

Institutions and US regional development: a study of Massachusetts and Virginia

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Abstract: The development of the American economy was accompanied by significant spatial income inequalities between the northern and southern regions. While many factors contributed to northern industrialization and southern stagnation, an important factor was differences in the region's institutions. In the North, a democratic institution fostered growth whereas in the South, oligarchic institutions favored status quo. To gain insights on the nature and causes of this divergence, this paper examines the development of political and legal institutions in Massachusetts and Virginia, the two leading states in the North and the South.

Introduction

US regional economies diverged between the nineteenth and the early twentieth centuries and then converged over the second half of the twentieth century (Easterlin, 1960; Kim and Margo, 2004). Evidence suggests that regional divergence occurred sometime between the late eighteenth and the early nineteenth centuries. In 1774, wealth and income per capita were relatively similar across the New England, Middle and Southern colonies for all populations but were significantly higher for free whites in the Southern colonies (Jones, 1980). However, by 1840, income per capita in the Northeast (New England and Middle Atlantic states) exceeded that of the South Atlantic (Southern colonial states) and East South Central states for all populations as well as for the free white population.¹ Southern incomes finally started to converge toward northern levels in the second half of the twentieth century.

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¹ In 1774, the wealth per capita (in pounds sterling) for New England, Middle, and Southern colonies were £36.4, £40.2, and £36.4 respectively. Similar patterns emerge when these wealth estimates are converted to incomes (Walton and Rockoff, 2002). In 1840, income per capita (in 1860 prices) was \$129 in the Northeast as compared to \$66 and \$69 in the South Atlantic and East South Central. By 1880, the North–South gap widened even more significantly (Fogel, 1989).

Why did US regional economies diverge and then converge? While factors associated with slavery, capital, labor and resource endowments played significant roles, this paper argues that the divergence of regional political and legal institutions was also a major contributing factor.² In the colonial period, the North emerged with democratic institutions which fostered trade and development, whereas the South arose with plutocratic institutions which fostered agrarianism. In the early nineteenth century, the North experienced a shift in its legal institutions to a judge-based, 'instrumental' law which promoted industrial development, whereas the South held on to its traditional jury-based, common law which defended the agrarian status quo. Even after independence and the formation of the United States, state political and legal institutions in the North and South remained divergent, through the antebellum period due to substantial states' rights under American federalism.³ With the outcome of the Civil War, the South faced a significant assault on its institutions but the convergence of their political and legal institutions toward those of their northern counterparts did not become clearly apparent until the second half of the twentieth century.

In recent years, scholars have proposed a variety of explanations for why institutions diverged across the European colonies around the world. One class of explanation emphasizes the role of initial conditions (North, 1990; La Porta *et al.*, 1998; Glaeser and Shleifer, 2002). In particular, because the Spanish, Dutch, French, and the English colonizers brought with them different sets of institutions, the development of colonial institutions was partly determined by the national identity of their colonizers. In general, these scholars believe that regions colonized by the British were more likely to inherit institutions of democracy and common law, whereas those colonized by the Spanish and French were likely to inherit centralized bureaucracies and civil law.⁴

The second class of explanations focuses on the geographic conditions of the colonies. For Engerman and Sokoloff (1997), the decisive factor was colonial factor endowments. In countries and regions where geography favored small-scale farming, democratic institutions were likely to arise, whereas in regions that favored plantation economies based on African or native slave labor, institutions based on elite-rule were likely to arise. For Acemoglu *et al.* (2002), colonial climate and native density or productivity were important factors. Since few Europeans settled in places with high settler mortality or high native population density, they had few incentives to develop democratic institutions in these colonies.

² It is beyond the scope of this paper to summarize the vast literature on the divergence and convergence of US regional economies. For a survey of this literature, we refer the reader to Kim and Margo (2004), Kim (1998), Michener and Mclean (1999), Hughes and Cain (2007), and Walton and Rockoff (2002).

³ See Key (1949).

⁴ Berkowitz and Clay (2006) find that legal origins influenced the quality of state courts in the US. Also see Michener and McLean (1999).

To better understand the nature and causes of the divergence of US northern and southern institutions, this paper examines the historical developments of political and legal institutions in Massachusetts and Virginia from their early colonial beginnings. Because there were important differences in the development of other colonies, the lessons learned from these two colonies must be interpreted with some caution. Nevertheless, these two major founding colonies served as important models for their respective regions. Over time, because settlers tended to migrate westward along the latitudes, institutions that developed in Massachusetts were transplanted into other northern states such as Ohio and Illinois, whereas those developed in Virginia found roots in other southern states such as Tennessee and Alabama.⁵

The study of Massachusetts and Virginia suggests that their initial variations in purpose, demographic composition, and wealth inequality played significant roles in creating the divergence of political institutions between these two colonies. In Puritan Massachusetts, where the distribution of land, wealth, and status was unusually equal, a democratic government arose in a relatively short time; in Cavalier Virginia, where the society was highly unequal, a plutocratic polity took root and persisted over time.⁶

After the early founding years, the differences in their climates contributed to the continued divergence in demographic and institutional structures in Virginia and Massachusetts. In Virginia, the extremely high mortality rates created an unsettled community which could only be sustained by the continual recruitment of new, poor, young male servants until the death rates stabilized in the eighteenth century. As a stable free white population emerged over time, an important element of democracy was introduced with the election of the Houses of Burgesses; however, many important offices, such as the county justice, continued to be appointed for life. In Massachusetts, a stable community led to a surprisingly quick emergence of a democratic society based on elections on

⁵ See Mathews (1962), Steckel (1983), Meinig (1993), and Kim and Margo (2004).

⁶ Fischer (1989), in his classic work *Albion's Seed*, argued that the British transplanted four distinct 'folkways' in colonial America. In Virginia, Fischer (1989) credits the rise of plutocracy in Virginia to the actions of Sir William Berkeley who governed Virginia between 1642 and 1677. Berkeley, in his desire to re-create the Royal government in England, recruited cavaliers in large numbers and then granted them large estates to create a ruling oligarchy. According to Fischer, a great majority of the ruling elite in Virginia arrived between 1647 and 1660 and that nearly all the ruling families were founded by younger sons of eminent families with no hope of inheriting an estate in England. This period of Cavalier settlement in Virginia was during a period of Parliamentary supremacy and republican government in England. In New England, however, Fischer finds the Puritan immigrants were extremely homogenous, composed of nuclear families, and came principally from the middle classes of the eastern counties of Norfolk, Suffolk, Essex, and Cambridgeshire. Quakers migrated from the North of England to the Delaware Valley, and Northern British and Scots-Irish to the Appalachian backcountry and beyond. Fischer also identified two other folkways – Quakers of Delaware Valley and the northern British immigrants of the Appalachian backcountry.

many levels of government.⁷ While important elements of democratic rule were removed by the British government when Massachusetts became a royal colony in 1691, democratic institutions quickly re-emerged after American independence.

Finally, factor endowments contributed to a major divergence in agricultural scale economies in the northern and southern colonies which in turn re-enforced the divergence of political and legal institutions in these colonies. In Massachusetts, poor soil led to small-scale agriculture, fishing, and commerce; in Virginia, however, climate proved excellent for growing tobacco on a large scale, especially with the introduction of slavery.⁸ Because the land laws in Virginia based on headrights, unlike those in Massachusetts, enabled the southern elites to accumulate significant amounts of land, an elite landed gentry with strong common economic and political interests emerged in Virginia. Moreover, the institution of slavery itself also contributed to diverging legal developments between the northern and southern colonies.⁹

Whether the geographic distribution of institutions is determined by historical initial conditions, climate or endowments, the establishment of stable political and legal institutions reflects a self-enforcing equilibrium solution to the fundamental dilemma of the state (North, 1990; Acemoglu *et al.*, 2002). To establish property rights, it is necessary to have a state which has a monopoly on violence; however, if the state has sole military power, then it has the incentive to extract rents from society. For North and Weingast (1989), the rise of Parliamentary rule by oligarchs in Britain in 1688 was associated with a greater commitment by the state to curtail the power of royal prerogatives. For Acemoglu and Robinson (2000), the rise of democratic rule in Britain in 1832 represented a credible commitment by the state to distribute resources toward the masses and was a necessary response to the potential mass rebellion.

In the American colonies, the states' coercive ability to enforce their laws and policies also played an important role in determining the level of democracy. Since the colonies relied on voluntary militia for their armies, the governor, council, and elected officials were acutely aware of their limited military authority over the governed. Rebellion by the free masses was a constant threat. Even in Massachusetts, the elites granted greater levels of democracy only after facing severe threats of rebellion. In Virginia, the potential for mass rebellion led to greater access to democracy, but this movement was short-lived when the elites regained an upper hand with royal military support. In Virginia, the potential for

⁷ Massachusetts did not possess democracy in the modern form, but it possessed significant early elements of democracy. See Wilentz (2005: xix) for a definition of democracy.

⁸ There has been extensive debate over the economic impact of slavery (Hughes and Cain, 2003; Walton and Rockoff, 2002). Fogel and Engerman (1974) find that southern agriculture under slavery was more efficient than northern agriculture due to plantation scale economies. Irwin (1988) finds that slave plantation economies extended to wheat production in the Virginia Piedmont. On the other hand, Wright (2006) and other scholars argue that slavery was economically inefficient.

⁹ See Morris (1996), Wahl (1998), Hindus (1980), and Tushnet (1981).

rebellion by poor free whites also lessened over time as their incentives became more and more aligned with the elites under the institution of slavery and as the elites relied less on local militias composed of free whites for social control.

The paper is organized as follows. Section 2 documents the historical development of political institutions in Virginia and Massachusetts; Section 3 documents the development of their legal institutions. Section 4 examines the role of states' rights and federalism on the continued divergence of institutions in Virginia and Massachusetts. Section 5 explores the causes of institutional divergence and Section 5 concludes with a summary.

2. The political institutions of Virginia and Massachusetts

Virginia and Massachusetts were both founded on the principles of royal corporate charters, but in the New World these colonies by necessity formed governing institutions which resembled commonwealths rather than corporations. Yet, even though both of these colonies were founded by peoples of one European nation with common history, culture, and background, they emerged with differing political institutions over time. In the early years of settlement, Virginia struggled to form a working political order, but eventually emerged with an oligarchic or plutocratic society. In Massachusetts, however, a more democratic form of government arose in a relatively short time. This section presents a selective historical account of the evolution of political institutions in these two colonies.¹⁰

The development of political institutions in Virginia

The founding of Virginia was based on a royal corporate charter drafted in 1606 for the Virginia Company which contained a mixture of private and royal organizational forms. For profit making, the private company planned to establish plantations worked by servants and laborers under contract managed by overseers. The company was given the right to transport settlers, supply provisions, and trade goods. For governing, however, the task was entrusted to three councils whose members were appointed by the King. The powers of government and ownership of land ultimately rested with the King who used instructions to give judicial powers to the local council and issued patents to grant land.

In 1607, 104 passengers in three vessels reached the Chesapeake and settled in Jamestown. The settlers were all male: a third to half were designated as gentlemen and the rest were artisans and laborers. By the order of the King, the identity of the local governing council was kept secret until arrival when the

¹⁰ There are many excellent and comprehensive accounts of the histories of political institutions in Virginia and Massachusetts. For example, see Osgood (1904), Morgan (1975), Sydnor (1952), Wall (1972), and Andrews (1934).

identity was to be revealed. The members of the council then chose a president. By most accounts, under the trying conditions of famine, disease, and threat from Indians, the council form of government proved to be ineffective. In 1608, when many of the council members had died or returned to England, John Smith emerged as the leader who commanded the colony in military style using labor gangs.

In response to the ineffectiveness of the council government, the Virginia Company requested and was granted a new charter by the King in which the company had complete control over the colony. In London, the company took steps to run the colony under a military regime initiated by Smith.¹¹ The new leaders of the colony were old soldiers. Between 1611 and 1618, the company ruled the colony through a governor who exercised absolute powers.¹² The government forged by the first governor, Lord De la Warr, his deputy Sir Thomas Gates, and subsequent deputy Sir Thomas Dale, was a code of military rule known as Dale's Laws. The settlers continued to work in gangs and were deprived of protection under the common law.¹³

When the gang labor system and military rule failed to bear any fruit in the New World, the Virginia Company in 1618 re-organized its governing structure and introduced a charter of grants and liberties. The general assembly, which possessed the powers to make laws, was composed of the governor and council, who were chosen by the company as before, but it now also included two Burgesses from each district who were elected. On 19 June 1619, 22 Burgesses were elected for the first time. While evidence on the workings of the assembly is scant, it is doubtful whether Virginia achieved a fully working form of government during this period. Nevertheless, the election of the Burgesses signaled a significant turning point in Virginian history. It marked the beginnings of a two-tier plutocratic society where access to political participation was open to the elites but closed for most of the masses.¹⁴

When the financially troubled Virginia Company was dissolved by the King in 1624, Virginia became a royal colony and the King appointed the governor and the council of the general assembly. Given the distance from England and the lack of a royal standing army, however, the royal governor could not overrule the colonists on important matters. The Virginians made up of the Houses of Burgesses and the council were able to effectively legislate on matters of taxes and law. As the Virginia colony stabilized and grew over the seventeenth century,

11 See Shea (1983: 13–15).

12 A decision was reached near the end of 1609 'to appoint a single head entrusted with exceptionally large powers. The company made up its mind to try a new experiment by sending to America a single and absolute governor, with authority so extensive as to make him almost a dictator for life' (Andrews, 1934: 107).

13 See Morgan (1975: 80).

14 See Morgan (1975: 124).

the government of Virginia evolved into its mature colonial form and formed political boundaries in counties and parishes.

More than the transition to a royal colony, the introduction of tobacco seeds of the Spanish West Indian variety by John Rolfe in 1617 had a major impact on the social organization of Virginians. With the tobacco boom of the 1620s, immigration of male indentured servants and share tenants increased. Under the headrights system introduced in 1618, a settler who came on his own or who paid the transportation of someone else was entitled to 50 acres. In these early years, given the abundance of land, the societal division arose in terms of the accumulation of servants. The growing of tobacco was both intensive in land and labor, but labor was scarce. Evidence shows that the elites were able to acquire numerous indentured servants, often by illegal means. The muster of inhabitants in 1625 shows that the officers of the Virginia Company each held ten to 39 servants.¹⁵

The elites were able to accumulate wealth and hold political power, but the basis for their power was precarious since they relied on local militias to enforce their laws. As mortality rates stabilized, an increasing share of the population was composed of free single males who were once servants. In the early seventeenth century, election of the Houses of Burgesses was held infrequently at the discretion of the governor; however, as free whites became more numerous and rebellious, Governor Berkeley was forced to hold new elections with greater access to voting.¹⁶ In the election of 1676, the free whites were able to vote into office a large share of their choices. However, this movement toward greater access was short-lived. When Bacon's rebellion collapsed, the elites re-established their political authority, confiscated the property of those who rebelled, and re-established the status-quo of elites.

The introduction of slavery sealed the elite rule based on the ownership of land and slaves rather than on servants. In this period, a mature, stable, plutocratic society emerged based on planter elites (Kulikoff, 1986). Prior to the eighteenth century, based on the identity of justices in tidewater Maryland, Kulikoff finds that justices were highly varied in background. However, by the mid-eighteenth century, the justices and burgesses were dominated by the planter gentry. In the late seventeenth century, Virginia justices and burgesses, as well councilmen, used their public offices to patent thousands of acres of frontier land. By 1705, three-fifths of Virginians who owned 2,000 or more acres of land were justices or burgesses. By the mid-eighteenth century, strong political dynasties formed. For example, more than a quarter of the 1,600 justices appointed in Virginia between 1757 and 1775 belonged to only 55 patrilineages. The gentry used entail and marriage to consolidate the political ruling class.

¹⁵ See Morgan (1975: 123–124).

¹⁶ In order to keep the same men in office in the House of Burgesses, Governor Berkeley did not call for a general election for 15 years between 1661 and 1676 (Andrews, 1934: 247).

The governor usually chose council members from the top families of the planter gentry. Sydnor (1952) finds that a small number of families enjoyed the powers of this office. Only 57 family names appear from 1680 to the Revolution as council members; nine families account for almost a third of the councilors during this century. The House of Burgesses was the only elected body in Virginia, but the election was also controlled by the elite gentry.¹⁷ Election dates were chosen by the governor and two members were elected from each county and one each from Jamestown, Williamsburg, and the College of William and Mary.

In Virginia, the county became the most important level of government for most people. Moreover, unlike Massachusetts, where local town officials were elected by freemen, county officials in Virginia were appointed and these officials possessed broad legislative, executive, and judicial powers.¹⁸ County justices, who individually settled disputes on small debts and collectively composed the county court, were appointed to serve for life by the governor. In practice, the justices provided the governor with a nominee who the governor then commissioned. The county justices not only decided on issues of law but they also set tax rates, allocated county funds, and managed roads and bridges. Just as importantly, the county justices appointed local government officials, such as the sheriff (who enforced laws, managed jails, collected taxes, managed the treasury, and conducted elections), coroner, militia officers below rank of brigadier, and tobacco inspectors.

The development of political institutions in Massachusetts

The Massachusetts Bay Company, formed in 1629, was based on a corporate charter, much like those of the earlier Virginia Company except in one important aspect.¹⁹ In all the previous colonies, they were managed chiefly for profit and controlled by proprietors in England, and the colonists were not entitled to the right of self-government. For Osgood (1904), the founding of the Massachusetts Bay colony marked a major change where the government of the plantation was transferred to those who lived in the colonies. For governing, the general court, prior to their departure in England, elected Winthrop as governor of colony and company, Dudley as deputy governor, and 18 other assistants. For profit making, the company created a temporary trusteeship known as undertakers who assumed control of assets and liabilities of the joint stock. Undertakers were to receive profits from the fur trade, the salt-making monopoly, and the transportation of passengers and goods.

¹⁷ See Sydnor (1952), Griffith (1968), and Morgan (1975).

¹⁸ Most scholars believe that the government in Virginia was undemocratic (see Porter, 1947; Sydnor, 1952; Morgan, 1975). However, Brown and Brown (1964) contend that Virginia was much more democratic.

¹⁹ The discussion on Massachusetts will concentrate on the more influential Massachusetts Bay colony. Plymouth and Massachusetts Bay colonies joined to form Massachusetts in 1691 (see Osgood, 1904).

In 1630, approximately 700 individuals in 11 ships sailed for New England. When the settlers arrived in Massachusetts Bay, they intended to work and live as a corporate body in one location where each settler received an allotment of land based on their investments.²⁰ Within months of their arrival, however, these plans were abandoned as settlers dispersed into nearby areas, formed separate towns and claimed land for themselves. These early settlements were established without the explicit authority of the general court. In addition, as the commercial element of the Massachusetts Bay Company quickly disappeared, trade was authorized to take place in private hands and the colony became a *de facto* commonwealth.

In Massachusetts, unlike Virginia, a democratic government based on regular elections arose in a relatively short period of time. Immediately, Winthrop and his associates were forced to recognize the new towns, fix their boundaries, and give them the rights to grant land. They were also forced to relinquish oligarchic control as large number of colonists applied for admission as freemen. In 1634, the colony declared that the freemen alone had power to admit new freemen, make laws, appoint officers, raise money and grant lands in the commonwealth of Massachusetts. The General Court, composed of two elected deputies from each town, was authorized with legislative powers; the governor and the assistants elected by freemen retained executive and judicial powers.

The General Court also took control over unoccupied lands and claimed the exclusive rights to grant land and create townships (Akagi, 1924; Martin, 1991). Prospective settlers, called proprietors, petitioned the General Court for a grant of land. Although the land was granted freely, starting a town was an expensive and complicated affair (Martin, 1991). Town promoters, often politically connected and experts in Indian affairs, coordinated the founding of towns and received land for their services. The General Court surveyed the land, coordinated its purchase from the local Indians, and then granted it to proprietors who were given exclusive rights to distribute land and admit new town members. The General Court also gave towns a considerable degree of local political control and, in 1641, selectmen were officially designated as chief administrators of local affairs.

In Massachusetts, democratic town governments became the most important local institution. Once a year in March, freeholders met to elect local town officials: clerk, selectman, treasurer, constable, and many lesser offices. Since the voting procedure was left to the discretion of towns, there was a great deal of variation in electoral practices. Over time, the elections were handled by a moderator, written but not secret ballots were used, and they became more formal (Cook, 1976). Yet, towns were not free of disputes. Because towns were often ill-equipped to settle and enforce disputes, Konig (1979) argues that the

²⁰ See Rutman (1965: 44).

quarterly courts were an indispensable institution for establishing social order throughout the colony.²¹

The continual movement toward a democratic government in Massachusetts occurred under considerable dissension and debate (Breen, 1970). For a colony founded to form a religious community, the political separation of church and state was a major issue, especially in the early years. Related to the idea of the religious and moral authority of the ruler was whether political leaders possessed wide discretion or possessed delegated authority. While dissension on the right form of government never dissipated, political debates increasingly became more secular and were on topics of property and liberty rather than of scripture and religion.

With the return to power of the Stuarts in 1660 in England, the Massachusetts colony faced a major challenge to its autonomy. In an abrupt change of policy, the King and the Board of Trade annulled the original charter in 1684 and established royal political authority over the colony. Massachusetts and other northern colonies were consolidated into a single Dominion of New England and placed under the rule of a royally appointed governor. Representative government and town authority were significantly curtailed. While an elected House of Representatives became the legislative body, and nominated the members of the upper house, the governor selected the Council from the representatives' list of nominees and his signature was necessary for an enactment to become law.

The period under royal rule between 1684 and 1776 was a period of uneasy compromise. When property rights and representation were significantly undermined under the rule of the royal governor Edmund Andros in 1686, the colonists rebelled by arresting Andros, thereby setting the boundaries of what they would allow. After the Andros affair, the royal governors learned to work within the limits of their authority, but for colonists who developed their own political institutions based on electoral representation, the royal government never gained full legitimacy. In the eighteenth century, as the interests of England and the American colony continued to diverge, the colonists, who were without representation on major policies, rebelled to recover their democratic institutions developed in their early years of colonial history.

3. The legal institutions of Massachusetts and Virginia

In the colonial period, the legal institutions in Virginia and Massachusetts were local, jury-based, and founded on the common law tradition of England (Nelson, 1975). To the extent that there were divergent trends in these two colonies, they may be accounted for by the fact that early colonists did not bring with them the

²¹ The colonists, according to Konig (1979), drew upon their English experience and created a judicial system based on the patterns of English county, the borough justices of peace, and courts of quarter sessions.

English common law of the King's court, but rather the customary law of English local courts which varied by region (Groebel, 1931; Allen, 1981). Moreover, in Massachusetts, there seems to be some evidence that local colonial circumstances may have led to changes in the application of common law (Konig, 1979). On the other hand, in Virginia, courts were presided over by country justices with little education in law for most of the colonial period (Roeber, 1981; Konig, 1992; Miller, 1994).

Property law in the American colonies, especially in New England, according to Priest (2006), may have diverged significantly from that of English law in its alienability. As the property law in England was designed to protect the devolution of real property, an individual's title to land was protected from the claims of unsecured creditors. In New England, however, the colonial legislatures moved to reject English protection of real property and, in 1732, the Parliament endorsed this movement by enacting a statute known as the Debt Recovery Act. Thus, in Massachusetts and elsewhere, land became equivalent to any other property. While the act was designed to apply in all the American colonies, evidence suggests that Virginia may have remained an important exception. In Virginia, the use of primogeniture, entail, and local juries provided an important mechanism for protecting real property from creditors.²²

In the first half of the nineteenth century, legal scholars believe that the American legal system went through a more fundamental transformation. In this period, the legal system went from jury-based, common law to judge-based, 'instrumental' law (Nelson, 1975; Horwitz, 1977).²³ While the evidence of the geographic divergence of legal systems between Massachusetts (North) and Virginia (South) is relatively scant, a growing number of scholars believe that Massachusetts was a leader in this transformation, whereas Virginia remained a laggard (Ely and Bodenhamer, 1984; Konig, 1992; Miller, 1994, among others).²⁴ Cases from Massachusetts (and New York) state supreme courts were cited, but those from Virginia and other southern states were ignored (Friedman, 1984).

²² Virginia and the southern colonies adopted the common law of primogeniture widely practiced in England, whereas Massachusetts and the other New England colonies (with the exception of Rhode Island and New York) adopted male multigeniture, a practice found in County of Kent (Alston and Shipiro, 1984). Primogeniture and entail significantly reduced the potential devolution of property in Virginia. While Keim (1968) finds that only a small percentage of property in Virginia was subject to entail, Brewer (1997) argues that Keim's estimates are flawed and that a larger share of property may have been subject to entail.

²³ To the contrary, Simpson (1979) and Schwartz (1981) argue that the Horowitz thesis is unfounded in the data. Both of these scholars claim that there was no radical change in law between the late eighteenth and the early nineteenth centuries.

²⁴ Campbell (1975) and Huebner (1999) argue that, while Virginia's legal system was not as advanced as that of Massachusetts, the legal system in Virginia was also moving away from common law to instrumental law.

Colonial law in Massachusetts and Virginia

For Nelson (1975), pre-revolutionary law in Massachusetts was characterized by a legal system based on the British common law tradition of local communal consensus. One of the most important features of pre-revolutionary law was that the jury ruled as both law and fact.²⁵ Because norms of local communities varied, and since local juries did not provide written commentaries on their decisions, jury-based law did not provide a sound basis for a uniform law over a wide geographic area. Moreover, the common law concept of fair exchange, often determined by the ethical norms of a local community, subjected the enforceability of a contract to local community standards of fairness. Likewise, under common law, corporations were believed to be created by the legislature for public rather than for private purposes and their charters could be amended or abolished for the communal purposes of a community.

Common law property rights gave the landowner the right to prevent the use of any neighbor's land that conflicted with his own quiet enjoyment. The natural use and prescription doctrines limited the use of a property to natural uses (agriculture) and gave monopoly rights to the first developer of a resource. Horwitz (1977) argues that property rights under common law hindered development. These laws raised the costs of building roads, canals, and railroads as well as building mills for waterpower. For example, the natural use doctrine did not allow the alteration of water flow except in its natural channel and any use of water that conflicted with the interests of other land owners along the stream was an unlawful invasion of property.

Common law principle of contract was based on the fairness doctrine that sought to protect people from unfair exchanges. The fairness standard, however, created uncertainty in contractual transactions. Under the fairness doctrine, if two parties agreed on a contract on the delivery of a good at a specified price, the contract could be nullified by the courts if the contract was deemed to be unfair to one party. Thus, the enforceability of a contract was at the discretion of the courts rather than bounded by the agreement drawn up by individuals.²⁶ Since the standards of fairness may differ between jurors in different communities, the fairness principle raised the costs of transactions across localities. In addition, the fairness standard limited the negotiability of a contract. If individual A gave a promissory note to B, who transferred the note to C, then C could not sue A in the event that the contract was breached.

Post-revolutionary law in Massachusetts

Between the American Revolution and the early nineteenth century, the legal institution in Massachusetts was transformed from one based on preserving the status quo and traditional social stability to one based on free will, uniformity,

²⁵ See Nelson (1975: 3–4).

²⁶ See Horwitz (1977: 167).

and predictability for economic exchange (Nelson, 1975; Horwitz, 1977). Between 1804 and 1809, reforms were enacted to limit jury power. The law finding function was shifted from the jury to the judge and the jury's task was relegated to fact-finding functions such as determining the credibility of the witness or weighing the probability of competing testimonies. Moreover, the common law of contract was replaced by the 'will theory' of contract. What mattered was whether individuals agreed on the terms of the bargain rather than whether the agreement was fair, foolish, or inequitable to a party. These developments reduced the uncertainty of contractual exchanges and the costs of market transactions.

The will theory of contract affected many areas of economic activity. In the sale of land, individuals were free to devise contracts which were binding in courts. The sentiment for will theory was expressed by Chief Justice John Marshall: 'To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase of land and sale of lands defeasible by the payment of money at a future date, or, in other words, to make a sale with reservation to the vendor a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants.'

In pre-revolutionary law, *caveat emptor* did not apply. For example, if two people bargained over a horse and the horse died subsequent to exchange, the buyer could sue the seller for damages. In post-revolutionary law, the will theory of contract increased the importance of *caveat emptor*. Thus, even if a person purchased a defective good, the buyer was now responsible for his actions. By limiting the buyers' right to sue for decline in the quality of goods after purchase, *caveat emptor* reduced the transactions costs of market exchanges.

Common law viewed corporations as similar to municipalities which were created for public rather than private purposes. In the early nineteenth century, Massachusetts recognized the private nature of corporations, upheld the private contractual nature of the corporate charter, and provided limited liability to managers and shareholders. In *Ellis v. Marshall* (1807), the Massachusetts Supreme Judicial Court made a firm distinction between public and private corporations. In deciding that a private corporation was distinct from a public corporation, the court effectively limited legislative authority over corporations. Likewise, in *Wales v. Stetson*, the Massachusetts Supreme Court ruled that private corporations were closer to contracts than municipal governments.²⁷

In *Gray v. Portland Bank* (1807), the Massachusetts Supreme court established that the officers of a corporation had fiduciary duty to its shareholders. In the early nineteenth century, it was not clear whether a breach of contract or in tort could be brought against a corporation rather than its officers who performed the injury-creating act. In *Gray and Riddle v. Locks and*

²⁷ *Wales* was the primary precedent for *Dartmouth College v. Woodward* (1819).

Canals on Merrimack River (1810), the court ruled that corporations could be sued for damages. However, while the corporation could be sued for damages, the court also gave the officers and shareholders of the firms limited liability. In *Nichols v. Thomas* (1808), the court ruled that owners were not personally liable for the debts of the firm.

In Massachusetts, the state legislature played an important role in eroding the common law vested property rights through enacting mill acts in the early nineteenth century. The foundation of common law was the view that property owners had absolute dominion over their land.²⁸ Because the development of mills, water power or transportation often impacted negatively on adjacent private properties, the hold-up costs associated with the vested rights doctrine raised the costs of development. The mill acts lowered the costs of litigation by allowing the owner to flood a neighbor's land and pay an annual compensation specified by the act. Thus, the legislature reversed the common law rule that flooding the land of a neighbor created an injury and nuisance (Hall, 1989).

Under the 'common law' rules of contract, the transaction costs of developing roads, canals, and railroads were very high because property owners had absolute dominion over their land. By using its power of eminent domain, the state legislature in Massachusetts was able to reduce the transaction costs associated with the development of roads, canals, and railways. Because transportation networks traversed property owned by numerous private individuals, traditional vested rights of property guaranteed under common law significantly raised the costs of infrastructural investments and collided with the public's interest in economic growth. In the antebellum period, state legislatures and courts used eminent domain to take property for public purpose subject to reasonable compensation to land owners.

Post-revolutionary law in Virginia

While the study of laws and legal systems in Virginia is not as developed as that of Massachusetts, scholars generally believe that the legal system in Virginia continued to champion the English common law traditions based on local juries (Miller, 1994). Unlike Massachusetts, which transformed its legal system to foster industrial development, Virginia used its legal system to protect the landed interests of the elites. Virginia's legal system inhibited development in a variety of ways: it favored debtors over creditors, favored landlords over tenants and sharecroppers, was slow to adopt *caveat emptor* or to recognize

²⁸ Before the nineteenth century, the common law view of water was a natural flow rule which restricted the uses of water for domestic and agricultural purposes. Beyond the natural use of water for supporting humans and animals, common law ruled that water flows and ought to flow, as it has customarily flowed, and that every man has a right to have the advantage of flow of water in his own land without diminution or alteration. In the early nineteenth century, a new view of water rights emerged. 'Under the influence of the mill acts, men had come to regard property as an instrumental value in the service of the paramount goal of promoting economic growth' (Horwitz, 1977: 47–51). See Steinberg (1991).

private corporations, and adhered to 'vested' rather than legislative rights (Ely and Bodenhamer, 1984).

In Virginia, unlike Massachusetts, Miller (1994) argues that the legal system continued to advance the traditional rights of the jury over the judge. Because a large share of civil suits between 1785 and 1825 involved British debt cases, the local jury system provided effective means to delay and reduce debt claims. The judges' role in Virginia was only to answer a question concerning a specific point of law if requested. A judge instructing the jury was seen as an invasion of the jury's province; judges in Virginia were not allowed to sum up the evidence at the end of the trial. In a series of cases brought to the appeals court on the relative roles of juries and judges, the Virginia appellate courts consistently upheld the traditional, common law rights of the jury.

Due to the lack of systematic legal studies, it is difficult to determine to what extent Virginia's contract law was based on the common law fairness doctrine rather than the will theory introduced in Massachusetts. At best, the evidence is mixed. In *Groves v. Groves* (1790), Virginia's lower court appeared to adopt the will theory of contracts by ruling for expectations damages in connection with a buyer's action for securities, but the Virginia Court of Appeals subsequently reversed this decision (Horwitz, 1977). In the sale or hiring out of slaves, Wahl (1998) finds continued acceptance of the common law fairness doctrine, but Morris (1996) argues that, except for the Carolinas and Louisiana, southern judges adopted *caveat emptor* by the end of the eighteenth century.²⁹

In Virginia, corporate charters were often seen as a public good and the legislature either reserved the power to amend the charter or, if not, limited the duration of the corporation (Campbell, 1975).³⁰ In the well-known case of *Currie's Administrators v. Mutual Assurance Society* (1809), Justice Spencer Roane ruled that the legislature could amend the original charter of the corporation.³¹ The Mutual Assurance Society, an insurance scheme where members insured each other, was originally chartered by the legislature in 1794. However, in 1805, the legislature amended the charter under interest group pressure. Since country subscribers were subsidizing town subscribers who faced great danger of fire, the legislature separated the subscribers into the two groups. In 1805, Currie, a town dweller, brought a suit against the Society claiming that

²⁹ Because Virginians tried to tie slaves to land, slaves were considered as realty for some purposes for most of the eighteenth century (Morris, 1996).

³⁰ While Ely and Bodenhamer (1986) believe that southern law diverged from northern law, they argue that southern courts enforced *caveat emptor* and accepted the private contractual nature of corporations.

³¹ Spencer Roane served on Virginia's Court of Appeals, the highest appellate court, between 1794 and 1822. 'English precedents and principles held a place of particular importance in Roane's decisions ... In Roane's view, English authorities stood on equal footing with decisions of Virginia's courts ... Harkening back to the great legal tradition of English legal scholarship, Roane cited Blackstone and others in support of adherence to such long-established precedent ... Roane's conception of the judicial role combined a belief in strong, independent, authoritative judiciary with a devoting to the wisdom of the ages as expressed through the common law' (Huebner, 1999: 22).

