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Edited by Daniel L. Dreisbach, Mark David Hall
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GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY

From the early days of European settlement in North America, Christianity has had a profound impact on American law and culture. This volume profiles nineteen of America's most influential Christian jurists from the early colonial era to the present day. Anyone interested in American legal history and jurisprudence, the role Christianity has played throughout the nation's history, and the relationship between faith and law will enjoy this worthy and unique study. The jurists covered in this collection were pious men and women, but that does not mean they agreed on how faith should inform law. From Roger Williams and John Cotton to Antonin Scalia and Mary Ann Glendon, America's great Christian jurists have brought their faith to bear on the practice of law in different ways and to different effects.

Daniel L. Dreisbach is a professor in the School of Public Affairs at American University in Washington, DC. His research interests include the intersection of religion, law, and politics in American public life. He has authored or edited ten books, including *Thomas Jefferson and the Wall of Separation between Church and State* (2002) and *Reading the Bible with the Founding Fathers* (2017). He has published numerous book chapters, reviews, and articles in scholarly journals, including *American Journal of Legal History*, *Journal of Church and State*, *Politics and Religion*, and *William and Mary Quarterly*.

Mark David Hall is Herbert Hoover Distinguished Professor of Politics and Faculty Fellow in the William Penn Honors Program at George Fox University. Mark has written, edited, or coedited a dozen books, including *Did America Have a Christian Founding?: Separating Modern Myth from Historical Truth* (2019); *Roger Sherman and the Creation of the American Republic* (2013); and *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding* (2009).

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Great Christian Jurists in American History

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This book is dedicated to the men and women in the legal profession who have devoted their time, talent, and resources to defending what many American founders called “the sacred rights of conscience.”

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Preface

The first English settlers in British North America brought with them laws and legal traditions steeped in Christianity and its sacred text. Long before their arrival in the early seventeenth century, Christianity had infused the English legal culture, specifically the common law, that the colonists would bring to the New World. Indeed, leading jurists in both England and America claimed that the common law was rooted in Christianity and nothing in the common law is valid that is not consistent with divine revelation. Sir William Blackstone, for example, wrote in his famous *Commentaries on the Laws of England* that “Christianity is part of the laws of England.”¹

When the colonists began to establish their own political communities and frame their own legal codes, they continued to draw on Christianity and the Bible.² The earliest expressions of law framed in the colonies, both in Virginia and New England, bear the unmistakable influence of Christianity.³ New England’s Puritan colonies, especially, set out to establish Bible commonwealths and remake political society in conformity with biblical laws as they understood and interpreted them in their religious traditions. Christianity’s

¹ William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–1769), 4:59. This view, it must be acknowledged, was not uncontested in England or America. See John Cartwright, *The English Constitution Produced and Illustrated* (London: T. Cleary, 1823), 388, and Thomas Jefferson, “Whether Christianity Is Part of the Common Law?” (1764?) in *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*, ed. Daniel L. Dreisbach and Mark David Hall (Indianapolis: Liberty Fund, 2009), 539–543. See generally Chapter 8 in this volume.

² See David D. Hall, *A Reforming People: Puritanism and the Transformation of Public Life in New England* (New York: Alfred A. Knopf, 2011); Michael P. Winship, *Godly Republicanism: Puritans, Pilgrims, and a City on a Hill* (Cambridge, MA: Harvard University Press, 2012).

³ See Daniel L. Dreisbach, “The Bible in American Law,” in *Oxford Handbook on the Bible in America*, ed. Paul Gutjahr (New York: Oxford University Press, 2017), 276–288.

pervasive influence on early colonial legal culture is no surprise because it was integral to the colonists' identity, cultural traditions, and civic pursuits. This influence extended to principles of rule of law and due process, forms and role of civil government, the rights and responsibilities of righteous citizens, and the protection of religious liberty. Christianity, in short, made significant and substantive contributions to American jurisprudence. Significantly, however, Americans making arguments purportedly based on Christianity and the Bible sometimes found themselves on opposite sides of some of the most contentious debates in American society, including the right to resist political tyranny, the scope of religious liberty, and the legitimacy of slavery, illustrating, perhaps, the flexible and contested use of theology and Scripture in legal and political debates.

Christianity and the Bible were often the explicit bases of early colonial laws. Colonial statutes in both southern and northern colonies borrowed explicitly and extensively from biblical codes, especially the Ten Commandments. For instance, the "Articles, Lawes, and Orders, Divine, Politique, and Martiall for the Colony in Virginea," as enlarged in 1611, prohibited speaking "against the holy and blessed Trinitie," blaspheming God's holy name, deriding or defying God's holy word, Sabbath breaking, murdering, and committing adultery.⁴ In New England, similar legal provisions were often accompanied by specific references to biblical authority supporting them. The influential "Massachusetts Body of Liberties" (1641), for example, borrowed from Mosaic law even more explicitly than Virginia's law, mandating the death penalty for "worship[ing] any other god, but the lord god"; "Blasphem[ing] the name of God, the father, Sonne, or Holie ghost"; and committing adultery or engaging in sexual sins forbidden in Mosaic law.⁵

As amply illustrated in this volume, many leading jurists in the colonies identified as Christians and unapologetically articulated a jurisprudence they believed was derived from Christian thought. Influential jurists of this age, such as the Puritans John Winthrop and Nathaniel Ward, were as learned in biblical theology as in law, and their training in one discipline was frequently used in the service of the other. More broadly, judges in the colonial era and beyond often cited the Bible as authority in their legal opinions.

⁴ "Articles, Lawes, and Orders, Divine, Politique, and Martiall for the Colony in Virginea" (1610, 1611), in *Sacred Rights of Conscience*, 84–86.

⁵ "Massachusetts Body of Liberties" (1641), in *Colonial Origins of the American Constitution: A Documentary History*, ed. Donald S. Lutz (Indianapolis: Liberty Fund, 1998), 83–84.

The framers of a distinctly American constitutional tradition that emerged in the colonial era and was refined in the founding era looked to the Bible and Christian tradition, among other sources, for political and legal concepts that they sought to incorporate into their constitutional regimes. For example, a biblical anthropology that views humankind as essentially fallen inspired a constitutional architecture characterized by the separation of government powers and checks and balances, reflecting a reluctance to vest unchecked civic power in the hands of sinful rulers. Some in the founding generation saw in the separated powers of prophet, priest, and king described in Deuteronomy 16–18 a model worthy of study and, perhaps, emulation in their own constitutions. The New England Puritans and some key figures in the founding generation believed that the Hebrew commonwealth described in the Old Testament provided a model for republican government. There were those who thought that passages chronicling the experiences of the Hebrew polity, more specifically, supported notions of consent of the governed and representative government. These are a few examples of the ways, some commentators have argued, that Christianity contributed to the American constitutional tradition. Other constitutional principles and provisions were arguably informed by biblical thought.⁶

Diverse intellectual, legal, and political traditions and perspectives have informed American law and politics. Among the influences scholars have identified and studied include British constitutionalism, Enlightenment liberalism in various forms, and republicanism (including Hebraic, classical, and civic).⁷ This volume gives evidence that another, often overlooked, source of influence on the American legal system and jurisprudential thought is Christianity. While it is important to identify and examine this source of influence, its significance should not be overstated nor should other perspectives be ignored. This volume's focus on Christianity's influence on leading jurists acknowledges Christianity's impact on American law and jurisprudence, but it is not meant to discount, much less dismiss, other traditions. Even before independence and adoption of the US Constitution, influential jurists and jurisprudential perspectives more secular and at times antagonistic to Christianity began to emerge. These jurists and jurisprudential schools of thought were increasingly in tension with legal perspectives more in harmony with traditional Christian thought. Indeed, by the twentieth century,

⁶ See Introduction.

⁷ For an introduction to and survey of diverse schools of political thought that influenced the American founding, see Alan Gibson, *Interpreting the Founding: Guide to the Enduring Debates over the Origins and Foundations of the American Republic* (Lawrence: University Press of Kansas, 2006).

principles of nonestablishment and church–state separation were increasingly deployed to exclude from public fora legal arguments and opinions apparently informed by Christianity or the Bible.

This volume focuses on the interplay between religion and law in the American experience by examining the jurisprudence of selected influential Christian jurists representing various eras in American history, from the establishment of English settlements in the early seventeenth century to the twenty-first century. By “jurist” we mean men and women who have had an important influence on the creation, application, and/or interpretation of constitutional, case, and statutory law or the philosophy of law. This broad definition includes judges, scholars, legislators, and legal practitioners. A few of the profiled jurists are better known for their professional pursuits as political or religious leaders than for their contributions to the law, but we believe these profiles reveal why they merit inclusion in this volume.

The essays in this volume take seriously the role of religion in informing the thought and actions of the profiled jurists. Each chapter commissioned for this volume examines the life and thought of a selected jurist who not only had a significant influence on law but also clearly identified with the Christian tradition and purportedly drew on Christianity to inform their jurisprudence. Religion mattered to these jurists, and, to varying degrees, they all sought to apply their religious beliefs to their professional pursuits. Most, if not all, of these jurists worked consciously to apply their Christian faith, theology, biblical interpretations, and ethical framework to their understanding or reform of the laws of the civil state; influential treatises or constitutions, statutes, or canons they drafted; or landmark cases they decided or litigated.

Selecting just a handful of jurists from the last four centuries of American history was an extraordinarily difficult task. The jurists profiled were chosen in consultation with approximately fifty scholars from a variety of academic disciplines who assisted us in identifying and evaluating the contributions of Christian jurists in American history. (Regrettably, due to space limitations, we were unable to include in this volume an examination of some important jurists we identified in this selection process and acknowledge as worthy of scholarly attention.) We urged the contributors to examine their subjects in the manner they thought appropriate. That said, to the extent possible, each chapter includes a biographical sketch of the profiled jurist, including mention of the jurist’s religious beliefs, denominational affiliations, etc.; a brief review of the scholarship on that jurist with an emphasis on whether Christianity’s influence on his or her jurisprudence has been studied adequately; an examination of the influence Christianity played on various aspects of the jurist’s legal philosophy and/or substantive legal positions; and

a discussion of the extent to which the profiled jurist influenced or represents a larger group or tradition.

It should come as little surprise that most of the jurists profiled in this volume are white males. Women and persons of color were excluded from the practice of law for much of American history and, once they gained entry into the profession, were often marginalized. We would have liked to have included more jurists who were not white males, but space limitations forced us to make difficult choices. In so doing, we decided that, in terms of sustained influence on American jurisprudence, we would not replace John Marshall Harlan with, say, Myra Bradwell or Antonin Scalia with Clarence Thomas. We understand that some readers will disagree with these decisions, and we hope that this volume encourages scholarship on jurists we did not profile.⁸

Prior to the twentieth century, most prominent jurists were Protestants (Roger Taney is a notable exception to this rule). Since the 1950s, arguably a disproportionate percentage of distinguished Christian jurists have been Roman Catholics – a shift illustrated by the fact that from Justice John Paul Stevens's retirement in 2010 until Justice Antonin Scalia's death in 2016, there were six Roman Catholics and no Protestants sitting on the US Supreme Court. This change is also reflected in the latter chapters in this volume – four of the last six essays profile influential Catholic jurists.

We find it difficult to generalize about *how* faith influenced each jurist. Some explicitly drew legal guidance from the Bible, Christian theology, and church traditions. Others did not clearly do so, and some indisputably pious jurists even contended that it is inappropriate for judges to engage in such an enterprise (see Chapter 14). It is fair to say, however, that the profiled jurists in the early colonial era reflected the religious perspectives of the communities and the times in which they lived. Many of the Christian jurists examined in this volume from the late twentieth and twenty-first centuries, by contrast, have espoused countercultural values and perspectives insofar as their jurisprudence challenges aspects of an increasingly secular and postmodern culture. It is perhaps no coincidence that many of the jurists profiled early in the volume held high political or judicial offices, whereas those considered later in the collection are more likely to be academics with less direct political or judicial involvement.

⁸ In some cases, of course, scholarship already exists on the men and women we were unable to include. See, for instance, Jane M. Friedman, *America's First Woman Lawyer* (Amherst, NY: Prometheus Books, 1993) and Ralph A. Rossum, *Understanding Clarence Thomas: The Jurisprudence of Constitutional Restoration* (Lawrence: University Press of Kansas, 2014).

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