Roman Catholic England; it involved more than a wish to restore the primitive apostolic church in accordance with biblical precept. Puritanism was also a way of life, a rigoristic ethic, prescribing strictness of living as well as simplicity of worship, affecting the mind and the heart. It sprang, in Ralph Barton Perry's words, "from the very core of the personal conscience—the sense of duty, the sense of responsibility, the sense of guilt, and the repentant longing for forgiveness."²⁹ Intense belief in all these underlying assumptions of Puritanism was a driving force not only in the emigration to Massachusetts but in the political and ecclesiastical organization that was there evolved. The deep spiritual conviction that the colonists could carry these ideals into practice is fundamental to an understanding of their new society.

Because Puritanism was a way of life, it had social and political implications of great magnitude. It assumed that its disciples would regulate not only their own conduct but that of others, so that the world could be refashioned into the society ordained by God in the Bible. Pursuant to this assumption, the Puritans placed great reliance upon religious dogma as the basis for reforming social and governmental institutions. In its earlier stages, Puritanism looked to the Bible as containing all the precepts—however few or brief—by which man should be governed. God had spoken in the first instance through His word, and hence extended study of the Bible and logical deductions from its texts were thought to provide the primary means of discovering the purposes of God. All parts of the Scriptures were thought to be explicable by study and dialectical deduction, and dogma and text were therefore continually expounded in tracts and sermons which the faithful read or listened to with rapt attention, both for the practical guidance which they provided and for the solemn joy and inspiration which they afforded. Yet, al-

though the Bible as so expounded was believed to provide a complete and unamendable constitution, God's word as therein contained did not inhibit, but rather gave impetus to, progress and reform. The Puritan conception of the kingdom of God was not a static one, confined by the injunctions of the Decalogue and the lapidary counsels of the prophets; it was equally inspired by the life of Christ and by the spirit of the Sermon on the Mount. Thus, a zeal to reform both the individual and society is one of the very notable features of Puritanism, which was active rather than contemplative.³⁰ "It is action," wrote Richard Baxter later in the century, "that God is most served and honoured by."³¹

The impulse to reform, though idealistic, was not utopian but was directed to the promotion and realization of what the Puritans referred to as Christian liberty. This was not liberty in the modern sense, a freedom to pursue individual wishes or inclinations; it was a freedom from any external restraint "to [do] that only which is good, just, and honest."³² Christ had been born to set men free, but the liberty so given was a freedom to walk in the faith of the gospel and to serve God through righteousness in conduct and devoutness in worship. Liberty of this kind, as John Winthrop said in 1645, "is the proper end and object of authority" and could only be exercised and maintained by subjection to authority.³³ Hence the insistence in Puritan thinking on the twin necessities of obedience to duly constituted civil authority and of subordination of the individual to the group of which he was a part. Religious objectives were accordingly intimately connected with political institutions.

The close bond that existed between religious and political thought in the seventeenth century has often been remarked upon, but it was not by any means restricted to Puritan thinking. As Prothero has observed, "In England, as well as on the continent, religion was the chief motive power of the age."³⁴ The Puritans were Englishmen of their day, and they subscribed, as did their contemporaries, to theories about law and government which were still essentially mediaeval. They believed, as the Schoolmen of the Middle Ages had taught, that God had instituted government to save men from their own depravity, and hence that civil rulers must be obeyed. More importantly, they believed that the welfare of the whole was more significant than individual advantage, that

society was an organism in which each part was subordinate to the whole, but in which each part contributed a definite share. At the same time, they accepted the principles of contemporary political philosophy which prescribed that religion and politics were one, and that, as a matter of religious duty, men must submit to their governing superiors, who had full powers to lead, to discipline, and to coerce.³⁵ Orthodoxy in matters of religion and politics was accepted as axiomatic, and hence there was no room for diversity of belief or for toleration, which was viewed nearly everywhere, in Europe as well as in England, as subversive to morals, to national independence, and to the compulsory uniformity essential to preserve both church and state.³⁶ Individual liberty, therefore, was viewed as permissible only within the limits of conformity as prescribed by civil and ecclesiastical authority.

This adherence to the mediaeval conception of uniformity, in the face of the diversities of belief which had in fact come about through the Protestant Reformation, is "the key to the political thought of the time."³⁷ Inevitably, as Professor McIlwain has observed, diversity in an age of uniformity results in persecution because acceptance of uniformity as a principle means that each religious or political group demands the supremacy of its own doctrines.³⁸ Each group regarded its own doctrines and beliefs as true and all others as false. This fact goes far to explain the intolerance of which the Puritans have commonly been accused and also what often appeared as their self-righteous attitude of superiority. Puritan theories of government were therefore not mere self-vaunting rationalizations but were complex responses to intricate social and intellectual challenges brought on by the breaking up of the assumptions of the mediaeval world. Within the ambit of their endeavors, in the face of these challenges, they were seeking to frame the kind of philosophic explanations and syntheses which Bacon and Descartes were then attempting in science and politics.³⁹

Although the leaders of the Winthrop group accepted generally current assumptions with respect to the purposes of government, there were divergences when it came to applying them. Thus, although this group adhered to the principle that civil rulers were ordained of God and must be obeyed, they were opposed to those who they believed were misusing governmental power. To assure

the maintenance of that principle, they felt compelled to remove from England, to conditions under which they could select rulers who would properly and faithfully carry out their duties. This aspect of their political beliefs parallels their religious thinking with respect to purifying the church. Separatism in civil as well as in ecclesiastical affairs was one of the direct consequences of their efforts to put their doctrines into effect.

Other conceptions helped to give new direction to contemporary political thought. Although the Puritans' theory of government was authoritarian, it was also consensual, for they drew upon and developed the theory of social covenant which was well known in the last quarter of the sixteenth century and which viewed government as a compact between ruler and subjects.⁴⁰ In the seventeenth century these contractual ideas had been given impetus and general currency in England as a means of combatting the prerogative pretensions of James I, but the New England Puritans also found them useful to justify the subordination of individuals to the state.⁴¹ In their view, the state was the embodiment of the collective will, and the covenant was the means whereby submission to the collective will was expressed. However, divine approval of the Christian purposes of the state made the state an emanation of God, and obedience to the common will was therefore also obedience to God. The older idea of obedience to civil rulers was thus enlarged and strengthened by the idea, fostered by the conception of covenant, that in obeying the civil ruler the people were also obeying God. Hence, the covenant was more than a social compact between men: it was a compact to live righteously and according to God's word. God was therefore viewed as a party to the covenant, as He had been in ancient Israel.

With the foregoing religious and political theories most men who espoused the Puritan cause were not only familiar but in general accord. Although few but the well educated could have understood them in any philosophic sense, it must be remembered that the issues to which they gave rise were at least as vital to them, and as hotly debated, as are issues of civil liberty in our own time. Moreover, there were not wanting Puritan ministers and lecturers who had the capacity to express, and to reduce to relatively simple terms, exceedingly sophisticated ideas, especially through their ser-

mons, which were not only eagerly attended but were the medium of communication among those to whom learned religious tracts were not accessible. John Winthrop, although a layman, was particularly capable of explaining complex ideas in simple form. In an address which he prepared on the outward voyage he emphasized the consensual aspects of the enterprise and the strong bonds of social solidarity upon which it was founded:

wee are a Company professing our selues fellow members of Christ . . . for the worke wee haue in hand, it is by a mutuall consent through a speciall overruleing providence . . . to seek out a place of Cohabitation and Consorteshipp. . . . In such cases as this the care of the publike must oversway all private respects. . . . The end is to improve our liues to doe more seruice to the Lord. . . .⁴²

Here, in concise phrases, are expressed the fundamental principles which guided Winthrop and his associates not only in undertaking the colonial enterprise but in establishing in Massachusetts what he described as a "due forme of Government both ciuill and ecclesiasticall."⁴³

Such was the appeal of their creeds and platforms that the leaders of the company were able within a matter of months to rally to the idea of a Puritan commonwealth a substantial group of persons who were prepared to remove permanently from England to Massachusetts. Word of the venture got about not only on market and lecture days, but through personal solicitation and letters on the part of Winthrop, Saltonstall, and others.⁴⁴ Much of the recruiting was accomplished by vicars and curates in various parts of England. John White, to whom reference has already been made, was one of the most energetic promoters of Puritan emigration.⁴⁵ Another was John Cotton, vicar of St. Botolph's in Boston, Lincolnshire, who held out to his parishioners the promise of a new Canaan in the wilderness that awaited the new children of Israel.⁴⁶

For the majority of those who determined upon joining in the Massachusetts enterprise religious motives were paramount. Many of them came from the eastern counties of England which had long been a stronghold of Puritanism,⁴⁷ and there, particularly, the belief was widespread that "in the great opening up of the world

. . . God had reserved a place for his elect."⁴⁸ Men were firmly convinced that at long last it would be possible to live and worship according to the word of God as they understood it, in a holy community where they would be free from the interference of outsiders and nonbelievers. Unlike those who escaped from religious persecution in the Bohemia of Ferdinand or the France of Louis XIV, the Puritan emigrants to Massachusetts were primarily concerned with purifying and perfecting their religion and with realizing its full implications in their daily lives. Nothing could be more clear than that religious persecution was not a cause of their leaving England. Certainly, many had been disciplined for refusing to obey the canons of the Church, and others had been prosecuted for defying the law of the land, but there is practically no evidence that any in the Massachusetts group had been subjected to persecution.⁴⁹

Contemporary conditions also provided a strong stimulus to the decision to leave England, not only in 1630 but in the ensuing years as well. A sense of impending calamity in religion and domestic affairs pervaded men's thinking. Winthrop sadly wrote to his wife that he was "veryly perswaded, God will bringe some heauye Affliction vpon this lande, and that speedilye."⁵⁰ Not only were Puritan clergymen being silenced and deprived of their benefices, but the outlook for Protestantism generally was gloomy, and Thomas Hooker could preach that "God is packing up his Gospell, because no body will buy his wares, nor come to his price."⁵¹ The new school of Anglicans, known as Arminians, were in the ascendant and were encouraged by the king in their efforts to force an elaborate sacerdotalism upon the country.⁵² Queen Henrietta was a Roman Catholic, and the laws against Catholics were largely suspended in order to please her. Anxious eyes were turned upon Europe where, too, the cause of the reformed faith was faltering. With the Huguenots crushed in the fall of La Rochelle, and the course of the Thirty Years' War favoring the Catholic cause, Winthrop could write that the churches of Europe were smitten and brought to desolation by the Lord, who "hath made them to drinke of the bitter cuppe of tribulation, euen vnto death."⁵³

Politics in England had become progressively unsettled by 1629. The sanguine enthusiasm with which men had greeted the acces-

sion of the lebonair young Charles had all but dissipated. Disgraceful failures had been the lot of English military endeavors abroad, while at home waste, corruption, and flagrant incompetence characterized the entire government. Forced loans and illegal exactions were being demanded of the rich, and mutinous troops billeted across the countryside. Even education seemed to many to be going the way of politics and religion. Winthrop wrote that the "Fountain of Learning and Religion are soe corrupted as (besides the unsupportable charge of there education) most children . . . are perverted, corrupted, and vtterlie ouerthrowne by the multitude of euill examples . . . of those Seminaries."⁶⁴ When parliament was dissolved in 1629, not only did the last hope of reforming the Anglican Church seem to have gone, but with it the political aspirations of the entire Puritan party. Under such circumstances, men might well think of forsaking the land of their birth for a New England that promised salvation.

Economic motives for migration there were, but they were subsidiary to the religious. John White had emphasized economic opportunities in his tract, *The Planters Plea*,⁶⁵ and, unquestionably, many of the prospective colonists, including Winthrop himself,⁶⁶ were influenced by hopes of material betterment. Excessive regulation by government had cramped industry, and the low level of wages, which had not kept pace with advancing prices, had reduced thousands to beggary. The rise in rents, and the progress of the enclosure movement, had been driving men from agricultural pursuits. Agrarian and industrial distress were especially severe in Puritan East Anglia, where during the 1620's a depression in the textile industry had caused widespread unemployment and poverty.⁶⁷ "This land," wrote Winthrop, "growes weary of her Inhabitanes, soe as man whoe is the most praetious of all creatures, is here . . . of lesse prise among vs then an horse or a sheepe. . . . all townes complaine of the burthen of their poore."⁶⁸ Moreover, there was a growing, though erroneous, conviction that England had become overpopulated.⁶⁹ Economic opportunity was urged by all the early promoters of colonization, not only to bring profit and self-sufficiency to the individual but to provide strength and greatness to the nation.⁷⁰ Economic opportunity was also urged by Winthrop as a reason for emigration, but he emphasized its con-

nection with religious purposes. The whole earth, he said, was the Lord's garden, and had been given to the sons of men with a commandment to replenish and subdue it.⁶¹ Yet while advocating such opportunity, the leaders were at pains—not only at the outset but during the ensuing years as well—to discourage emigration merely for the prospect of gain.⁶²

Other motives also inclined the minds of those who decided upon emigration. The prospect of owning land, as well as the lure of the unknown, played some part in the decision, according to individual temperament. Such prospects were, of course, conspicuous in the thinking of those who were not Puritan. Of these there were a considerable number among the colonists,⁶³ chiefly servants and men having special skills who were recruited to ensure the practical success of the undertaking.⁶⁴ To many of such persons Puritanism did not appeal, and for them adventure, material gain, or the hope of greater personal freedom were among the principal inducements.

Concurrently with the recruitment of colonists, Winthrop and his associates took steps to fit out vessels and to obtain the provisions, supplies, and equipment which would be needed both for the Atlantic voyage and in the colony. Cattle, seed, furniture, clothing, food, beer and wine, household utensils, nails and tools, firearms, and articles for trading were among the many types of articles collected.⁶⁵ Concluding arrangements were made for settling the English affairs of the company, and those of the assistants who decided to remain in England resigned their places on the board.⁶⁶

In the spring of 1630, the company, consisting of the governor, the deputy-governor, and ten assistants,⁶⁷ was ready to set sail for New England with some seven hundred colonists.⁶⁸ With them they had the precious charter, to which they clung both as a shield of their religion and as a weapon of defense against possible encroachments of king and parliament.⁶⁹ Genuinely sad though they were at departing, their aims were clear: the founding of a "united, cohesive body politic, led by the saints, shepherded by the clergy and regulated by energetic governors, . . . fully prepared to use the lash of authority upon stragglers or rugged individualists."⁷⁰ These were purposes that they could hardly openly avow, for it was essential that they not attract the unfavorable attention of either

Charles or Archbishop Laud. Not long before, the company had urged Governor Endecott not to "render yourselfe or vs distastefull to the state heere, to which (as wee ought) wee must and will haue an obsequious eye."⁷¹ Accordingly, in a farewell letter, written aboard Governor Winthrop's flagship, the *Arbella*, and addressed to their "Brethren in and of the *Church of ENGLAND*," the leaders were at pains to enunciate their allegiance to the land of their birth and to seek to correct any "misreport of our intentions"—presumably with respect to Separatism.⁷² In April the eleven vessels of the Winthrop Fleet, seven carrying passengers and the rest freighted with livestock and supplies,⁷³ weighed anchor at Cowes. By June they began to drop anchor, one by one, in Massachusetts Bay, joining forces with the few hundred colonists who were already established at Salem under the former governor, John Endecott. Other vessels crossed over during the summer, and before winter the total number of settlers in the Bay Colony was well over a thousand.⁷⁴

This handful of men and women, inspired by the creeds and platforms of Puritanism, and believing themselves children of Israel bent on the achievement of a mission that was divinely inspired and protected, was the nucleus not of a colony but of an American commonwealth. Thousands were to come after them during the ensuing decade of the great migration, but the ideals of the first-comers continued to inspire and permeate the enlarging community. Little did Winthrop know how accurately would be fulfilled his prophecy that his "Citty vpon a Hill" should be made "a prayse and glory."⁷⁵ Separating first from the English Church, later from English ways, they and their children began slowly to form the matrix of a new and indigenous American civilization.

III

Foundations of Power

ALMOST the first task that faced the colony leaders upon their arrival in Massachusetts was the adaptation of the machinery of a simple business organism to the requirements of a body politic. As they viewed the task, it involved the institution of legal and political arrangements which would most effectually control and shape the social and religious life of the colonists in accordance with the purposes for which the enterprise had been undertaken. That those purposes were primarily social and religious, rather than commercial, is clear not only from the creeds in which their hopes were sown but from the courses of action upon which they immediately embarked.

From the outset, for example, the new government adopted land and trading policies which were entirely different from those usual in trading companies of the day. By the time of Winthrop's arrival, the company had ceased to act as an organization seeking profit from its landholdings. It began at once to grant land to the various communities as they were established, and these in turn distributed allotments to individual colonists.¹ Trade, likewise, was encouraged on a private and individual, rather than on a corporate, basis, so that by the close of 1630 the commercial element in the enterprise had virtually disappeared. Moreover, within a matter of months the admission of new freemen into the company came to be based on religious qualifications rather than on a capacity and willingness to pay for shares in the enterprise.² These radical departures from

normal trading-company practice demonstrate that the leaders viewed the enterprise as anything but commercial in character. Above all, however, the organization of the colony government, developed in association with the churches, provides objective proof that the chief aim of the undertaking, as declared by Winthrop, was to build "a Citty vpon a Hill" where it would be possible not only to worship and live as Christians but to set the world an example of godliness.³

The most striking feature of the organization of Massachusetts government during the first two decades of its history was the "concentration of influence, power, offices, functions of every kind, in a small and compact group of leaders."⁴ As stated earlier, the charter had placed the general management of the company in the hands of the General Court, consisting of the freemen, or stockholders, and of the officers and assistants. However, it appears that although the company consisted of something over a hundred freemen, practically none of them who was not also an assistant or an officer emigrated to the colony,⁵ and of these there were no more than ten or eleven in Massachusetts in 1630.⁶ From the standpoint of composition, therefore, the General Court and the Court of Assistants were virtually identical at this date, and hence from that standpoint it made little practical difference by which body the affairs of the company were managed. However, since seven of the assistants constituted a quorum under the charter, and since a majority of those seven were empowered to act, it was obviously advantageous that the governing body should be the Court of Assistants rather than the General Court, in which the concurrence of the governor and at least six assistants was essential to action.⁷

It may be inferred with some confidence that it was partly for this reason that the General Court, at its first meeting of only eight members in October, 1630, gave to the assistants the power to select the governor and deputy-governor from among themselves, to make laws and to select officers for carrying them out.⁸ A more compelling reason was the likelihood that a number of the colonists would, in due course, be admitted as freemen, and that, consequently, the assistants would be in a better position to control the life of the colony if the power of legislation were entirely in their hands. To this first meeting of the General Court the assistants, as

the constituent members, invited a large number of the colonists. Although none of the latter was a freeman and entitled to participate in the proceedings, Winthrop and his colleagues undoubtedly perceived that their power would be strengthened if existing as well as future arrangements had the approval of those who were to be governed thereunder. Probably this consideration explains why so many of the inhabitants were invited to the meeting. In any event, the advisability of the transfer of the General Court's functions was put to the assemblage, which assented thereto by "erection of hands."⁹

At the first meeting of the Court of Assistants, held two months before, that body had conferred upon six of its members the powers of English justices of the peace.¹⁰ Hence, the effect of the October meeting of the General Court was to concentrate in the hands of the "magistrates" (as all members of the Court of Assistants were hereafter referred to) all legislative, judicial, and executive powers of the government. It seems not to have concerned these few men that the assumption of the powers of the General Court was a clear violation of the charter. If pressed, they might have agreed with Milton that "Men of most renowned virtue have sometimes by transgressing most truly kept the law."¹¹

Among the powers which the charter had conferred on the General Court was the power:

from tyme to tyme to make, ordeine, and establishe all manner of wholesome and reasonable orders, lawes, statutes, and ordinances, direccions, and instruccions not contrarie to the lawes of this our realme of England, aswell for setling of the formes and ceremonies of government and magistracy fitt and necessary for the said plantacion and the inhabitantes there, and for nameing and stiling of all sortes of officers, both superior and inferior, which they shall finde needefull for that government and plantacion, and the distinguishing and setting forth of the severall duties, powers, and lymttes of every such office and place, . . . and for impositions of lawfull fynes, mulctes, imprisonment, or other lawfull correction, according to the course of other corporacions in this our realme of England. . . .¹²

Pursuant to these powers, now transferred to the Court of Assistants, the latter proceeded to grant lands, establish town boundaries,

vote taxes, appoint officers, and issue orders designed to supervise and control the social, political, and religious life of the settlers. In September, 1630, they ordered that no one should settle within the limits of the patent without their consent.¹³ In the following March, six persons were sent back to England as "vnmeete to inhabit here";¹⁴ and before the autumn of 1636 as many as twenty persons were reportedly banished from the colony.¹⁵ Contempt of authority was summarily punished. One Phillip Ratcliffe, for uttering "scandalous speeches" against the government and the church of Salem, was ordered whipped, to have his ears cut off, to be fined £40, and banished.¹⁶ Another colonist was sentenced to the bilboes for threatening to take an appeal to the English courts.¹⁷ The assistants also proceeded to regulate trade and industry by fixing prices and wages, as well as to deal judicially with such matters as manslaughter, theft, fraud, breach of contract, and the administration of estates.¹⁸ Orders reflecting typically Puritan concern about personal conduct were issued to punish idleness, to exact fines for drunkenness, and to proscribe tobacco, dice, and cards.¹⁹

This concentration of all governmental power in the hands of a dozen or less men substantially endured until 1634. Prior thereto, several efforts on the part of some of the colonists to limit that power and to obtain a share in the government made little headway, largely because of the keen political insight of Governor Winthrop, who, like the other magistrates, had no wish to see the colony's objectives jeopardized by allowing its management to fall into the hands of those who might not be sympathetic with the leaders' views. However, at the October, 1630, meeting of the General Court above referred to, about a hundred colonists expressed a desire (whether by invitation or otherwise is not clear) to be admitted as freemen, presumably in order to obtain some voice in the conduct of colony affairs.²⁰ Inevitably, complete exclusion from a share in the government was bound, sooner or later, to arouse resentment, at least on the part of the earlier settlers. Prior to Winthrop's arrival, the colonists under Endecott had had the express right to choose two members of the governor's council.²¹ Whether a formal demand, political expediency, or even the Puritan conception of the social compact²² explains the step, Winthrop and his colleagues nevertheless decided to admit as freemen a substantial

number of colonists in the spring of 1631.²³ As a result, the membership of the General Court and the Court of Assistants ceased to be substantially identical.

At the same session in 1631, an order of far-reaching implications provided that thereafter no one should be admitted as a freeman unless a member of one of the colony churches.²⁴ Since only a portion even of those who were devout Puritans could qualify for church membership,²⁵ the order imposed a drastic limitation on the franchise and constituted another flagrant violation of the charter, which neither authorized nor contemplated any religious or political qualification for membership in the General Court. The significance of the order becomes clear when it is realized that between 1631 and 1641 only about thirteen hundred adult males are listed as having become freemen.²⁶ Assuming that the total population by 1641 was about fifteen thousand,²⁷ the proportion of those who had any voice in the colony government cannot, even by that date, have been much more than 7 or 8 per cent. The effect of the 1631 order was thus to put the colony government on a narrow religious basis and to ensure that the composition of the General Court, as now enlarged, should be limited to those "visible saints" who were members of the churches and shared the views of their leaders as to the dominantly religious purposes of the enterprise. Since the General Court began forthwith to elect the assistants²⁸ and, after 1632, the governor and deputy-governor as well,²⁹ and since in 1634 it also assumed from the latter their legislative functions,³⁰ it is plain that the order was one of the foundation stones upon which the new commonwealth was built. Yet, narrow and oligarchical as the basis of the government may appear, it was hardly more so than the government of an English chartered borough in which, typically, only a small, although differently selected, portion of the inhabitants participated.³¹

The movement on the part of the colonists to obtain a stronger voice in the government, and to restrict the power of the governor and assistants, continued to express itself in various ways and with varying degrees of success throughout most of the first twenty years of the colony's existence. In 1632 the levy of a tax by the Court of Assistants met with resistance when the minister of the church at Watertown assembled his flock and warned them that

it was not safe to pay taxes to which they had not consented, lest they bring themselves and posterity into bondage.³² It may be observed that the charter had no more given to the Court of Assistants power to levy taxes and assessments on nonfreemen than it had given the General Court power to delegate legislation to the assistants. Yet the protestants were summoned before Winthrop for admonishment, and they confessed their error, and submitted. Winthrop counseled that the government of the colony was not like that of a corporation but was "in the nature of a parliament" in which the assistants, now the elected representatives of the freemen, had full power both to legislate and to levy taxes.³³ Nevertheless, the government apparently felt obliged to concede that thereafter two from every town should be appointed "to advise with the governor and assistants about the raising of a public stock, so as what they should agree upon should bind all, etc."³⁴

The Watertown protest thus had an important result in that it led to the institution of representative government for the limited purpose of taxation. Two years later, however, the principle was extended, and brought about what amounted to a constitutional revolution.³⁵ In the spring of 1634, the freemen appointed two deputies from each town to consider what matters might be brought before the May meeting of the General Court. An important result of their discussions was a request to see the charter, from which they learned that all laws were to be made in the General Court. Forthwith they repaired to Winthrop, who had no choice but to concede that this was so. However, he told them, the freemen were now so numerous that "it was not possible for them to make or execute laws, but they must choose others for that purpose."³⁶ Accordingly, deputies from the towns appeared at the May meeting of the court, but they proceeded to pass resolutions which went far beyond the limited purposes envisaged by Winthrop in his conference and voted that only the General Court should have the power to admit freemen, the power to make laws, and the power to dispose of lands.³⁷ At the same session the establishment of a general representative system was ordered: those in each town who had become freemen were empowered to choose two or three representatives to prepare business for the General Court and to act therein on behalf of all the freemen in the making of laws, the

granting of lands, and in dealing with "all other affaires of the commonwealth wherein the freemen haue to doe," elections excepted.³⁸ The General Court thereby became a wholly elective body, which thereafter consisted typically of some twenty or so deputies in addition to the governor and the deputy-governor and the assistants.³⁹ The order applied to only three of the four yearly sessions of the General Court. At the fourth, or election, session every freeman was expected to be present and to "gyve his owne voyce."⁴⁰

As a result of this session, the General Court resumed the powers granted to it under the charter and displaced the Court of Assistants as the chief organ of the governmental system. Its activities were not limited to legislation, but included judicial and administrative functions as well; indeed, in conformity with ideas then current, little distinction was perceived between those functions.⁴¹ Much business came before it through petitions, many of which were of a public character and resulted in legislative or executive orders.⁴² Others were of a private nature—requests for licenses, for grants of land, for remission of fines—so that the action required was essentially judicial or administrative.⁴³

The task of dealing with these various matters was now shared in the General Court by the deputies and assistants, but the latter still retained extensive powers when meeting separately either as the Court of Assistants or as an executive board during the recess of the General Court. In 1636 there was created an elite standing council for life which was to have certain nonjudicial powers, including direction of military affairs.⁴⁴ Winthrop and Dudley were named to the council initially, later Endecott.⁴⁵ Soon afterward, the principle of life tenure came under fire from the deputies and was repudiated, but the council itself, with an enlarged membership of magistrates, continued to perform important functions in directing public affairs.⁴⁶ Thus, throughout the early period, the magistrates not only continued to play a major role in the enactment of laws and in the decision of cases but performed most of the administrative and directive work of the government. Indeed, as Osgood says, the "continuous executive work of the colony was done as fully by the governor and assistants . . . as it was by the king and council in England."⁴⁷

The judicial powers of the governor and the assistants were in many ways more extensive than the legislative and other functions which they exercised. Not only did they have, individually, wide summary jurisdiction, but they sat in, or controlled appointments to, every court in the colony. Thus, most of the cases that arose during the early years of the colony's existence were decided by them, in one capacity or another. Sitting singly, they had, under the early order of August, 1630, the "like power that justices of peace hath in England for reformation of abuses and punishing of offenders." Under an act of 1638 a single magistrate was further authorized to decide in his discretion and without a jury, in the town where he lived, all suits in which the debt or damage was twenty shillings or less.⁴⁹ He might also punish for drunkenness, profane swearing, lying, and petty theft, as well as for such offenses as contempt toward ministers and absence from church.⁵⁰ Sitting together as the Court of Assistants, the magistrates exercised judicial powers which initially were as broad as those of the three great English common-law courts, as well as of Chancery, the High Commission, and the Court of Star Chamber.⁵¹ Subsequently, the jurisdiction of the Court of Assistants was narrowed as a result of the creation of new courts of first instance.

These new courts were established in 1636. In March of that year it was ordered that the assistants should hold four judicial sessions annually at Boston.⁵² This provision was made necessary partly by the pressure of judicial business consequent on the increase in population and partly by a recognition that the General Court, which by then included deputies of the towns, was ill suited in composition to determine judicial matters. These new judicial sessions of the assistants were known as Great Quarter Courts. The concurrent establishment of four Inferior Courts for Ipswich, Salem, New Towne (Cambridge), and Boston, which were likewise to be held every quarter, also reflected the increase in the number of suits and at the same time presaged the division of the colony into counties.⁵³ That division was accomplished in 1643,⁵⁴ and shortly thereafter it became customary to refer to the Inferior Quarter Courts as the County Courts. The establishment of these lower courts had the effect of limiting the number of cases heard in the first instance by the Court of Assistants, whose original juris-

diction thereafter was limited to civil suits involving more than £10,⁵⁵ to cases of divorce,⁵⁶ and to all capital and criminal cases extending to life, member, or banishment.⁵⁷ The Court of Assistants also heard appeals from the County Courts,⁵⁸ and concurrent jurisdiction of the two courts was authorized in certain types of suits.⁵⁹ In 1649 it was expressly ordered that the Court of Assistants should take cognizance of no case triable in the County Court except by appeal.⁶⁰

Under the act of 1636 it was provided that the Inferior Quarter (or County) Courts should be held by the assistants who resided in or near the particular towns named,⁶¹ or by any other magistrate who could attend them, or by any whom the General Court should designate to be joined as associates to the magistrates. Five were to sit, but three constituted a quorum, provided that at least one was a magistrate. The records disclose that prominent freemen regularly sat with the magistrates.⁶²

The jurisdiction of the County Courts at the end of the period under consideration extended to all civil and criminal causes not expressly reserved to the Court of Assistants or to some other inferior court or to a single magistrate.⁶³ Assault, battery, debt, defamation, drunkenness, fornication, Sabbath-breaking, theft, and trespass were among the most frequent types of suits that came before them.⁶⁴ Like the Court of Assistants, the County Courts normally employed jury trial for questions of fact. They also had extensive administrative jurisdiction, broadly summarized as follows:

... They appointed . . . persons to lay out highways, . . . searchers of money, and viewers of fish. They confirmed the nomination of military officers, apportioned charges for the repair of bridges; they licensed innkeepers, and packers of sturgeon, and punished violation of licenses; they ordered the removal of obstructions on highways, punished idle persons, punished excess of apparel, compelled restitution of overcharge by merchants, determined rates of wages in case of dispute, provided for the poor; . . . fixed ministers' allowances, saw that they were paid, inquired into the publication of heretical doctrines, . . . saw that Indians were civilized and received religious instruction, did all varieties of probate business, punished those who carried on unlicensed trade with the Indians.⁶⁵

Two other sets of courts supplemented the work of these courts of first jurisdiction—Commissioners' Courts and Strangers' Courts.⁶⁶ In 1638 it was enacted that in towns where no magistrate lived, the General Court might appoint three freemen to hear and determine suits in which the debt or damage involved did not exceed twenty shillings.⁶⁷ Later, the County Courts and the Court of Assistants were given this appointive power.⁶⁸ Commissioners were empowered to send for parties and witnesses by summons or attachment and to administer oaths; but they had no power to commit to prison, and, when a party refused to give bond for satisfaction and had no property in the town, the case was remitted to a magistrate or to the County Court.⁶⁹ The jurisdiction of the Commissioners' Courts was therefore less extensive, particularly in criminal matters, than that of the single magistrate. The several towns had no courts of their own other than the Commissioners' Courts, but the town selectmen usually had power to punish offenses against the town by-laws, and under specified circumstances they were required to determine "small causes" and to enforce certain of the colony laws.⁷⁰

Strangers' Courts were instituted by an act of 1639.⁷¹ Strangers who could not conveniently await the next session of the County Court were entitled to have summoned a special court consisting of the governor or deputy-governor, together with any two magistrates, who were empowered to try any civil or criminal cause triable in the County Court by jury or otherwise.⁷²

As already indicated, important judicial functions were also exercised by the General Court, which in due course became the supreme court of judicature in the colony. Initially, that Court was seldom convened, so that during the first four years the entire judicial administration was conducted by the Court of Assistants.⁷³ After the General Court was resuscitated in 1634 and enlarged by the inclusion of deputies from the towns, numerous suits began to come before it. However, its size and composition was not suited to the trial of ordinary suits, and these were discouraged,⁷⁴ particularly after the institution of the Inferior Quarter Courts in 1636.⁷⁵ In 1642 a law declared that all causes between parties should first be tried in an inferior court.⁷⁶ Thereafter, although a few suits continued to come before the General Court as a court of first in-

stance,⁷⁷ its principal judicial function became one of hearing appeals from the Court of Assistants.⁷⁸ Since, as will be explained, the assistants successfully insisted in 1644 that they had the final or "negative vote" in both judicial and legislative matters before the General Court, they had the power for several years to defeat appeals from their own decisions.⁷⁹ In 1649 that practice was altered insofar as judicial matters were concerned, and thereafter cases in the General Court were decided by majority vote.⁸⁰

For a supposedly simple frontier community, the colony's judicial system was both elaborate and comprehensive. The numerous courts made justice conveniently accessible to litigants. Procedures were simple compared with those of the English courts of common law, but they afforded the parties involved adequate notice, hearing, trial, and appeal. Although the magistrates controlled the judicial process, several were legally trained or had had experience as justices of the peace in the English quarter sessions. The judicial system, like the political system, was thus developed largely out of traditional ideas and practices.

Notwithstanding the union of the deputies and assistants in the General Court, the embers of earlier discontent flared up from time to time into open conflicts between those component parts. Essentially, the cause of these conflicts was the determination of the magistrates to retain in their hands a maximum amount of governmental power in order to promote and ensure the success of the colony mission as they conceived it. Three of those conflicts deserve special emphasis: the question of the magistrates' exercise of discretionary justice, the question of their final or "negative" vote in the General Court, and the question of the extent of their executive powers.

An early and persistent source of complaint against the magistrates was the wide discretion which they exercised in the courts in the imposition of punishments. The freemen were dissatisfied with the manner in which penalties for similar crimes varied from case to case, and they did not believe that the magistrates could be counted upon to do justice in particular situations unless penalties were openly fixed by law. Both the magistrates and the clergy were, as a group, opposed to having penalties so fixed. "I would knowe," asked Winthrop, "by what Rule we may take vpon vs to

prescribe penalties, where God prescribes none."⁸¹ Nevertheless, objections to discretionary justice were voiced with increasing insistence, and they not only brought about the prescription of clearly defined punishments for certain types of crime,⁸² but, more importantly, they stimulated a movement to reduce the colony laws to writing.⁸³

As early as 1635 Winthrop noted that the deputies were fearful of the dangers which could result from the "want of positive laws" whereby the magistrates "in many cases, might proceed according to their discretions," and he went on to say that it was therefore agreed by the General Court that "some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws."⁸⁴ In the following year the court "intreated" Winthrop, Dudley, and others "to make a draught of lawes agreeable to the word of God, which may be the Fundamentalls of this commonwealth. . . . And . . . in the meane tyme the magistrates & their assosiates shall proceede in the courts to heare & determine all causes according to the lawes now established, & where there is noe law, then as neere the law of God as they can."⁸⁵ These excerpts clearly attest the deputies' desire to limit the magistrates' judicial powers through a written constitution, but they also bring out the standards to which the magistrates were expected to adhere: on the one hand, the traditional and fundamental rights of Englishmen, as embodied in Magna Carta and the common law; on the other hand, the clear and unamendable word of God as embodied in the Bible.

The magistrates, however, were opposed to having the laws reduced to writing, partly because they believed that to do so would call to the attention of the crown colonial divergences from English law, but more particularly because a written code would put a bridle upon their own power and discretionary authority, which they regarded as necessary for the accomplishment of their tasks and as belonging to them by virtue of their office.⁸⁶ Nevertheless, despite their opposition and continued resistance, the movement for written laws gradually made headway. By 1641 an extensive bill of rights, known as the Body of Liberties, had been prepared and published.⁸⁷ Its provisions contained important constitutional rules and standards, many of which were intended to inhibit the exercise

of arbitrary justice, but the deputies were not content. They wanted a complete codification of the colony laws, including, particularly, precise statements of punishments and penalties.⁸⁸ This the Body of Liberties had not accomplished for any but the capital crimes, and hence it failed to meet a primary ground of complaint against the magistrates. Accordingly, the preparation of a complete code was soon consigned to a series of committees,⁸⁹ and at the same time the whole problem of discretionary justice was again brought before the General Court as one of a number of broad issues relating to the powers of the magistrates in the colony.⁹⁰

During the summer of 1644, and in anticipation of the differences which were certain to arise between the magistrates and the deputies at the autumn meeting of the General Court, Winthrop prepared a "Discourse on Arbitrary Government."⁹¹ In it he argued for flexible penalties, partly on the basis of the discretion permitted English judges and juries in certain types of cases, but principally on the ground that the Bible prescribed few fixed penalties except for capital crimes. He also argued that, since the magistrates resorted to God's word as the guide for their decisions, the administration of justice could not be arbitrary. The issue of discretionary justice was submitted to the clergy, who substantially supported the magistrates' position but who nevertheless set forth with care and finality the circumstances under which latitude and discretion were properly to be exercised.⁹² At the end of the session, it was resolved that certain penalties ought to be prescribed, and that such as were prescribed might not be departed from without the consent of the General Court.⁹³ In other situations, it must be presumed *a silentio* that the magistrates' discretion was to remain unimpaired. After this session of the Court, the work of codification again proceeded, and it was accompanied by extensive revision and elaboration of the existing laws, including those which prescribed penalties. By 1648 the long-awaited comprehensive code of laws had been completed and was approved by the General Court.⁹⁴

The second phase of the controversy between the deputies and the magistrates related to the latter's right to exercise, through the standing council which had been established in 1636, executive and consultative powers when the General Court was not sitting.⁹⁵ In the spring of 1644, a bill was carried through the deputies empower-

ing a committee consisting of seven magistrates and three deputies to order the affairs of the colony during the approaching recess of the Court.⁹⁶ Essentially, it was the theory of the bill that the General Court was supreme in the colony and that when that Court was not in session the assistants had no power other than that given them by the Court. The assistants, on the other hand, took the position that, although the charter authorized the General Court to direct the exercise of their power, there was no authority therein to deprive them of it. The scheme was temporarily defeated by the refusal of the named magistrates to serve; but the question was again raised in the autumn meeting of the Court, the same session at which the question of discretionary justice was taken up.⁹⁷ In this matter, too, the clergy were called upon for advice, and struck hard at the assertion of the deputies that the General Court was by itself the supreme power in the colony.⁹⁸ Again, as in the resolution of the question of penalties, Winthrop's discourse on arbitrary government undoubtedly carried great weight.⁹⁹ In any event, as Osgood says, "the position of the assistants as an executive board was never again questioned."¹⁰⁰

A third, though chronologically second, phase of the struggle between the magistrates and the deputies was the attack on the magistrates' asserted right to exercise a "negative vote" in assenting to or rejecting all matters—judicial as well as legislative—brought before the General Court. The controversy had its origin in a statute of 1636 enacted at the time of a dispute arising out of the emigration of Thomas Hooker and others to the banks of the Connecticut River.¹⁰¹ The statute had apparently been intended to give the magistrates the prevailing voice in the settlement of disputed questions in the General Court, but the issue did not become crucial until 1642 as a result of *Sherman v. Keayne*, the celebrated case of the missing sow.¹⁰² In 1640 a County Court had acquitted the defendant, Robert Keayne, of taking and killing a stray sow belonging to the plaintiff's husband. Two years later, the case came on original petition to the General Court, where a majority of the assistants voted for the defendant and a majority of the deputies for the plaintiff, who was thus defeated by the rule of the "negative vote." Thereupon, the constitutional issue involved in the rule became the subject of heated debate. Winthrop prepared the defense

of the magistrates' position and argued on the basis of English precedents that the assistants, as a distinct body within the General Court, had an original and fundamental authority to reject all matters brought before that Court.¹⁰³ This view prevailed, and the question was resolved, for a few years, by an act of 1644 providing for the separation of the assistants and the deputies into two bodies and for the concurrence of both in the adoption or resolution of any measure.¹⁰⁴ Although the issue at the time was that of ultimate judicial authority, the 1644 act had important consequences in other directions in that it resulted in establishing a bicameral legislature in Massachusetts.¹⁰⁵

These conflicts were all aspects of the same source of difference between the deputies and the magistrates, namely, the problem of the basis of political power and of the allocation of spheres of authority within the colony. Underlying the position of the deputies, and of the two or three assistants who from time to time sided with them,¹⁰⁶ was the belief that the composition of the General Court as a representative body made it supreme in the colony, whereas Winthrop and a majority of the magistrates took the position that under the charter, and in accordance with contemporary political thinking, the magistrates had final authority in all matters. The issue was raised in final and dramatic form in 1645 in a case involving the propriety of Winthrop's having committed and bound over for trial two defendants who had slighted the authority of the colony government in the course of a dispute over confirming the lieutenant of the militia at Hingham.¹⁰⁷ A majority of the deputies were of the opinion that the excessive power of the magistrates was jeopardizing the liberties of the freemen. The remainder of the deputies, along with the magistrates, saw in the issue the danger that, unless the authority of the magistrates was sustained, the government would fast degenerate into a popular democracy.¹⁰⁸ The deadlock lasted for several months, and the issue became primarily political. Those who had been thwarted in the issue of the "negative vote" and in their wish to see an early enactment of written laws, appear to have resolved to make an example of Winthrop. The latter was determined that the issue of censure or acquittal be squarely faced, and a majority of the magistrates thereupon decided to refer the matter to the arbitration of the clergy—always

their strong supporters. At that point, the opposing deputies, "finding themselves now at the wall," gave in and agreed that Winthrop should be publicly exculpated.¹⁰⁹ When the sentence of acquittal had been pronounced in the General Court, Winthrop delivered himself of a "little speech" which is one of the clearest and most concise statements ever made of the magistrates' position as to the foundations of power in the colony government:

The great questions that have troubled the country, are about the authority of the magistrates and the liberty of the people. It is yourselves who have called us to this office, and being called by you, we have our authority from God. . . . I entreat you to consider, that when you choose magistrates, you take them from among yourselves. . . . Therefore when you see infirmities in us, you should reflect upon your own . . . when you have continual experience of the like infirmities in yourselves and others. 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 . . . that we shall govern you and judge your causes by the rules of God's laws and our own, according to our best skill . . . when you call one to be a magistrate . . . you must run the hazard of his skill and ability . . .

"Concerning liberty, . . . There is a twofold liberty, natural . . . and civil or federal. The first is common to man with beasts and other creatures. By this, man . . . hath liberty to do what he lists; it is a liberty to do evil as well as to good. This liberty is incompatible and inconsistent with authority, and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty makes men grow more evil . . . The other kind of liberty I call civil or federal, it may also be termed moral. . . . This liberty is the proper end and object of authority, and cannot subsist without it; and it is a liberty to that only which is good, just, and honest. This liberty you are to stand for, with the hazard (not only of your goods, but) of your lives, if need be. Whatsoever crosseth this, is not authority, but a distemper thereof. This liberty is maintained and exercised in a way of subjection to authority; it is of the same kind of liberty wherewith Christ hath made us free. . . . [S]o shall your liberties be preserved, in upholding the honor and power of authority amongst you."¹¹⁰

Here Winthrop was going beyond the accepted seventeenth century doctrine that men must submit to their rulers because God

orders them to submit. He was making the further point that by joining in a covenant men renounce their liberty to do anything but that which has been agreed to, and, further, that the duty to do that which is "good, just and honest" extends beyond the field of moral law and is the basis of political authority in the state. In other words, none might have the benefit of the law except those who subject themselves to it, and none have the protection of authority except those who obey it.¹¹¹

These conceptions of law and government were cornerstones upon which the political institutions of the colony had been built, and the freemen were continually reminded of them not only by the exhortations of the magistrates and the clergy but by the oath in which all freemen—including even the magistrates¹¹²—undertook to support the commonwealth and to submit themselves "to the wholesome lawes & orders made & established by the same."¹¹³

Thus, despite the broadening of the basis of government through the extension of the franchise, the management of the colony government remained, and in several respects became more strongly entrenched, in the governor, the deputy-governor, and the assistants. The right of the magistrates to exercise the broad powers which they had arrogated to themselves in 1630 and in the years immediately following had been effectively challenged and to some extent curtailed; but they had been successful in limiting the franchise to church members who subscribed to their own creeds and platforms. The magistrates had also succeeded in resolving the controversy over the "negative vote" in a way that made them supreme in legislative and, temporarily at least, judicial matters. When their executive and consultative powers had come under fire, they had again emerged triumphant.

For two decades, and more, the Massachusetts system worked, and it worked well. In the first place, the magistrates, to whom ultimate power was entrusted, were as a group united in their outlook and purpose and energetic in their leadership. Composed though that group was of men of strong personalities and differing temperaments, there was remarkably little dissension among them as to the policies to be pursued.¹¹⁴ Another reason the system worked well was that the freemen who shared political power with the magistrates were essentially in agreement with them as to the

basic mission of the colony. Moreover, as will appear, many of the institutions of government established to carry out that mission were, to a substantial extent, reproductions or adaptations of what the colonists had known in England.¹¹⁸ Hence the system also worked because little violence was done to their inherited sentiments and traditions.