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## REVIEW ESSAY

### ORTHODOXY AND HERESY: THE NINETEENTH CENTURY HISTORY OF THE RULE OF LAW RECONSIDERED

RICHARD P. COLE\*

Review of David Ray Papke, \*\* *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH*, New York University Press, New York (1998).

#### INTRODUCTION: NEW PERSPECTIVES UPON THE RULE OF LAW

The dominant genre of American legal history informs lawyers about how the legal system evolved to its present form. It is an internalized history of influential lawmaking that shaped American legal culture.<sup>1</sup> It includes a large body of scholarship, much of it within the past generation, recounting the rise of a legalistic and powerful rule of law in Nineteenth Century America.<sup>2</sup> Although the existing history is most valuable, we are fortunate that David Papke has devoted his considerable intellectual talents to produce a book, *Heretics in the*

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\* Professor of Law, Western New England College School of Law. M.A., 1972, University of Michigan; J.D., 1969, University of Michigan; B.A., 1966, University of Pennsylvania. I wish to thank the Indiana University School of Law—Indianapolis for the opportunity to write this Essay, and the editorial board of its law review for their thoughtful assistance in revising it. I also wish to thank James Gardner and Francis J. Mootz for reading a draft of the Essay, and Pat Newcombe for her invaluable assistance in procuring sources for the study. Most especially I wish to thank my research assistant, Corrine Burnick, for her many contributions to the Essay.

\*\* R. Bruce Townsend Professor of Law, Indiana University School of Law—Indianapolis.

1. See Daniel Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 428-33 (1941); Robert Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & SOC'Y REV. 9, 17 (1975-1976).

2. General works that address this history include: LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2nd ed., 1985); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (1989); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992) [hereinafter *CRISIS OF LEGAL ORTHODOXY*]; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) [hereinafter *TRANSFORMATION*]; WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE IN MASSACHUSETTS, 1760-1830* (1975). Some of this history is critical, notably Horwitz'.

*Temple: Americans Who Reject The Nation's Legal Faith*, that provides scholars with new perspectives upon the history of the rule of law in America. All of Papke's perspectives are consistent with the broad approach to the study of American legal culture that is characteristic of his scholarship.<sup>3</sup> While none of Papke's perspectives is entirely without precedent, all have been given far too little attention in histories of American Law.

Although most legal history tells of the Creons who built and defended the rule of law, Papke's protagonists are the Antigones who attacked it. Papke's heretics include: the abolitionist William Lloyd Garrison; the feminist Elizabeth Cady Stanton; the labor advocate and Socialist leader Eugene Debs; the three major leaders of the Black Panthers, Huey Newton, Bobby Seale, and Eldridge Cleaver; and finally, contemporary militia and anti-abortionist activists. Papke has chosen to study heretics who were activists rather than original thinkers.<sup>4</sup> For example, he did not include academics, like the Realists or their successors, the Law and Society and Critical Legal Studies movements, who have attacked the rule of law as illusory.

In writing *Heretics* Papke has cast the door of internal legal history ajar, allowing its readers to peek outside and see some of the popular protest against the rule of law during the past century and a half. All of Papke's heretics, save for William Lloyd Garrison, advocated for an alternative that their contemporaries rejected, and that to this day in some cases has not been accepted. Papke's book, then, breaks out of the confines of Whig history.<sup>5</sup> Still, one finishes his book with the impression that America has had a few heroic Antigones who fought a lonely struggle against a dominant culture that unreservedly celebrated the rule of law. Part I reviews a conventional version, relied upon by Papke in chapter one of *Heretics*, of the rise of the rule of law in America that supports this view.

In contrast to this version of the history of the rule of law, Part II of the Essay argues that if historians push open the door of internal legal history wider they will find not just a few heretics, but a chorus of diverse voices that during the Nineteenth Century critiqued the rule of law. Consistent with the democratic tone of their antilegalism, some critics proffered an alternative of popular justice to it. This tradition of antilegalism suggests another point. Although Papke's litmus test for a heretic is objective—to identify those who lost faith in the rule of law—this Essay suggests the more subjective approach of defining legal heresy within a specific historical context.

Because there was more popular resistance during the Nineteenth Century to

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3. Papke is a leading figure in the law and literature, and broader law and culture movements.

4. There are exceptions to this general statement. They include Elizabeth Cady Stanton's application of principles of the Declaration of Independence to support the claims of feminists, and the concept of a "lumpen proletariat" borrowed from Karl Marx in the ideology of the Black Panthers. See DAVID RAY PAPKE, *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH* 59-61, 117-18 (1998).

5. See generally HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1951).

the rule of law than conventional history suggests, Part III of this Essay reconsiders how the rule of law became the bedrock of modern American legal culture. In this reassessment Papke again offers a valuable perspective to scholars. Legal historians from both the political right and the left, consistent with the dominant form of legal history, have usually focused their attention upon the efforts of America's legal elite consciously to fashion a rule of law. In striking contrast, *Heretics* reflects a perspective upon American culture that Papke gained as a Fulbright Scholar in Asia, as well as his abiding interest in popular legal culture. For Papke, a foundational feature of the history of the rule of law is that Americans became infused with a legal faith in it, seemingly unique among the nations of the world.<sup>6</sup> Indeed it is this legal faith that explains why the rule of law became so powerful in Nineteenth Century America. Papke intends his studies of isolated heretics to illuminate the depth of America's legal faith. In reassessing the rise of the rule of law, Part III of this Essay begins with a review of the legal ideology articulated by the new nation's legal elite. But there were important divergences between it and the popular legal ideology of the free market. This suggests that factors external to the legal profession were important to the development of the popular legal faith during the Nineteenth Century. Part III explores what these might have been.

Part IV concludes the Essay by arguing that the greatest value of Papke's book is to urge scholars, employing the new perspectives suggested by him, to engage in further study of the history of the rule of law. In addition to an externalist view of law and concern for law's impact on popular culture, Papke offers yet another valuable perspective to scholars who choose to study the rule of law in American culture. Fitting for a book concerned with legal heresy, Papke suggests intersections of law and religion in American history. They are more than just shared trappings like jargon and ritual, whatever their importance.<sup>7</sup> For example, both law and religion have bodies of doctrine that developed through a process of interpretation. Of particular significance for study of the rule of law, religion and law are both systems of authority. Given the similar territory they occupy, it is hardly surprising that for a very long time religion and law vied in American culture as the source of its values and arbiter of its conflicts. During the Nineteenth Century, law prevailed and displaced religion as the central institution of what became defined as the public sphere of life, although a wide spectrum of Americans ultimately perceived a synthesis of law and religion at least in constitutional law. Heretics were often at the cutting edge of this struggle, therefore it is not surprising that the legal heresies of a number of them, notably of William Lloyd Garrison and Eugene Debs, and of course, anti-abortionists, were spawned by religious ideals.<sup>8</sup> In focusing upon interactions of law and religion, Papke departs from the dominant tradition of American legal history, which isolates law from cultural contexts. Papke's

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6. "The legal faith is one feature of Americanism that distinguishes it on the world stage." PAPKE, *supra* note 4, at 23.

7. Papke stresses the ritualistic nature of the courtroom trial. *Id.* at 8-12.

8. *See id.* at 39-41, 93-94.

approach is also welcome because one of the greatest weaknesses not only of American legal history, but of much of American history generally, is a failure to recognize the enormous significance of religion in the American experience.

Though challenging to scholars interested in the history of the rule of law, *Heretics* is a most readable book readily accessible to anyone interested in the history of American law. Both its prose (in Papke's characteristically concise style and conversational tone) and its organization have clear, simple lines. Papke also made several important choices in writing about his subject that enhance the book's readability. Though the heresy of each of his subjects was nurtured by membership in a group,<sup>9</sup> he focuses upon the lives of individual heretics. In general, *Heretics* is historical rather than analytic in its approach, an act of restraint that keeps it from becoming ponderous. *Heretics*, then, constitutes a winning combination: It provides readers with new perspectives upon a most important subject in an arresting form.

#### I. ONE (OVERLY WHIGGISH) VERSION OF THE RISE OF THE RULE OF LAW

In an important passage demonstrating his ability to condense large ideas into a concise form, Papke summarizes the characteristics of the Nineteenth Century rule of law:

Americans believed that laws were to be made in public, without bias for particular individuals or classes and with an honest commitment to the public good. Lawmakers were to expressly promulgate the laws in clear, general, non-retroactive and non-contradictory form. The laws were to be feasible and predictable, and people were for the most part to know them or at least be able to find them out. Officials applying the law, especially judges, were to be fair and impartial, treating similar cases in similar ways, extending due process, free from public pressure, to one and all. An alternative popular will theory never seriously contested with this variety of legalism.<sup>10</sup>

Papke insightfully associates the rise of the rule of law with a process of "modernization" of American life whose roots extended back into Eighteenth Century colonial history.<sup>11</sup> During this period there occurred a general anglicanization of American life. Commerce began to quicken as more Americans became enmeshed in market transactions. In some colonies there occurred an enormous increase in debt claims litigated in local courts. Rising commercial activity provided business for a legal profession that began to emerge. Talented young men like John Adams increasingly chose to make law their profession.<sup>12</sup> The law they practiced was highly anglacized, as English

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9. *See id.* at 38.

10. *Id.* at 13.

11. *Id.* at 1-2.

12. *See* Stephen Botein, *The Legal Profession in Colonial North America*, in *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* 129, 133, 138-39 (Wilfred Prest ed., 1981); *see also* John

common law and its attendant legal institutions became commonplace throughout the American colonies.

Reflecting the rising importance of law and the legal profession, by the time of the revolutionary period America had a new cultural paradigm, a configuration of law and letters. It was neoclassical in its sources and style. Many of the founders, including Adams and Thomas Jefferson, were highly educated lawyers who disdained the unlearned pettifogger and practiced the neoclassical style. The new culture was so powerful that William Blackstone's *Commentaries on the Laws of England*,<sup>13</sup> published during the last half of the 1760s, "rank[ed] second only to the *Bible* as a literary and intellectual influence on the history of American institutions."<sup>14</sup> This is one reason why the great documents of the revolution, even the Declaration of Independence, despite Jefferson's resort to natural law in its opening clause, were legalistic. In 1787 the Federal Constitution replaced the Articles of Confederation with a stronger national government, including a federal judiciary. By their successful revolution Americans had replaced royal prerogative with a rule of law. As Thomas Paine observed: "[I]n America the law is king."<sup>15</sup>

According to Papke, the adoption of a legalistic rule of law in the new nation occurred with remarkable celerity. During the Revolution, American patriots viewed law as a corrupt British institution. But, in an amazing turnabout, by the 1820s both the common law and the legal profession had attained a status in the new nation that was without precedent in American history.<sup>16</sup> Defenders of the common law successfully parried recurrent efforts to codify American law that cropped up throughout the period between the Revolution and the Civil War, and that were particularly sustained during the generation from 1820 to 1850.<sup>17</sup> As Americans moved westward they typically destroyed the law and legal institutions of established Native American and European communities and replaced them with a familiar common law.<sup>18</sup>

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M. Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in STANLEY NIDER KATZ, *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 415 (1971).

13. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* (Wm. Hardcastle Browne ed., 1892).

14. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984). *See also id.* at 30-32. Ferguson observes: "Not since Justinian's *Institutes* in the [S]ixth [C]entury had there been within western civilization such a successful attempt to reduce to short and rational form the complex legal institutions of an entire society." *Id.* at 31.

15. PAPKE, *supra* note 4, at 1.

16. *See* TRANSFORMATION, *supra* note 2, ch. 1; PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 109 (1965).

17. *See* CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* chs. 4-8 (1981).

18. The Louisiana civil code was an exception. *See* MORRIS S. ARNOLD, *UNEQUAL LAWS UNTO A SAVAGE RACE: LAW IN AMERICA, 1686-1826* at xviii (1985); GEORGE DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (1975); Richard P. Cole, *Law and*

The legal elite who defended the common law legal order reworked it into a more strictly legalistic form. A major indication of the law's increasing legalism was the dramatic decline of the lawmaking powers of juries in civil litigation by the early Nineteenth Century.<sup>19</sup> The legal elite also created an indigenous American body of written law and legal literature. For the first time each state began to publish the opinions of its highest court. Leading judges like James Kent and Joseph Story published many important treatises on law that became the centerpieces of the new American legal literature. Kent and Story also taught law in colleges to young men aspiring to the law as professional legal education began to challenge the apprenticeship as the method of preparation for law practice.<sup>20</sup>

America's legal elite also promoted the influence of the new body of constitutional law, adopted by Americans as the basis of their federal and state governments, as another foundation stone of America's rule of law.<sup>21</sup> Critical to emergence of the Federal Constitution as a preeminent symbol as well as an instrument in American culture was the adoption of judicial review of legislation to ensure that it was in accordance with principles of constitutional law.<sup>22</sup> This practice did not have deep historical roots in English legal culture, but by 1803, with John Marshall's decision in *Marbury v. Madison*,<sup>23</sup> the doctrine of judicial review became a fixture of American jurisprudence.

The Federal Constitution soon became the central icon of a legal faith that almost mystically formed around it. The majestic trial advocacy of giants like Daniel Webster, as well as Fourth of July speeches, enshrined it. By the 1820s a new literature venerating the Constitution, including public school readers inculcating its virtues to the nation's children, began to appear.<sup>24</sup> Americans used powerful metaphors to describe the role of the Constitution in American culture. In his first inaugural, Jefferson described it as the "anchor" to the American

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*Community in the New Nation: Three Visions for Michigan, 1788-1831*, 4 S. CAL. INTERDISC. L.J. 161, 172 (1996) [hereinafter *Law and Community*].

19. See NELSON, *supra* note 2, at 165-72.

20. By 1800, the famous Litchfield Law School was educating lawyers, and William and Mary, the University of Pennsylvania, Columbia College, and Transylvania University offered courses in law. Between 1760 and 1840 about 70% of practicing lawyers in Massachusetts had a college education. See GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840*, at 135-41 (1979); see also John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993).

21. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 259-67 (1969).

22. See Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1078 (1936). The French commentator upon American society, Alexis de Tocqueville, surely had the practice of judicial review in mind when he observed that Americans had given their Supreme Court "higher standing than any known tribunal." MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 48 (1986).

23. 5 U.S. (1 Cranch) 137 (1803).

24. See PAPKE, *supra* note 4, at 4-8.

system of government. Others described it as the “ship of state,” or as a Newtonian machine so wonderful that it would run by itself.<sup>25</sup> Some cartoons suggested that it was the basis of American union, prosperity, justice and peace.<sup>26</sup> No one claimed more for it than did Abraham Lincoln. According to him it was “[a] reverence for the Constitution and laws” that kept American democracy from a decline into the mobbish anarchy feared by classical political theory.<sup>27</sup>

These developments lead both Papke and Robert Ferguson to conclude that law attained cultural ascendancy in the earliest period of the new nation. Law became its “official discourse.”<sup>28</sup> The doctrine of judicial review was critical to “the lawyer’s hegemony as republican spokesman official.”<sup>29</sup> Borrowing a concept from Clifford Geertz, the grand courtroom advocacy characteristic of America’s first generation of lawyers became “the active center[] of social order.”<sup>30</sup> Summarizing the triumph of the rule of law in Nineteenth Century America, Papke quoted a notable passage from an address delivered by David Dudley Field at the University of Chicago Law School:

“Though [law] may be the most familiar of all things, it is also the most profound and immense. It surrounds us everywhere like the light of the autumnal day, or the breath of this all-comprehending air. It sits with us, sleeps beside us, walks with us abroad, studies with the inventor, writes with the scholar, and marches by the side of every branch of industry and every new mode of travel. The infant of an hour old, the old man of three-score and ten, the feeble woman, the strong and hardy youth, are all under its equal care, and by it alike protected and restrained.”<sup>31</sup>

The cultural ascendancy of law constituted a triumph of law over nature, of head over heart. Neoclassical form reigned in both romantic imagination and evangelical enthusiasm. A number of the new nation’s young men talented in literature continued to practice law. Those who did break away from practice, at least for a time, suffered a severe vocational crisis that constrained them from writing literature for its own sake.<sup>32</sup> Legalistic values were also foundational to

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25. See KAMMEN, *supra* note 22, at 17-18.

26. See Alan Ira Gordon, *The Myth of the Constitution: 19th Century Constitutional Iconography*, in LAWS OF OUR FATHERS: POPULAR CULTURE AND THE U.S. CONSTITUTION 89, 89-93 (Ray B. Browne & Glenn J. Browne eds., 1986).

27. PAPKE, *supra* note 4, at 15.

28. *Id.* at 13.

29. FERGUSON, *supra* note 14, at 20.

30. *Id.* at 23 (quoting Clifford Gertz, *Centers, Kings, and Charisma: Reflections on the Symbolics of Powers*, in CULTURE AND ITS CREATORS: ESSAYS IN HONOR OF EDWARD SHILS 150 (Joseph Ben-David & Terry Nichols Clark eds., 1977)).

31. PAPKE, *supra* note 4, at 14 (quoting David Dudley Field, *Magnitude and Importance of Legal Science*, in STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 712-17 (2d ed. 1989)) (alteration in original).

32. See FERGUSON, *supra* note 14, at 91; MILLER, *supra* note 16, Part II. John Adams considered writers to be “learned Idler[s].” FERGUSON, *supra* note 14, at 91. Blackstone again

the literature of some of the lawyer turned writers, notably that of William Cullen Bryant.<sup>33</sup> Another result of the post-revolutionary triumph of a rational legalism was that lawmaking became separated from the moral values of the community. Law seemed to be replacing religion as the primary source of authority in Nineteenth Century America.<sup>34</sup>

Some renditions of the rise of the rule of law in America suggest that it weakened by the middle of the Nineteenth Century.<sup>35</sup> The influence of the Enlightenment in America had dissipated by the end of the first quarter of the century and the neoclassical culture of law and letters would soon collapse. Legal education and standards for admission to the bar declined during the Jacksonian period. Further, the incendiary slavery controversy, ultimately leading to the cataclysm of the Civil War, represented a resort to force over law. Papke rejects this nuance to the history of the rule of law. Instead, he argues that the rule of law, bolstered by the emergence of a formalistic jurisprudence, emerged from the Civil War and into the late Nineteenth Century more powerful than it had been during the antebellum period.<sup>36</sup> I agree. Indeed, it was only after the Civil War that the rule of law seems to have achieved widespread acceptance in Nineteenth Century popular culture.

This account, or variants of it, constitutes the dominant version of the rise of rule of law in America. It is in many respects insightful. But in the Whig tradition of writing history, it is another story of a progressive march to modernity, and it retells this story from the perspective of America's legal elite. This version of the history of the rise of the rule of law is so powerful an orthodoxy that it has left its mark even upon a study of America's legal heretics. But if we adopt Papke's perspective that focuses our attention upon popular culture, we can discern many examples of resistance to the emerging legalistic rule of law in America during the period from the Revolution to the Civil War. Those who resisted the rule of law frequently favored an alternative law based upon a simple, popular and natural justice.

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became the model, for he abandoned writing poetry for writing about the law. *Id.* at 92.

33. Despite the celebration of nature in some of his best works, Bryant always rejected its allure for civilization, order, the public good, and work. Even at the level of art he preferred aesthetic unity over the confused natural world, the rational perception over emotion and an unrestrained surrender to the heart. See FERGUSON, *supra* note 14, ch. 7.

34. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 80-81 (1975); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* ch. 1 (1985); Alfred Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988) (book review). Konefsky uses two pictures from 1805 and 1850 to demonstrate the displacement of religion by law as a source of authority, one imaginative and one real, for Boston's social elite. Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court, was at the center of the picture in 1850. *Id.* at 1156.

35. One example of this view is found in FERGUSON, *supra* note 14, ch. 10.

36. PAPKE, *supra* note 4, at 19.



## II. POPULAR RESISTANCE TO THE RULE OF LAW

A. *The Pre-Nineteenth Century Tradition of Anglo-American Antilegalism*

Seventeenth Century English immigrants did not arrive in America imbued with a deep faith in a strict rule of law. To the contrary, they came from a country that had a long tradition of antilegalist sentiment, which became stronger during the Seventeenth Century. Over many centuries, of course, antilegalists expressed diverse, sometimes inharmonious, views. But as Robert Gordon recognized, there were also important continuities in the Anglo-American tradition of antilegalism.<sup>37</sup> While marking out the exact parameters of antilegalism is difficult, it typically embodied an attack upon professional lawyers and judges, upon a complex and uneconomical system of litigation, and upon lawmaking based upon the internal logic of the law itself, separated from popular moral values. Antilegalists often proffered an alternative of a popular justice dispensed in simple and economical forms by lay persons of the community, and based upon the moral values of that community.<sup>38</sup> Antilegalism, then, represented a protest against elitism and, especially in Nineteenth Century America, against the centralization of lawmaking authority. It often reflected the view that the culture had become too secular and worldly. Gordon makes the important point that in its most radical form Anglo-American antilegalism represented a fundamental challenge not only to the existing legal order, but to the wealth, power, and hierarchy of the general social order.<sup>39</sup>

Anti-lawyer sentiment is almost as old as the emergence of the legal profession itself in English history. The new profession became the object of many criticisms, including that it contributed to the complex technicalities that made law foreign and confusing to ordinary people. The mysteriousness of law, malleable to a seemingly infinite variety of interpretations, enabled lawyers to use it to prey upon the people for the benefit of the rich and powerful.<sup>40</sup> This critique of the legal profession was often linked to a utopian vision of justice

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37. Robert W. Gordon, *American Codification Movement: A Study of Antebellum Legal Reform* (1981), 36 VAND. L. REV. 431, Part V (1983) (book review).

38. Because antilegalists emphasized the linkages of law and morality, the few references to natural law in Part II may surprise readers. One reason for this is the limits of this Essay. But more importantly, contemporary jurisprudential discussions make clear that natural law is a protean concept. Historically it has been used both as the basis to support a rule of law and, as some of the material of this Part will show, to critique it.

39. Gordon, *supra* note 37, at 452-53.

40. In early English literature, for example, law was "[w]here Judges and Juries may see, as in a glass." E.W. Ives, *The Reputation of the Common Law Lawyers in English Society, 1450-1550*, 7 U. BIRMINGHAM HIST. J. 130, 131 (1959). The lawyer was able to "[p]rove right wrong, and all by reason, And make men lose both house and land." *Id.* at 134. One writer characterized lawyers as "insatiable cannibals," and felt it would only be justice to turn the Inns of Court into hospitals for the poor. *Id.* at 141.

without lawyers.<sup>41</sup>

The conflict between Parliament and the Crown that led to the English Civil War and Oliver Cromwell's Protectorate during the middle decades of the Seventeenth Century provided a unique opportunity for ordinary citizens to vent antilegalist views.<sup>42</sup> A variety of groups critiqued the English common law and lawyers during this period, the most representative of popular protestors being the Levellers, and secondarily, the Diggers. The Levellers had middle class origins, and their views became influential in Cromwell's army. The Diggers were dispossessed agrarians. In general the Levellers were more moderate in their attacks upon the common law than were the Diggers, who articulated a deep protest against the law, and of the existing political, social and economic order.<sup>43</sup>

Antilegalism of this period often began with a golden age of popular justice in Anglo-Saxon England. But the Norman conquest had destroyed this simple justice and replaced it with a professional and centralized legal order that was needlessly laden with foreign legalese, complex forms, delay and expense. English law came to exalt form over spirit, best exemplified by a slavish adherence to old and now irrelevant precedents. Instead of being rooted in popular community, law became a vehicle for the rich to oppress the poor.<sup>44</sup> In popular literature the central figure of this unjust legal system, the lawyer, became associated with the "Court," and a resolute foe of the "Country" opposition.<sup>45</sup>

Antilegalists of this period typically advocated some form of popular justice

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41. After describing the "infinite . . . number of blind and intricate laws" of English society, Thomas More envisioned that "in Utopia every man is a cunning lawyer. For they have very few laws: and the plainer and grosser that any interpretation is, that they allow as most just." Hugh Latimer foresaw that at the day of judgment that men "shall not need any men of law, to go about to defend or discern their causes" for then they would be judged "for their own hearts and consciences." *Id.* at 135.

42. People used petitions, pamphlets, and public meetings to express their views, forms of expression that in the Seventeenth Century were "quite new and unprecedented." Further, those expressing their views were "the hobnails, clouted shoes, the private soldiers, the leather and wollen aprons and the laborous and industrious people . . . the oppressed friends, the commoners of England, the inferior tenants and pour labourers." DONALD VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM* at ix (1970).

43. The views of the more radical Levellers, however, like William Walwyn, shaded into those held by the Diggers. *See id.* at 98-100, 106-09. Levellers were "skilled craftsmen, tradesmen, shopkeepers, lesser merchants, common soldiers, self-employed miners, and later, small peasant proprietors." *Id.* at 100.

44. Two important pamphlets of the period expressed this view. Writing in 1649, John Warr observed that, "The web of law entangles the small flies and dismiseth the great." A decade later William Cole expressed a greater fear of being stolen from by the power of the law than by those who would endeavor to take his purse on the highway. *See id.* at 102-03.

45. *See id.* at 200-06; *see also* A. G. ROEBER, *FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810* ch. 1 (1981) (concerning the perception of lawyers as associated with the court).

alternative. They called for either the abolition of the legal profession, or its strict regulation. They also wanted decentralized tribunals resolving cases according to published legal rules understandable to lay persons. The Levellers were ardent supporters of trial by jury, a view not shared by dispossessed Diggers because to be a juror one had to be a freeholder. Some advocated for a general framework of law embodied in codes. Whatever its form, lawmaking was to be in accordance with the values of the community.

Some of the antilegalism of the period was truly radical. For example, the advocacy for natural justice of a leading pamphleteer of the period, John Warr, was linked to a vision of the liberated citizen of an egalitarian social order. He proposed

to free the clear understanding from the bondage of Form and to raise it up to Equity, which is the substance itself. . . . [T]he principled man hath his freedom within himself, and walking in the light of Equity and Reason (truly so called) knows no bounds but his own, even Equity.<sup>46</sup>

Though the radical antilegalism of Warr was not evident in England's Seventeenth Century American colonies, elements of antilegalism could be found throughout them. This was so even in southern colonies originally settled by supporters of the King. Both the charters that the colonies received from the Crown, as well as the recent decision in *Calvin's Case*,<sup>47</sup> called for adherence to English law by the colonists. In Virginia a small legal profession soon developed. Still, there were trappings of antilegalism in early Virginia. Much of its law was based upon community moral values.<sup>48</sup> Further, anti-lawyer sentiment soon surfaced, much of it fanned by an indigenous elite that emerged during that century. Because Virginia lay at the periphery of the English empire, its elite identified with the Country Party and viewed lawyers as competitors for patronage. Further, the legal style of the two groups differed. When members of Virginia's elite, most of whom were not legally trained, acted as magistrates, they resolved cases brought before them with a patriarchal discretion instead of by strict adherence to precedents cited by lawyers. For example, debt cases filed in their courts were typically settled with each party "receiving his due."<sup>49</sup>

46. Gordon, *supra* note 37, at 453 (quoting JOHN WARR, ADMINISTRATIONS CIVIL AND SPIRITUAL 6-10 (1648), *quoted in* CHRISTOPHER HITT, THE WORLD TURNED UPSIDE DOWN 230 (1972)). Gordon is citing from the work of Christopher Hill, who states that Warr equated "Equity" with "natural justice," not the lawmaking of the Court of Chancery. *Id.* at n.103. Gordon also points out that when Warr criticized "form" he was attacking "not only strict technical rules and intricate, rigid procedures, but also the deferential ceremonies and ritual trappings of documents, seals, costumes, special languages and the like." *Id.* at n.104. For Warr, law "was . . . a kind of idolitry." *Id.* at 452-53. *See generally* VEALL, *supra* note 42; Barbara Shapiro, *Law Reform in Seventeenth Century England*, 19 AM. J.L. HIST. 280, 294-95 (1975).

47. 77 Eng. Rep. 379 (K.B. 1608).

48. *See* 1 PHILLIP BRUCE, INTELLECTUAL HISTORY OF SEVENTEENTH-CENTURY VIRGINIA Part 1, chs. II-V, VII-IX; Part 3, ch. I (1910).

49. *See* ROEBER, *supra* note 45, at 62-63, 73, 76-77, 83-89. A colonial statute of 1658

Antilegalism was more pronounced in the Seventeenth Century New England and middle colonies. Settled mostly by religious dissenters who opposed the Crown, the antilegalism of these colonists was based upon the view that English society had become deeply corrupted. In the famous words of Perry Miller, the Puritans who came to New England were on an "errand into the wilderness," to build a model community.<sup>50</sup> Quoting from the book of *Matthew*, in 1629 John Winthrop told the first Puritan settlers who came to Massachusetts that their mission was to build "a city upon a hill." This would require a major reformation of traditional English law.<sup>51</sup>

Within the first several decades of their settlement of New England, early Puritans had created a new body of law that was the centerpiece of new orthodoxy. This law bore the unmistakable mark of legal sophistication. It drew upon a diversity of legal traditions and lawmakers shaped law to render it suitable to present circumstances.<sup>52</sup> Nevertheless, one impulse for the successful advocacy of the deputies for the publication of codes of law in Massachusetts (just a decade earlier than the unsuccessful advocacy for code law in England) was to make law more accessible to lay persons. Further, a central feature of the law of Seventeenth Century New England was that it was closely associated with the moral values of the community. Old Testament legal precedent was highly influential, especially as a source of code law. Local arbitrators decided cases according to the golden rule.<sup>53</sup> The lawmaking of magistrates, who acted both as legislators and judges in early Massachusetts, as well as that of deputies, was highly influenced by the views of prominent clerics.<sup>54</sup> Church courts as well as civil courts were important in resolving not only religious, but also social and economic conflicts.<sup>55</sup> In addition, reflecting a deep anti-lawyer sentiment, few lawyers practiced in the New England colonies during the Seventeenth Century.<sup>56</sup>

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admonished courts to render judgments "according as the right of the cause and the matter shall appear unto them, without regard to any *imperfection*, default or want of form in any writ, return, plaint or process." Botein, *supra* note 12, at 133 (emphasis added).

50. PERRY MILLER, *ERRAND INTO THE WILDERNESS* ch. 1 (1956).

51. Winthrop proposed these ideas in a sermon, entitled *A Model of Christian Charitie*, given to Puritan migrants to the New World on the *Arabella* in 1629. See MILLER, *supra* note 50, ch. 1.

52. See generally GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* (1960).

53. According to the Reverend Thomas Hooker of Connecticut, law was to conform to "the practice of the Jewish Church directed by God." Botein, *supra* note 12, at 130. In 1836, the Reverend John Cotton of Massachusetts drafted a code entitled, "Moses, his Judicials." BENJAMIN FLETCHER WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT* 23 (Russell & Russell 1962). On arbitration according to the golden rule, see KENNETH A. LOCKRIDGE, *A NEW ENGLAND TOWN: THE FIRST ONE HUNDRED YEARS*, DEDHAM, MASSACHUSETTS, 1636-1736 ch. 1 (1970).

54. See EDMUND S. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 163-64* (Oscar Standlin ed., 1958).

55. See HASKINS, *supra* note 52, ch. VIII.

56. John Winthrop, the most powerful leader of the colony, had been forced to leave law

This was also true of the middle colonies settled by the Friends. The dearth of lawyers reflected the view of the founder of their religion, George Fox, that “blackness” enveloped lawyers. Reflecting the preference of the Friends for simplicity, a Pennsylvania statute of 1701 instructed courts to demand “brevity, plainness and verity, in all declarations and pleas.”<sup>57</sup> Lawmakers of New Jersey, another colony settled by the Friends, also leavened the strict justice of English legal precedents with their own views of what was equitable.<sup>58</sup>

The history that Papke relies upon in *Heretics* suggests a transformation from the morally-based legal culture of the early colonies to a strict rule of law during the Eighteenth Century.<sup>59</sup> In addition to factors, notably the rising commercial activity already discussed in Part I, a growing pluralism also fostered reliance upon formal legal institutions in the Eighteenth Century colonies. The “Great Awakening” of religious sentiment, along with immigration, spawned the rise of many sectarian churches undermining the authority of established churches like the Congregational Church in New England and the Episcopal Church of the South. When people from different churches became involved in failed debt transactions, they now had to take their disputed transactions to local courts for resolution.<sup>60</sup> Such changes seem to support the view of one historian who pictured the Puritan becoming a Yankee during this century.<sup>61</sup>

But the moralistic Puritan did not become a legalistic Yankee so quickly. One basis for this conclusion is a streak of antilegalism in merchants, not only in the Eighteenth Century, but throughout history, who preferred to have their disputes settled quickly and inexpensively by arbitration or reference tribunals rather than by the complex and uneconomical litigation of the common law.<sup>62</sup> Further, some of the immigrants who settled in the colonies during this century were antilegalistic.<sup>63</sup>

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practice in England because of his religious beliefs. The *Body of Liberties* of 1641 forbade the payment of fees for legal representation, see GAWALT, *supra* note 20, at 8, and not until 1673 did law give formal recognition to practicing law in Massachusetts, see Botein, *supra* note 12, at 131.

57. Botein, *supra* note 12, at 132.

58. Stephen B. Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 RUTGERS-CAMDEN L.J. 262, 290 (1975).

59. PAPKE, *supra* note 4, at 8-9.

60. See BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 164-69 (1987).

61. See RICHARD L. BUSHMAN, *FROM PURITAN TO YANKEE: CHARACTER AND THE SOCIAL ORDER IN CONNECTICUT, 1690-1765* at ix (1967).

62. See 2 ALEXANDER HAMILTON, *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 379-80 (Julius Goebel ed., 1964); M. Klein, *The Rise of the Bar New York Bar: The Legal Career of William Livingston*, 15 WM. & MARY L.Q. 334, 342 (3d series, 1958); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132-38 (1934).

63. One example is the Germans in Pennsylvania, who settled disputes within their own communities, in which the clergy was an influential source of social authority. In 1761 a German-language newspaper in that colony advised against electing lawyers to the provincial assembly

More important, an impetus to Eighteenth Century antilegalism was the Great Awakening of religious sentiment. It affected all of the colonies by the second quarter of the century. Illustrative of just how pervasive was its influence, revivalism touched commercial seaports as well as the agrarian hinterlands.<sup>64</sup>

The revivalism of the Great Awakening undermined legalism and in its most radical form offered an alternative to the established legal and social order. The leading revivalist minister George Whitefield warned the believer against becoming a lawyer, and there are evidences that such pleas stirred up old anti-lawyer sentiments.<sup>65</sup> More generally, the evangelical clergy critiqued law as "too rational, too complex, and too much under the control of designing intellectuals."<sup>66</sup> The Great Awakening revived a pervasive moral sentiment that included the view that law should reflect moral values. For example, in Virginia, evangelicals advocated before magistrates for a closer nexus of law and morality, while lawyers advocated for a strict legalism.<sup>67</sup> Even more profoundly, the Great Awakening revived a community of believers that provided a powerful alternative model to the existing hierarchical and deferential legal order. In describing Virginia's Baptists, Rhys Isaacs observed that their "salvationism and sabbatarianism effectively redefined morality and human relationships; their church leaders and organization established new and more popular foci of authority, and sought to impose a radically different and more inclusive model for the maintenance of order in society."<sup>68</sup>

### *B. The Revolutionary Period*

By the mid-Eighteenth Century, then, there was a growing unrest in the colonies with strict English law. After the successful conclusion of the French and Indian War in 1763, protests that would lead to the American Revolution began. Though during the 1760s protesters often rooted their claims in English law, there was also a growing mob activity that sometimes disrupted court proceedings and resulted in acts of violence against lawyers and legal officials. As Stephen Presser has observed: "This was not a banner period for the rule of law."<sup>69</sup> By the 1770s patriots turned to attacking English law as another example of the corruption of their colonial rulers. The most famous example of this view, of course, was the Declaration of Independence. Drafted by Jefferson, it

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"because what is to their profit is often to the farmers' loss." Botein, *supra* note 12, at 139.

64. See CHRISTINE LEIGH HEYRMAN, *COMMERCE AND CULTURE: THE MARITIME COMMUNITIES OF COLONIAL MASSACHUSETTS, 1690-1750* chs. 5, 11 (1984).

65. As anti-lawyer sentiment rose in mid-Eighteenth Century Virginia, lawyers defended themselves by trying to claim country virtue. See ROEBER, *supra* note 45, at 113.

66. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 255 (1971).

67. See ROEBER, *supra* note 45, at 112-13, 126.

68. Rhys Isaacs, *The Nature of the Baptist Challenge to the Traditional Order*, 34 WM. & MARY L.Q. 345, 369 (1974).

69. Presser, *supra* note 58, at 311. See generally *id.* at 311-17.

contained a list of indictments against the rule of George III and claimed that the colonists were endowed with inherent natural rights that English law could not violate.

By the 1780s Americans, successful in their revolution against England, began to reconstruct a legal order for their new nation. The conventional story emphasizes the replacement of the Articles of Confederation government, a league of the states that had no centralized judiciary, with the more powerful central government and judicial system of the Federal Constitution. This history recognizes the opposition of the Anti-Federalists to the Federal Constitution, but trivializes it.

Just as much as the Federalists, the Anti-Federalists believed in a rule of law.<sup>70</sup> But unlike the Federalists they advocated for a legal system of popular justice rooted in community. Their approach to law was part of a vision for a more democratic society than that envisioned by Federalists.

The debate over the proposed federal judiciary was one of the critical differences that separated Federalist supporters and Anti-Federalist opponents of the new Constitution. While Anti-Federalists were not monolithic in their views, including those relating to law,<sup>71</sup> they believed that the primary purpose of law was to protect individual liberties. They stridently attacked the proposed federal judicial system because they believed that it was too distant from the people and too powerful, and that it therefore threatened individual liberties.<sup>72</sup>

The Anti-Federalist alternative to the large territorial union and the federal judiciary created by the Federal Constitution was a “small republic” with a popular legal system.<sup>73</sup> For the people to “have a confidence in, and respect for” law, Anti-Federalists insisted that laws must be made by institutions that were close to them and that reflected community values. This required a population that was homogeneous, most especially in the wealth that each citizen

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70. The *Letters from the Federal Farmer* argued:

The great object of a free people must be so to form their government and laws, and so administer them, as to create a confidence in, and respect for the laws; and thereby induce the sensible and virtuous part of the community to declare in favor of the laws, and to support them without an extensive military force.

LETTERS FROM THE FEDERAL FARMER, *reprinted in* 2 HEBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 214 (1981). Storing argues that to appreciate such statements by Anti-Federalists we should translate fear of standing armies into fear of a large bureaucracy. 1 STORING, *supra*, at 16-17 & n.12.

71. Storing emphasizes their diversity when he states that “[t]here is in fact no hard and fast way of even identifying ‘Anti-Federalists.’” 1 STORING, *supra* note 70, at 5.

72. That Anti-Federalists did not attack the doctrine of judicial review, proposed by Alexander Hamilton, in *Federalist* 78, probably reflects more the ill formed nature of the doctrine in that period, rather than their acceptance of it.

73. See 1 STORING, *supra* note 70, ch. 3. Some Anti-Federalists cited Montesquieu as authority for the view that only a small republic could survive, and that only in it would law reflect the public interest. See LETTERS OF CATO, *reprinted in* 2 STORING, *supra* note 70, at 110.

possessed.<sup>74</sup> Ideally, law would be made in a direct democracy, which is why Anti-Federalists were such strong supporters of jury trials.<sup>75</sup> But Anti-Federalists recognized that direct popular participation in lawmaking was not always possible. They therefore also favored lawmaking by legislators who remained close to the people and shared their interests.<sup>76</sup> Such a legal system, indeed, constituted “[t]he essential parts of a free and good government.”<sup>77</sup>

The popular legal system of a small republic supported by Anti-Federalists reflected the localistic bent of their ideology. Though they recognized the need for a national government to regulate interstate commercial transactions and relations with foreign nations,<sup>78</sup> they believed that the national government established by the Federalists would undermine the closeness of the people to lawmakers.<sup>79</sup> Anti-Federalists therefore championed the exercise of governmental powers by the states.<sup>80</sup>

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74. Melancton Smith wrote that representatives “should be a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests.” MELANCTON SMITH, *SPEECHES DELIVERED IN THE COURSE OF DEBATE BY THE CONVENTION OF THE STATE OF NEW YORK ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (June 21, 1788), *reprinted in* 6 STORING, *supra* note 70, at 157.

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The jury trial, especially politically considered, is by far the most important feature in the judicial department in a free country . . . . Juries are constantly and frequently drawn from the body of the people . . . and by holding the jury’s right to return a general verdict in all cases sacred, we secure to the people at large, their just and rightful controul in the judicial department. If the conduct of the judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases.

LETTERS FROM THE FEDERAL FARMER (Jan. 18, 1788), *reprinted in* 2 STORING, *supra* note 70, at 320.

76. The legislative branch of government “must possess abilities to discern the situation of the people and of public affairs, a disposition to sympathize with the people, and a capacity and inclination to make laws congenial to their circumstances and condition.” LETTERS FROM THE FEDERAL FARMER (Dec. 31, 1787), *reprinted in* 2 STORING, *supra* note 70, at 265.

77. LETTERS FROM THE FEDERAL FARMER (Oct. 9, 1787), *reprinted in* 2 STORING, *supra* note 70, at 230.

78. Federalists, who ultimately came to advocate for a strong national government, were very adroit in framing the terminology of their debate with Anti-Federalists. 1 STORING, *supra* note 70, chs. 1, 4.

79. Brutus feared that Congress, pursuant its authority to make all laws necessary and proper to execute its enumerated powers “may so exercise this power as entirely to annihilate all the state governments, and reduce the country to one single government.” ESSAYS OF BRUTUS (Oct. 18, 1787), *reprinted in* 2 STORING, *supra* note 70, at 367.

80. For example, in *Letters from the Federal Farmer*, October 8, 1787, the writer considers alternatives akin to the Articles of Confederation with a weak national government, a strong national government with little state power, and a federal union in which we “consolidate the states as to certain national objects, and leave them severally distinct independent republics, as to internal



Another basis for Anti-Federalist support for popular justice was that they favored lawmaking shaped by the moral values of the community. We can infer this from the Anti-Federalists' insistence upon virtue as absolutely necessary to sustain a viable republic. It is also suggested by the insistence of some Anti-Federalists that a degree of religious establishment be maintained in the new nation.<sup>81</sup>

It was not just Anti-Federalists who opposed the adoption of a strict rule of law and supported an alternative of a more popular and local justice during the 1780s. The educated lawyer *par excellence*, Jefferson, engaged in two efforts that, had they been successful, would have given a popular justice alternative a substantial foothold in the new republic. In 1779, proclaiming that many laws "hertofore in force . . . are founded on principles heterogeneous to the republican spirit," Jefferson proposed a code of laws suitable to a republican form of government. He, along with other leading Virginians, began this project, but did not complete it.<sup>82</sup> Five years later, in 1784, Jefferson drafted an ordinance for the government of the West. In addition to indigenous constitutions, it envisioned community tribunals and legislative statutes as the sources of law for territories of the new region.<sup>83</sup> Jefferson's Ordinance, however, was soon superceded by a more permanent and legalistic blueprint for the government of the western territories, the Northwest Ordinance.<sup>84</sup>

Further, popular protest against lawyers, especially as they collected debts through local court litigation, was widespread in America during the 1780s. The protracted war had ignited a spiraling inflation and dislocated traditional commercial ties, creating severe economic distress. Massachusetts was a hotbed of popular antilegalism. Towns petitioned the legislature to restrict the practice of lawyers, and it responded with laws allowing lay persons to represent themselves in litigation.<sup>85</sup> In 1786, indebted farmers of western Massachusetts

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police generally." LETTERS FROM THE FEDERAL FARMER (Oct. 8, 1787), *reprinted in* 2 STORING, *supra* note 70, at 298-99. The writer concluded: "The third plan, or partial consolidation, is . . . the only one that can secure the freedom and happiness of this people." *Id.* at 229. *See also* 1 STORING, *supra* note 70, ch. 4.

81. *See* 1 STORING, *supra* note 70, at 20-23.

82. *See* EDWARD DUMBAULD, THOMAS JEFFERSON AND THE LAW at xii (1978). *See also* ELIZABETH G. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836, at 117-18 (1964).

83. Jefferson's commitment to popular participation in lawmaking in the western territories is shown by the following critical passage of the Ordinance of 1784. Resident adult males were to "meet together for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of these states . . . and erect . . . counties or townships for the election of members of their legislatures." Richard P. Cole, *Community Justice and Formal Law: The Jurisprudence of the Western Ordinances*, 16 L. STUD. F. 263, 268 (1992) (quoting the Ordinance of 1784) [hereinafter *Community Justice and Formal Law*].

84. Suggesting the strength of antilegalist sentiment, the Northwest Ordinance, however, was vague and incomplete about law, leaving many important issues to be resolved later. *See id.* at 268-69.

85. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 214-20 (1911). Warren uncovered

rebelled, forcibly closing courts that collected debts in their region.<sup>86</sup> Perry Miller uncovered a shred of evidence suggesting that the antilegalism of debtors was not something new in Massachusetts in 1786.<sup>87</sup>

The most renowned antilegalist of post-revolutionary Massachusetts was the Boston artisan, Benjamin Austin, Jr. In 1786 he published his views on law in an important series of letters in a Boston newspaper under the name "Honetus."<sup>88</sup> As would Elizabeth Cady Stanton several generations later, Austin advocated for a literal application of the principles of the Declaration of Independence, in this case to the process of lawmaking. This led him to a virulent attack upon lawyers. Austin believed that they were politically too powerful, and wielded this power to establish an intricate and expensive legal system that effectively denied justice to the people. He therefore called for the "annihilation" of the legal profession. As for common law, Austin asked: "Can the monarchical and aristocratical institutions of England be consistent with the republican principles of our Constitution? . . . We may as well adopt the law of the Medes and Persians."<sup>89</sup>

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a petition to the legislature from "the conservative little town of Braintree, close to Boston," imploring:

We humbly request that there may be such laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers, the completion of whose modern conduct appears to us to tend rather to the destruction than the preservation of the town.

*Id.* at 215 (quoting CHARLES FRANCIS ADAMS, THREE EPISODES OF MASSACHUSETTS HISTORY (1892)).

Roscoe Pound agreed with Warren, noting that the revolution "set back" the training of lawyers and reception of common law in America. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 7 (1938).

86. Two important accounts of Shays Rebellion and its background are found in DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980); and ROBERT JOSEPH TAYLOR, WESTERN MASSACHUSETTS IN THE REVOLUTION (1954).

87. Miller found a document written by John Adams describing antilegalist sentiment he encountered among Washington's army during the siege of Boston in 1775. Adams observed that: "If the Power of the Country should get into such hands, and there is great danger that it will," all of the efforts directed against colonial rule would be in vain. He at last consoled himself that: "The good Sense and Integrity of the Majority of the great Body of the People" would constrain popular antilegalism. THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 191-92 (Perry Miller ed., 1862) [hereinafter THE LEGAL MIND IN AMERICA]. See also Gordon S. Wood, *The Worthy Against the Licentious*, in THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES (Gordon S. Wood ed., 1973).

88. See Edwin C. Surrency, *The Pernicious Practice of Law—A Comment*, 13 AM. J. LEG. HIST. 241, 242 (1969).

89. MILLER, *supra* note 16, at 106. See also WARREN, *supra* note 85, at 219. In calling for the annihilation of the legal profession, Austin observed that it was becoming "more and more powerful. . . . The people should be guarded against it as it might subvert every principle of law and establish a perfect aristocracy." *Id.* Austin characterized lawyers as "not only a useless but a dangerous body to the public." *Id.*

Austin's alternative to the legal system he attacked envisioned legislative codes replacing common law. In civil proceedings people would represent themselves, and in criminal cases they would be represented by the Attorney General. Jurors, who were to decide questions of both fact and law, and referees were to render decisions according to principles of natural justice. The result would be laws that treated the rich and poor equally.<sup>90</sup>

Antilegalism did not manifest itself everywhere during the late Eighteenth Century.<sup>91</sup> Further, local manifestations of antilegalist sentiment of the 1780s, like that of the Anti-Federalists, was not of a radical variety. It accepted the necessity of law and limited its fire to an attack of a professional and legalistic rule of law.<sup>92</sup> Still, it was only after a fierce and protracted struggle that the Federalists finally succeeded in getting the new Constitution adopted. Historians have generally assumed that once the Constitution was in place, its opponents embraced the new document and their influence in American culture disappeared. To the contrary, the Anti-Federalist vision powerfully shaped the most basic features of American culture between the Revolution and the Civil War.<sup>93</sup> It provided the foundation for a continuing popular critique of the rule of law in post-revolutionary America.

### C. *The Persistence of Antilegalism in the New Nation*

To paraphrase Roeber's conclusion about antilegalism in Eighteenth Century Virginia,<sup>94</sup> available historical sources render it impossible to gauge either the breadth or depth of this sentiment in post-revolutionary America. While it did not manifest itself in all of the American states, there is surviving evidence of antilegalist sentiment in all classes and all sections of the new nation.<sup>95</sup> It is enough to demonstrate, in contrast to Papke's assertion cited earlier, that there did exist a serious antilegalism that contested the rise of the rule of law in the new nation.<sup>96</sup>

This is difficult to fathom because antilegalism failed to thwart the rise of the rule of law in Nineteenth Century America. But antilegalism prior to the Civil

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90. See MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 32-39 (1976). In the wake of Shays Rebellion, John Quincy Adams, like his father, became concerned about antilegalism. He complained about the "popular odium which has been excited against the practitioners in this Commonwealth." ELLIS, *supra* note 66, at 113-14. See also WARREN, *supra* note 85, at 220.

91. Professor Nolan found little evidence of it in Maryland. Dennis R. Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969, 969-71 (1976).

92. In his letters attacking the pernicious practice of the law Austin is careful to make this distinction. See Surrency, *supra* note 88, at 242-43.

93. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 258-60 (1992).

94. ROEBER, *supra* note 45, at 251

95. Both Ellis and Gawalt give many examples of antilegalism in the new nation. ELLIS, *supra* note 66; GAWALT, *supra* note 20, at 63-64.

96. See *supra* note 10 and accompanying text.

War did enjoy great success in constraining assertions of federal lawmaking authority that would diminish state authority and establish uniform federal law. Early examples of resistance to federal assertions of authority include the passage of the Eleventh Amendment to overrule the Supreme Court's holding in *Chisholm v. Georgia*<sup>97</sup> that a state could be sued by a citizen of another state in a federal court. Also important were the Virginia and Kentucky Resolutions challenging the validity of the Alien and Sedition Acts of the late 1790s. They asserted that Congress could not pass laws that exceeded its enumerated powers and made the more radical claim that the states had the power to judge the legality of the exercise of federal powers. In 1803 St. George Tucker appended a long essay to his edition of Blackstone's *Commentaries* expounding the doctrine of state sovereignty within the American system of government.<sup>98</sup>

During John Marshall's tenure as Chief Justice, the Supreme Court made bold assertions of federal powers vis-a-vis those of the states. In *Martin v. Hunter's Lessee*,<sup>99</sup> the court struck down a Virginia law confiscating the Fairfax lands as contrary to a federal treaty. When Spencer Roane, Chief Justice of the Virginia Court of Appeals, refused to enforce the decision, arguing that section twenty-five of the Judiciary Act of 1789 granting federal courts jurisdiction to review the decisions of state courts was unconstitutional, the Supreme Court upheld its constitutionality.<sup>100</sup> The Marshall Court also asserted a broad federal authority to regulate the economy, notably in *McCulloch v. Maryland*<sup>101</sup> and *Gibbons v. Ogden*.<sup>102</sup> But assertions of federal authority in the early republic had little real social impact. In the critical area of regulation of the economy, for example, the Court also recognized the power of the states to regulate the economy when the federal government chose not to exercise it.<sup>103</sup> This was an important admission, for during this period, state law, rather than that of the federal government, was primary in fostering economic activity.<sup>104</sup> Also of great significance was the Supreme Court's refusal to uphold Justice Story's attempt, while riding the federal circuit, to establish a uniform federal commercial law.<sup>105</sup>

Further, though the decision in *Marbury v. Madison*<sup>106</sup> had clearly established the power of judicial review, the Supreme Court exercised the power only sparingly during the entire period before the Civil War.<sup>107</sup> The restraint of the

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97. 2 U.S. (2 Dall.) 419 (1793).

98. See KAMMEN, *supra* note 22, at 51-52.

99. 11 U.S. (7 Cranch) 603 (1812).

100. *Id.* at 603.

101. 17 U.S. (4 Wheat.) 316 (1819).

102. 22 U.S. (9 Wheat.) 1 (1824).

103. See *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

104. See OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, 1774-1861* chs. 3, 5, 8 (1969).

105. See *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,766).

106. 5 U.S. (1 Cranch) 137 (1803).

107. Between 1789 and 1869 the Court invalidated just six congressional acts. See KAMMEN, *supra* note 22, at 31. Only in 1857, in *Dred Scott*, did it invalidate a state statute. *Dred Scott v.*

court in exercising its ultimate power may have been a reaction to popular attacks upon the powers of the Supreme Court in the new nation. A number of bills filed in Congress during the early Nineteenth Century proposed limits upon the jurisdiction and powers of the Supreme Court.<sup>108</sup> In a letter written to Judge Roane in 1819, Jefferson attacked the doctrine of judicial review. Pursuant to this doctrine, the Constitution, wrote Jefferson, "is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."<sup>109</sup> Some sources suggest a widespread popular dismay over the Constitution. In 1793 the Federalist, John Sargeant, a member of the lower house of the Pennsylvania legislature, expressed concern over hearing the "whole Constitution denounced, and a decided hostility to it boldly avowed."<sup>110</sup> In a letter to John Adams in 1808 Benjamin Rush observed of the Constitution that "I cannot meet a man who loves it," because half the people think it too weak and the other half too strong.<sup>111</sup>

In addition to the new body of constitutional law, the other building block of Nineteenth Century American legal culture was the adoption of an old body of English law, the common law. America's legal elite resolutely and successfully advanced the adoption of this body of law. But even members of the legal elite recognized that there was an artificial quality to English common law that required it to be adapted to the changed circumstances of the new American culture. At the very least common law had to be shorn of its arcane technicalities, a task that one of Massachusetts' most elite lawyers, Theopolis Parsons, addressed when he was appointed Chief Justice of the state's Supreme Judicial Court in the early years of the Nineteenth Century.<sup>112</sup>

During the late Eighteenth and early Nineteenth Centuries there also continued to appear encompassing critiques of the common law, typically coupled with advocacy for popular justice. Although there were important differences among post-revolutionary antilegalists, in accord with Anglo-American tradition, this antilegalism often began with a utopian golden age of simple law. There existed both religious and neoclassical roots to the golden age image in literature of the period, and it was reinforced by the widely-held view

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Sandford, 60 U.S. (19 How.) 393 (1856).

108. See KAMMEN, *supra* note 22, at 76. Between 1823 and 1831 Congress introduced twelve bills to curb the Court in some manner. See *id.*

109. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), in 10 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 140-42 (Paul Leicester Ford ed., 1892-1899).

110. KAMMEN, *supra* note 22, at 46 (quoting Letter from John Sargeant to Thomas Biddle, Jan. 10, 1808).

111. *Id.* at 73-74. Kammen himself concluded: "[T]he cult of the Constitution did not arise as early, nor so pervasively, as scholars have believed. . . . I do not see a strong constitutional consensus emerging almost from the start." *Id.* at 46.

112. See ELLIS, *supra* note 66, at 212-24. One of the early Nineteenth Century legal reforms in Massachusetts was the replacement of the common law system of writ pleading with a much simpler fact pleading. See NELSON, *supra* note 2, ch. 5.

that some day Eden would be recreated in a region to the west.<sup>113</sup>

The most common legal golden age in early republican literature was again the law of Anglo-Saxon England. Jesse Higgins, who had suffered the agony of entanglement in protracted litigation in the chancery court, identified the golden age as the reign of Good King Alfred. During it, a highly decentralized body of local courts decided cases according to a natural justice without written law. Higgins implored Americans to recapture their lost Anglo-Saxon heritage by restoring trial by jury to its pristine vigor.<sup>114</sup>

The foremost exponent of the purity of Anglo-Saxon law was Jefferson. His scattered writings on law are hard to render consistent, but from them one can piece together a frontal attack upon English common law. Jefferson espoused the purity of Saxon law and believed that the Norman Conquest had sullied it. This view of history led Jefferson to resist the repeated assertions of elite defenders of the common law that it was a moral body of law.<sup>115</sup> Further, always suspicious of the exercise of judicial discretion, Jefferson was dismayed by the reworking of common law effected by Mansfield during his long tenure as England's leading jurist. As for Blackstone, Jefferson came to view him as "honeyed Mansfieldism."<sup>116</sup>

The most intellectually vibrant, satirical and popular rendition of a legal golden age in the literature of the early republic was Washington Irving's *A History of New York*.<sup>117</sup> "[A] comedy of confusion [that] ridicule[d] order and system within the world,"<sup>118</sup> it relentlessly critiqued those who believed in progress, as quintessentially represented by the republican politics and neoclassical style of Jefferson, and by the vision of the Founders of a polity based upon a rational legal order. *A History* begins with a golden age in early New Amsterdam. In it plump and idle burghers lived amidst plenty, with little need for law. The infiltration of law into this blissful community was both a cause and a sure sign of its decline. A governor too learned in law, who passed "a multitude of good-for-nothing laws"<sup>119</sup> was followed by the famous Peter

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113. Evangelicals revived religious utopianism, while in neoclassical thought the golden age was traceable to ancient writers, notably Ovid. See BLOOMFIELD, *supra* note 90, at 32-33. See HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS A SYMBOL AND MYTH* (1950), on the general imagery associated with the Nineteenth Century West.

114. See JESSE HIGGINS, *SAMPSON AGAINST THE PHILISTINES* (2d ed. 1805).

115. See Part III on this claim of the legal elite. For example, in an important passage of his *Commentaries* Blackstone claimed that the common law reflected Christian morality.

116. *Community Justice and Formal Law*, *supra* note 83, at 274.

117. WASHINGTON IRVING, *DIEDRICH KNICKERBOCKER'S A HISTORY OF NEW YORK* (Stanley Williams & Tremaine McDowell ed., Harcourt, Brace, 1927) (1809).

118. FERGUSON, *supra* note 14, at 166 (quoting WILLIAM L. HEDGES, *WASHINGTON IRVING: AN AMERICAN STUDY* 262 (1965)).

119. *Id.* at 156 (quoting IRVING, *supra* note 117, at 211). "William the Testy is 'smothered in a slough' of [] learning. 'Full of scraps and remnants of ancient republics . . . and the laws of Solon and Lycurgus and Charondas, and the imaginary commonwealth of Plato, and the Pandects of Justinian.'" *Id.* at 157 (quoting IRVING, *supra* note 117, at 180). William's learning is "highly

Stuyversant, who completed the debacle by negotiating legalistic treaties with neighbors. By then “the ‘galling scourge of the law’ and ‘the herds of pettifogging lawyers’” was undermining the Dutch culture of early New York.<sup>120</sup> Not only that, but Irving also catalogued a number of atrocities affected by the law. They included the stealing of land from Native Americans and the hanging of alleged witches in Salem, as well as many instances of the rich manipulating law to oppress the poor. Irving often pictured law as a “deliberate sham,” covering the reality of “law as dangerous illusion.”<sup>121</sup>

There are other works of early republican literature that critique law without resort to a utopian golden age. An excellent example is a number of the works of Charles Brocton Brown at the end of the Eighteenth Century. They included a root and branch critique of a rule of law. Brown suggested that a rational law was beyond human capacity and that law did not address the important questions of human life. Law afforded no protection for Brown’s protagonists and they in turn refused to resort to legal institutions to resolve problems that they faced.<sup>122</sup>

Advocacy for popular justice in the new nation was not just confined to literature. Examples of it can be found in each section of the country, though its intensity and purposes differed in each.

Antilegalist sentiment was widespread in the South, but it was constrained to the moderate goal of reducing the legalism of established legal institutions. For example, in 1811 the Virginian, Henry Banks, published *Propositions Designed to Simplify and Expedite the Administration of Justice*. It attacked both the state’s judiciary and the avarice of swarming lawyers. Banks proposed a local justice without legalese, with simple procedures, and in which lay juries would decide cases.<sup>123</sup> A letter, also published in 1811 by CANDIDUS, attacked lawyers as absorbed in their own interests and laws as unnecessarily written and confusing.<sup>124</sup> The legal elite of the early Nineteenth Century South reacted to anti-lawyer sentiment by claiming the tradition of the country lawyer, creating Patrick Henry as a mythical prototype. A man of the people, Henry was a landowner and local squire who above all was a great orator.<sup>125</sup> Not coincidentally, he was also an Anti-Federalist in his politics who had argued passionately against the distant and powerful government created by the Federal Constitution.

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classic, profoundly erudite, and nothing at all to the purpose.” *Id.* at 158 (quoting IRVING, *supra* note 117, at 181-82).

120. *Id.* at 155 (quoting IRVING, *supra* note 117, at 123, 216). The ultimate symbol of destruction is the circuit-riding lawyer, “lean sided hungry pettifoggers, mounted on Narraganset pacers, with saddle bags under their bottoms, and green satchels under their arms, as if they were about to beat the hoof from one county court to another—in search of a law suit.” *Id.* at 156 (quoting IRVING, *supra* note 117, at 267).

121. *Id.* at 158.

122. *Id.* ch. 5.

123. See ROEBER, *supra* note 45, at 241-44, 250-51.

124. See *id.* at 251.

125. See WILLIAM WIRT, *THE LIFE AND CHARACTER OF PATRICK HENRY* (1817).

In the Northeast expressions of antilegalism were often coupled with pleas for forms of popular justice. Most moderate in tone was the Jeffersonians' (who were gaining strength even in the Federalist Northeast) support for the expansion of available institutions of local justice, and especially trial by jury.<sup>126</sup> Warren suggests that sentiment for the replacement of common law with code law continued to be widespread in Massachusetts.<sup>127</sup>

Sentiment for arbitration as an alternative to common law litigation was strong in Pennsylvania. One proponent of this form of justice was the man who had most shaped patriot opinion during the Revolution, Tom Paine, although by the time he lent his gifted prose to the cause of arbitration his own prestige had been much reduced, at least among America's elite. In his last published pamphlet in 1805, in the midst of a hotly contested race for governor in Pennsylvania, and while that state was considering revisions to its original constitution of 1776, Paine attacked America's legalist order. He believed that American courts were far too dependent upon foreign law and inappropriate legal precedents. Paine believed that "[e]very case ought to be determined on its own merits," and by "the laws of [a man's] own country." As for lawyers, they were far too devoted "to form rather than to principles, and the merits of the case become obscure and lost in a labyrinth of verbal perplexities." Paine preferred arbitration because it was nonlegalistic and economical. Besides, who better to resolve disputes between merchants than merchants?<sup>128</sup> Another advocate for arbitration in Pennsylvania was William Duane, editor of the influential Jeffersonian newspaper, the *Aurora*. Critical of the mysteriousness of the common law, and one of the first commentators to recognize lawyers as America's new aristocracy, he wanted speedy, local trials decided by juries and a radical extension of arbitration.<sup>129</sup>

But it was in the early West that antilegalism was most widespread and radical in its implications. Indeed, it was suggested by the conception of the West in contemporary literature. The image of the West was of the Garden of Eden, representing a movement backward to a more primeval and utopian environment. One reason for moving westward, which many Americans did in the frenetically mobile Nineteenth Century, was to disengage themselves from the constraints of civilization, including the law.<sup>130</sup> The West, then, offered an opportunity to antilegalists, not available to their predecessors of the English Civil War and the Great Awakening, to escape the bonds of the law and to live

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126. See *Law and Community*, *supra* note 18, Part III.

127. He uncovered the following Fourth of July toast from Cambridge in 1801: "The Common Law of England: may wholesome statutes soon root out this engine of oppression from America." WARREN, *supra* note 85, at 227 (citing *Account of the Fourth of July Celebration in Cambridge*, COLUMBIAN CENTINAL (Boston), July 11, 1801).

128. See 2 THOMAS PAINE, THE COMPLETE WRITINGS OF THOMAS PAINE 996-97, 1003-04 (Philip S. Foner ed., 1945).

129. See WARREN, *supra* note 85, at 222-23.

130. See SMITH, *supra* note 113, bk. 2. The immediately following discussion of James Fenimore Cooper's literature supports this view.



a simpler and more liberated lifestyle by migrating westward.

The importance of the West to the yearning for a simple popular justice is suggested by the most important literary representation of the clash between popular justice and a strict rule of law of not only the early republican period, but the entire Nineteenth Century, James Fenimore Cooper's *The Pioneers*.<sup>131</sup> Published in 1826, just two years before the ascension of the western hero Andrew Jackson to the presidency, the book was a "sensation." Its protagonist, Natty Bumppo, became so popular in American culture that he would appear in five of Cooper's novels.<sup>132</sup>

Despite its date of publication, Cooper set his story over a generation earlier, in 1793, in the major American frontier of that period, upstate New York.<sup>133</sup> A child of nature and a legendary hunter, Bumppo was the first American settler of the region. But by the time of Cooper's story the West was experiencing the process of settlement and social transformation, brilliantly described by Frederick Jackson Turner's frontier thesis, that was recurrent in American history from the Seventeenth through the Nineteenth Centuries. Yeomen were establishing farms everywhere, and the institutions of civilization—schools, churches and the law—were becoming visible in every town. The transformation of the region was disconcerting to Bumppo, the more so when the legislature passed a law restricting the catching of fish and the killing of deer. When Bumppo violated it, he was brought before the court of the wealthiest and most influential person of the region, Judge Marmaduke Temple, a throwback to the paternal magistrates of colonial Virginia.

Bumppo was an unlearned man of a humble social background and his defense was that of a simple natural justice: "I may say not guilty with a clean conscience, for there's no guilt in doing what's right."<sup>134</sup> Though Judge Temple was a primary instigator of the legislature's passing of the game law, he seemed briefly to waver under the force of Bumppo's argument. Nevertheless, he directed the jury to adhere to the letter of the law and to find Bumppo guilty as charged.

Bumppo had saved the Judge's daughter, Elizabeth, from harm at the hands of a panther, and she protested his conviction to her father: "Surely, sir, those laws that condemn a man like Leather-stocking is so severe a punishment, for an

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131. JAMES FENIMORE COOPER, *THE PIONEERS* (Singer Classics ed. 1964) (1826).

132. *The Pioneers* would become the most widely read of Cooper's novels and the one most responsible for establishing his literary reputation. See G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, in III & IV OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 40-41 (1988) [hereinafter HOLMES DEVISE].

133. See PAUL W. GATES, *THE FARMERS AGE: AGRICULTURE, 1815-1860* ch. 2 (1960).

134. COOPER, *supra* note 131, at 374. Perry Miller drew parallels between Bumppo and Davey Crockett. When Crockett served as a justice of the peace he boasted that "I had never read a page in a law book in all my life." Still, appellants were never successful on appeal of his judgments, "as I g[i]ve my decisions on the principles of common justice and honesty between man and man, and rel[y] on natural born sense, and not on law learning to guide me." MILLER, *supra* note 16, at 102.

‘offense’ that even I must think very venial, cannot be perfect in themselves.” Judge Temple conceded her point, but responded: “Society cannot exist without wholesome restraints . . . and respect to the persons of those who administer them.” He added: “Try to remember, Elizabeth, that the laws alone remove us from the conditions of the savage . . . .”<sup>135</sup> Temple did, however, give Elizabeth money to pay Bumpo’s fine and ultimately Bumpo was pardoned. By the end of the book, Bumpo has fled further westward to escape the constraining forces of civilization for a more liberated and independent lifestyle.

Bumpo represented a deep cultural yearning in the new nation for a simple life lived in accordance with popular moral values. It is not surprising then that during the first half of the Nineteenth Century the West was alive with forms of popular justice. As had their ancestors who had come from England to the New World two centuries earlier, sectarian Protestant pioneers who settled in the early West established church courts to resolve their social and economic conflicts, including their debts.<sup>136</sup> There were also examples of important local persons resolving disputes by a simple, discretionary justice in the early West.<sup>137</sup> Sometimes the West’s popular justice collided with technical rules of law, leading to violence. Settlers claimed priority of right to land and other assets of economic value, and there were examples of vigilante justice in the pre-Civil War West.<sup>138</sup>

But a simple West with little law would not long survive. As large numbers of migrants moved westward and established new settlements, they brought with them the institutions of more advanced society. This engendered recurrent clashes between advocates of a strict rule of law (lawyers were always in the forefront of their ranks) and settlers attached to a popular law alternative. One example of such a clash was in late Eighteenth Century Kentucky. Based upon a Jeffersonian preference for limited government, some Kentucky settlers, especially those from its less populous districts, attacked lawyers as an educated and powerful elite. As an alternative to the common law they proposed establishing arbitration tribunals and available local courts, the latter rendering decisions based upon a code of simple laws understandable to lay persons. Although the proponents of this program achieved some measure of success, including the passage of a statute in 1795 authorizing arbitration, by the early Nineteenth Century a common law legal order was in place in Kentucky.<sup>139</sup> There were also recurrent pleas for the codification of the law in the early West, most notably those of Augustus Woodward, Chief Justice of the Supreme Court of the Territory of Michigan from 1805 to 1823, and by the Ohio lawyer, John

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135. COOPER, *supra* note 131, at 394-95.

136. See T. SCOTT MIYAKAWA, PROTESTANTS AND PIONEERS: INDIVIDUALISM AND CONFORMITY ON THE AMERICAN FRONTIER Part I (1964).

137. See MERLE CURTI, THE MAKING OF AN AMERICAN COMMUNITY: A CASE STUDY OF A DEMOCRACY IN A FRONTIER COUNTY 13-16 (1959).

138. See DANIEL BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE chs. 11-12 (1965); GATES, *supra* note 133, ch. 3.

139. See ELLIS, *supra* note 66, at 124-26, 137, 147, 150-51.

M. Goodenow, in attacking the doctrine of a common law of crimes.<sup>140</sup>

Another recurrent clash as Americans moved westward during the Nineteenth Century was between common law and the legal cultures of diverse traditional communities of Native Americans and Europeans already in the West. The usual result of such clashes was that the common law obliterated the earlier legal culture.<sup>141</sup> The result of clashes between the common law legal order and popular justice, not just in the West but throughout the nation, also normally resulted in the triumph of the former, albeit with accommodations made for a readily available local justice. This was usually effected through the availability of arbitration or reference, the expansion of the jurisdiction of the justice of the peace court, and the restructuring of county and circuit court jurisdiction.<sup>142</sup>

Within the historical context of clashes between common law and its competitors, and the repeated triumphs of common law, Cooper's attitude concerning the rule of law and popular justice is noteworthy. It is also not without ambiguities. Bumpo is the hero in *The Pioneers*, but Cooper did not embrace his simple justice. Instead, he accepted the frontier process in which new societies were created out of wilderness and Judge Temple's view that law was integral to the transformation.<sup>143</sup> But it is equally clear that Cooper was repulsed by the democratic culture that he perceived to be emerging in America by the Jacksonian period. This is suggested by his portrayal of social classes in *The Pioneers*,<sup>144</sup> and is made more clear in *Home as Found*,<sup>145</sup> written fifteen years later and set in the 1830s. In it Cooper compares American society to "a runaway carriage crashing downhill." The social bonds of hierarchy had been rent asunder and American life was now characterized by "envy, rapacity, uncharitableness, and all other passions of man 'unloosed.'"<sup>146</sup> His sense of loss of an earlier social order suggests why Cooper was one of those in the minority

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140. *Law and Community*, *supra* note 18, Part III. Goodenow portrayed common law as, "'founded in the darkest ages (of English feudalism), supported by usages, through the most barbarous revolutions.'" *Id.* at 221 (quoting John Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence*, in 17 CLASSICS OF LEGAL HISTORY 2-3 (Roy M. Mersky & J. Myron Jacobstein ed., 1972)). In light of the "stupendous" change characteristic of his own time, Goodenow concluded that at least English criminal law was unsuited to the circumstance of America's republican future. *See id.* at 221-22.

141. *See* ARNOLD, *supra* note 18; *Law and Community*, *supra* note 18, Parts I, III.

142. *See* *Law and Community*, *supra* note 18, Part IV.

143. Cooper observed that "the whole district is hourly exhibiting how much can be done, in even a rugged country, and with a severe climate, under the domination of mild laws, and where every man feels a direct interest in the prosperity of a commonwealth of which he knows himself to form a part." COOPER, *supra* note 131, at 13-14.

144. Cooper pictures the upper class, including Judge Temple, becoming more moderate and virtuous. In contrast, his characterization of middle and lower class persons are negative. White, *supra* note 132, at 43-44. Bumpo, of course, is an exception to this general characterization, though he is more of a model for civilization rather than truly being a part of it.

145. JAMES FENIMORE COOPER, *HOME AS FOUND* (Capricorn Books 1961) (1860).

146. FERGUSON, *supra* note 14, at 301.

of old Federalists who became a Jacksonian Democrat.<sup>147</sup> Cooper's view of social change, accepting it to a degree but repulsed by a pell-mell rush to an industrial democracy, may suggest sympathy with the paternal justice of Judge Temple.<sup>148</sup> At the very least Cooper did not unambiguously embrace a strict rule of law.<sup>149</sup> In a later novel, *The Ways of the Hour: A Tale*,<sup>150</sup> Cooper, not unlike Garrison, took the position that God should replace the Constitution as the foundation of American liberties.<sup>151</sup>

More important than Cooper's sentiments was his acute perception of what was happening to contemporary America's legal culture. By the time Cooper wrote *The Pioneers* in 1826 the common law legal order had become firmly established in America and the legal profession had achieved a position of unprecedented prestige and power.<sup>152</sup> Cooper therefore was right to set his story in 1795, and in a frontier region. In *Home as Found* he pictured Bumpo as a "mocking spirit" barely remembered by the 1830s.<sup>153</sup> Cooper insightfully recognized that American culture was changing very fast. At the very moment that he was creating a great folk hero who personified popular yearning for a simple popular justice, the forces of modernization were overtaking it, even in the West. The long tradition of support for popular justice in American history was at last receding.

#### *D. The Decline of Antilegalism During the Remainder of the Nineteenth Century*

Antilegalism continued throughout the Nineteenth Century. Though some of it would have radical implications for American society and culture, much of it was now of a more moderate tone. Antilegalism of this genre did not present alternatives to the established legal system, but rather sought to reduce its legalistic qualities. Of whatever stripe, outbursts of antilegalism became more

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147. Marvin Myers discerned a deep nostalgia for a simpler past was central to Jacksonian ideology, classically represented in Andrew Jackson's speech vetoing the recharter of the national bank in 1832. MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 19 (1957).

148. For example, Cooper pictures Judge Temple devoting considerable time to justifying his actions to those beneath his station, even to one of the remnant of the region's Native Americans. Like Tocqueville, Cooper pictured social bonds as warm in hierarchical society.

149. Who rightfully owned the land of this frontier region is a major issue of *The Pioneers*, and Cooper seems to accept the view that the only practical course is to uphold the claims of white settlers, which rest upon the arcane technicalities of the common law of property. But he sometimes directly attacked a strict rule of law, for many of the same reasons as had Irving. Cooper's lawyers were typically shallow or corrupted figures, and even Judge Temple was not above stain. Lawyers manipulated law to advance their own personal interests, or those of their clients, as when the Judge got the legislature to pass the law against killing deer.

150. JAMES FENIMORE COOPER, *THE WAYS OF THE HOUR: A TALE* (Gregg Press 1968) (1850).

151. See FERGUSON, *supra* note 14, at 304.

152. See *supra* note 16.

153. See FERGUSON, *supra* note 14, at 301.

episodic after 1830 than they had been during the long period from 1760 to 1830.

1. *The Jacksonian Period.*—The Jacksonian period has a reputation as a high point of egalitarianism in American history. Antilegalism during this period did have an egalitarian bite, protesting against corporate monopolies and social privileges.<sup>154</sup> Evangelical religion provided the impulse for a closer nexus of morality and law.<sup>155</sup> It also was related to the emergence of antislavery agitation that would culminate in a major unsettling of America's social order. Nevertheless, except in less settled regions of the West,<sup>156</sup> examples of popular justice disappeared. The practices of both arbitration and trial by jury declined precipitously by the middle of the Nineteenth Century.<sup>157</sup> Further, while the tradition of localism continued in the Jacksonian period, it suffered some significant setbacks in the context of the slavery controversy. And many of those who resisted a strict rule of law were now members of America's elite favoring moderate reform aimed at rationalizing the law.

During the generation from 1820 to 1850 advocacy for the codification of law swelled. But now, instead of outsiders like Austin, advocacy for codes of laws came from within the legal profession itself and was no longer linked to an alternative of popular justice. For the most part even ardent advocates for codification agreed with defenders of the common law that the *raison d'être* of law was to order society. Most of what separated them was how best to effectuate this end.<sup>158</sup>

Code advocacy began with a critique of common law. When articulated by the Irish immigrant, William Sampson, the attack was iconoclastic. He ridiculed the common law's ancient forms, like special pleadings and fictions, "which give it the air of occult magic," and characterized its lawmaking as akin to "judicial astrology." Forged by "semi-savage Saxons," who were "barbarians in a time of universal darkness," and in the age of kingship, common law doctrine was formed in conditions "essentially different" from those existing in America. Sampson concluded that continued devotion to common law by Americans was equivalent to "devotion to idols which their fathers had levelled in the dust."<sup>159</sup>

Although Sampson's critique cut deep, all but the most dogmatic of defenders of the common law by this period conceded that it was marred by technicalities and anomalies. Further, while debunking the lineage of the historic common law, Sampson distanced himself from more radical advocates of natural justice by heaping scorn upon the Saxon golden age history. Most illuminating

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154. See COOK, *supra* note 17, at 162.

155. See MILLER, *supra* note 16, bk. 2, Part IV.

156. See *supra* note 138.

157. See *supra* note 19; see also TRANSFORMATION, *supra* note 2, ch. V.

158. This is the conclusion of the most complete recent study of Jacksonian codification proposals. See generally COOK, *supra* note 17.

159. WILLIAM SAMPSON, AN ANNIVERSARY DISCOURSE, DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK: SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND THE NATURE OF THE COMMON LAW (Dec. 6, 1823), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 121, 132, 125-28, 130.

is that Sampson's justifications for code law were quite mainstream. He argued that code law would bring a large measure of simplicity and order to "trackless forests." It would constitute a cohesive body of law suited to contemporary American culture, one that could be easily understood and economically implemented. For Sampson, code law would actually reinforce the rule of law by limiting the exercise of judicial discretion.<sup>160</sup>

The conventional quality of much of the advocacy for codification was illustrated by the writings of its leading southern proponent, Thomas Grimké. Grimké emphasized that law was a science. Just as the physical sciences ordered and arranged a seemingly disordered natural world, so legal science, especially a comprehensive body of code law, brought "simplicity and order" to the disparate sources of accumulated legal precedents.<sup>161</sup> It was left to the reformist attorney, Robert Rantoul, to make an uncharacteristically radical claim for the codification of American law: "We must have democratic governors, who will appoint democratic judges, and the whole body of the law must be codified."<sup>162</sup>

We should not overlook the result of code advocacy during this period. It failed almost entirely to achieve its objective. But it may have provided a bargaining chip for moderate reforms of the existing judicial system.<sup>163</sup>

Attacks upon the legal profession continued during the Jacksonian period. A stinging critique penned by an unknown person named P.W. Grayson portrays lawyers as a greedy class destructive of both individual liberty and moral community.<sup>164</sup> Further, although they were politically powerful, lawyers were so enmeshed in precedents that they lacked the vision to contribute constructively

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160. See *id.* at 132-33; see also HENRY DWIGHT SEDGWICK, ON AN ANNIVERSARY DISCOURSE DELIVERED BEFORE THE HISTORICAL SOCIETY ON SATURDAY, DECEMBER 6, 1823, SHOWING THE ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND NATURE OF THE COMMON LAW, ARTICLE VIII, THE NORTH AMERICAN REVIEW 416-39 (Oct. 1823), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 136, 143-45.

161. See THOMAS SMITH GRIMKÉ, AN ORATION OF THE PRACTIBILITY AND EXPEDIENCE OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY OF A CODE, DELIVERED TO THE SOUTH CAROLINA BAR ASSOC. (Mar. 17, 1827), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 148, 148-49, 152-53.

162. ROBERT RANTOUL, ORATION AT SCITUATE (July 4, 1836), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 222, 225. Note, however, that in this statement Rantoul, though calling for a democratic body of law, accepted the practice of appointing, rather than electing, judges.

163. These reforms include the election of state and local court judges and perhaps moves to expunge technicalities from the judicial process including pleading. GAWALT, *supra* note 20, at 182-84. Professor Gordon argues that moderate reform as a way to parry more radical antilegalist claims was a persistent pattern in Anglo-American history. Gordon, *supra* note 37, 438-39.

164. P.W. GRAYSON, VICE UNMASKED, AN ESSAY: BEING A CONSIDERATION OF THE INFLUENCE OF LAW UPON THE MORAL ESSENCE OF MAN, WITH OTHER REFLECTIONS (New York, 1830), reprinted in THE LEGAL MIND IN AMERICA, *supra* note 87, at 192. Like harlots they served the private interests of the highest bidders. Also, to obtain wealth lawyers pry into private affairs, "discern the ingredients of litigation, and blow them up into strife." *Id.* at 195.

to the development of either individual liberties or community life.<sup>165</sup> Within the context of the democratic and anti-monopolistic ideology of the Jacksonian period, such attacks had an impact. Professional legal education markedly declined.<sup>166</sup> Local bar associations no longer set standards of admission for law practice and legislative statutes seemed to make it easier to become a lawyer.<sup>167</sup> The democratization and commercialization of American culture undermined the neoclassical culture of law and letters. David Dudley Field bore witness to the rise of a new breed of pettifoggers: "The bar is now crowded with bustling and restless men . . . . The quiet decorous manners, the gravity, and the solid learning, often conjoined in a former generation, are now rarely seen together."<sup>168</sup>

Those who, in the Anti-Federalist tradition, favored state authority continued to have great success during the Jacksonian period in thwarting the economic nationalism of the Marshall Court. South Carolina's refusal to abide the federal tariff in 1832 ended in a standoff.<sup>169</sup> It was in the context of the Nullification Crisis that John C. Calhoun honed his theoretical framework for supporting states' rights against impositions by the federal government.<sup>170</sup> Despite his stance on the tariff issue, Jackson was decidedly not an economic nationalist. The great act of his presidency, of course, was his veto of the re-charter of the federal bank. The result was a major decentralization of the American monetary system.<sup>171</sup> Further, the Taney Court moved away from the Marshall Court's economic nationalism.<sup>172</sup> The Whig leader, Henry Clay, was never able to procure passage of his program of economic nationalism. The triumph of economic localism during the Jacksonian period, however, was not complete. In 1842 Justice Story was at last able to establish the doctrine of a federal commercial law.<sup>173</sup> Still, the

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165. *See id.* at 194-95.

166. A number of law schools failed, including Tapping Reeve's famous school at Litchfield, and even Harvard had almost no law students by the late 1820s. *See* 2 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 210-14, 194-97 (1965).

167. *See id.* at 129-72. Gawalt discusses major changes in legal education and bar admission during this period. GAWALT, *supra* note 20, ch. 5; *but see Law and Community, supra* note 18, Part IV (finding no decline in the standards of professionalism in Michigan during the Jacksonian period).

168. FERGUSON, *supra* note 14, at 201.

169. Though Andrew Jackson strongly asserted its legitimacy, Congress did accede to the wishes of its opponents by lowering its tariff rates.

170. *See* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 27-29, 32-39 (1988); *see also* KAMMEN, *supra* note 22, at 52-55.

171. *See* EDWARD PESSEN, *JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS* 142-44, 308-13 (rev'd ed., 1978).

172. In the famous *Charles River Bridge* case, the Supreme Court, in an opinion written by its new Chief Justice, Roger Taney, upheld the authority of state legislatures to issue new charters that undercut the activity and profits of corporations with earlier charters. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). *See also* STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (1971).

173. *See* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

forces of localism were so strong that during this period no less than Marshall, Kent and Story despaired that all of their efforts to establish a national rule of law would come to nought.<sup>174</sup>

But during this period there was a form of advocacy for states rights that utterly failed. This was legal attacks upon the federal fugitive slave laws.<sup>175</sup> The greatest success of the states' rights view in antislavery advocacy was in opinions of the Wisconsin Supreme Court in *In re Booth*,<sup>176</sup> but the United States Supreme Court soon overruled the decision.<sup>177</sup> During the entire pre-Civil War period, in no matter what form antislavery advocates attacked the authority of the federal government to pass or enforce fugitive slave laws, the federal courts doggedly enforced them by a legalistic jurisprudence.<sup>178</sup>

Abolitionist advocacy was part of a broader antilegalist attack upon a rational rule of law during the antebellum period. Demanding the immediate end of slavery, abolitionists of the period measured laws supporting slavery against a higher moral law and found them wanting. For example, the political platform of the 1843 Liberty Party asserted that "the moral laws of the Creator are paramount to all human laws."<sup>179</sup> Some of the legal advocacy against the fugitive slave laws relied upon a dissonant array of natural law arguments. One example is the advocacy of the leading antislavery lawyer, Salmon P. Chase. In his first fugitive slave case, in which he argued that his client should have a presumption of freedom and a trial by jury, Chase implored the court to uphold "natural rights, derived . . . from the constitution of human nature, and the code of heaven . . . proclaimed by our fathers in the Declaration of Independence to be self-evident, and reiterated in our state constitutions."<sup>180</sup> In a later case before the Supreme Court, Chase made his most radical argument: "No court is bound to enforce unjust law; but to the contrary every court is bound, by prior and superior

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174. In the late 1820s Justice Marshall stated to Justice Story that "I begin to fear that our Constitution is not doomed to be so long lived as its real friends had hoped." In 1832 he wrote to Story: "[S]lowly and reluctantly [I yield] to the conviction that our Constitution cannot last." KAMMEN, *supra* note 22, at 51. Chancellor Kent and Justice Story were distraught over the *Charles River Bridge* decision. See Carl B. Swisher, *The Taney Period, 1836-64*, in V HOLMES DEVISE, *supra* note 132, at 92.

175. Robert Cover observed: "The fugitive's advocate stood four-square for states' rights and against extensions of national power." COVER, *supra* note 34, at 161.

176. 3 Wis. 1 (1854), *rev'd sub nom.* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858). See also *Ex parte Booth*, 3 Wis. 145 (1954), *rev'd sub nom.* Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

177. *Ableman*, 62 U.S. (21 How.) at 506. See also COVER, *supra* note 34, at 166, 186-87.

178. Judges would typically interpret these laws according to their letter, claiming that they lacked power to do otherwise. It was such lawmaking that prompted Professor Cover to study antislavery jurisprudence.

179. WRIGHT, *supra* note 53.

180. Salmon P. Chase, Speech in the Case of the Colored Woman Mathilda Who was Brought Before the Court of Common Pleas of Hamilton Co., Ohio, by Writ of Habeas Corpus (Mar. 11, 1837).



obligations, to abstain from enforcing such laws."<sup>181</sup>

The antislavery movement was part of a pervasive moral reformism during the Jacksonian period.<sup>182</sup> The primary source of this moral reformism was evangelical revivalism. For example, in *Elements of Moral Science*, published in 1835, the Reverend Francis Wayland argued that political science was a moral science, based upon God's moral law.<sup>183</sup> In 1853 Henry Whitney Warner observed that "We are a christian people . . . . Our political and civil institutions are all imbued with christianity in a greater or less degree."<sup>184</sup>

2. *The Late Nineteenth Century.*—By the late Nineteenth Century the level of antilegalism in America had declined again and became increasingly episodic. Popular images of the Constitution in literature became more uniformly favorable than before the Civil War and indeed now were often reverent.<sup>185</sup> There were still instances of popular justice in the West and South during the late Nineteenth Century,<sup>186</sup> and there was an element of antilegalism in the Populist's broad critique of American society.<sup>187</sup> Enmeshed in the social conflicts that surfaced during the late Nineteenth Century some labor unions<sup>188</sup> and immigrant groups<sup>189</sup> had internal mechanisms of justice. The deep social conflicts of the late

181. Salmon P. Chase, An Argument for the Defendant Submitted to the Supreme Court of the U.S. in the Case of Jones v. VanZandt (1847). The Court dismissed Chase's argument by resort to a rule of law position in which the judiciary "possess[ed] no authority . . . to modify or overrule" laws of the states. COVER, *supra* note 34, at 174.

182. For example, moral reform was an impulse for the antislavery movement, the feminist movement, temperance, and the building of institutions for criminals, the mentally ill and the poor. See DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).

183. See WRIGHT, *supra* note 53, at 219.

184. MILLER, *supra* note 16, at 67.

185. See KAMMEN, *supra* note 22, ch. 5.

186. See RICHARD MAXWELL BROWN, AMERICAN VIOLENCE 63-66, 99-102, 107-10 (1970); Richard Cole & Gabriel Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 L. & HIST. REV. 325, Part I (1999); see also W.F. BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930 chs. 1-5 (1933).

187. Committed Populists deeply critiqued America's emerging capitalism. Though not specifically focused upon the legal system, Populist leaders attempted—unsuccessfully—to develop internal mechanisms that would allow them to operate independently of established social institutions. Populism was a very powerful political force, but for a short time, during the late Nineteenth Century. See generally LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976).

188. See Jonathan Garlock, *The Knights of Labor Courts: A Case Study of Popular Justice*, in *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 17-34 (Richard L. Abel ed., 1982).

189. Chinese immigrants, for example, resolved disputes in their *hui-kuan*. However, they also were litigants in thousands of common law and constitutional law cases. See generally CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* (1994).

Nineteenth Century are why the contest between William Jennings Bryan and William McKinley in 1896 was so pivotal. McKinley campaigned for a nation ordered by law and his narrow victory represented a triumph of the rule of law.<sup>190</sup>

Five years earlier, in 1891, Herman Melville published his remarkable novella, *Billy Budd, Sailor (An Inside Narrative)*,<sup>191</sup> which distilled much of the history of the rule of law in Nineteenth Century America. Melville's protagonist, Billy Budd, is an innocent young sailor. When falsely accused of mutiny by the malevolent master-of-arms, John Claggart, he could not speak because of a stutter. In his frustration Budd unleashed a single impulsive blow that unintentionally kills Claggart. The incident occurred in the presence of the ship's captain, Edward Vere, whom Melville used to depict the thinking and method of operation of the classic legalist.

Upon witnessing Claggart's death an agitated Vere exclaimed: "Struck dead by an angel of God. Yet the angel must hang."<sup>192</sup> He decided to charge Budd in a drumbeat court, which meant that the ship's officers would decide his fate.<sup>193</sup> In his charge before the court Vere acknowledged that natural justice, which he too felt the "full force of," cried out for relief from the strictures of the martial law that mandated Budd's death. But rejecting the biblical example of Abraham and his innocent son, Isaac, Vere did not draw back the knife. Referring again to the clash of head and heart in Nineteenth Century American culture, while recognizing that the "exceptional" nature of Budd's circumstances stirred the sentiments of the heart, Vere nevertheless implored, "let not warm hearts betray heads that should be cool." He reminded his listeners that "the heart denotes the feminine in man," and "hard though it may be, she must here be ruled out."<sup>194</sup> Vere rhetorically asked his listeners: "[D]o these buttons that we wear attest that our allegiance is to Nature? No, to the King." He added: "For the law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly the law may operate, we nevertheless adhere to it and administer it."<sup>195</sup>

The place of Melville's classic novella within the framework of Nineteenth Century American history is peculiar. It embodied the most brilliant representation of the clash between natural justice and the rule of law in all of Nineteenth Century American literature. But by 1891 its foundational struggle was the relic of a museum, rended from historical context. Any formidable challenge to the rule of law now came from a very different flank. Its source was not popular culture, but the bureaucracy that was administering the emerging body of federal and state administrative law.<sup>196</sup>

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190. See GOODWYN, *supra* note 187, at 530-32.

191. HERMAN MELVILLE, *BILLY BUDD AND OTHER TALES* (Willard Thorp ed., 1979) (1891).

192. *Id.* at 60.

193. But Vere has no illusion about who would be responsible for Budd's fate, for he would act as Budd's accuser and have the ability to interpose as needed in the proceeding. See *id.* at 63.

194. *Id.* at 68-69.

195. *Id.*

196. See LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING*

*E. Reconsidering Papke's Heretics*

What constitutes heresy is best decided within its historical context. We gain perspective upon Papke's heretics, and the historical development of the rule of law, by reconsidering them within the context of Nineteenth Century antilegalism. As Papke recognizes, William Lloyd Garrison's brand of abolitionism was truly heretical.<sup>197</sup> Garrison and his followers accepted the positivist jurisprudence of judges who upheld the fugitive slave laws. The Constitution was the rule of law. But this led Garrisonians to a stance of moral abstention,<sup>198</sup> and in Garrison's case, to desecrate the Constitution. In a Fourth of July address in 1854 to the Massachusetts Anti-Slavery Society, he proclaimed the Federal Constitutional "an agreement with hell" for violating "the higher law of God" by condoning slavery, and set it aflame.<sup>199</sup> Yet in 1854 his defiant act did not evoke popular outrage. The muted reaction to Garrison's heretical act undoubtedly related to the wide popular sympathy for protest against slavery in a place like Boston by this time. In addition, it would seem to suggest again the vitality of antilegalism in antebellum America and the Constitution was still not yet enshrined in the popular imagination in the 1850s.

Conversely, another of Papke's heretics, Eugene Debs, evoked a very strong reaction in both public sentiment and from government officials during his career as a labor leader.<sup>200</sup> As Part III tries to demonstrate, the harsh reaction received by Debs, at least in part, reflects the fact that by the late Nineteenth Century the rule of law in America had become more strict and entrenched than it had ever been in the antebellum period.

Finally, Papke's modern heretics, including the militia and the anti-abortionists, seem ambivalent in their attitude toward the rule of law and have not fully disengaged from the legal faith.<sup>201</sup> This phenomenon suggests that time has

OF MODERN IMMIGRATION LAW 37-116 (1995); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

197. PAPKE, *supra* note 4, at 24-50.

198. In his book, *The Constitution: A Pro-Slavery Compact*, Wendell Phillips included a letter of resignation by Francis Jackson, a justice of the peace in Massachusetts:

The oath to support the Constitution of the United States is a solemn promise to do that which is a violation of the natural rights of man, and a sin in the sight of God. . . . I withdraw all profession of allegiance to it [the Constitution], and all my voluntary efforts to sustain it.

COVER, *supra* note 34, at 153-54 (quoting WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* 171-81 (3d ed. 1856)) (alteration in original).

199. See PAPKE, *supra* note 4, at 25.

200. *Id.* at 76-105.

201. For example, militia ideology devotes extended attention to interpretations of the Second and Fourteenth Amendments. New militia members must swear allegiance to the Constitution. See *id.* at 140-42. *Closed: 99 Ways to Stop Abortion*, a manual of anti-abortion tactics, begins with the proclamation that: "Pro-life activists . . . cannot wait for legislative and judicial process that

ingrained popular faith in the rule of law. The depth of the popular legal faith during the Twentieth Century may provide another reason why historical antilegalism has received so little attention from legal historians. It is very hard, even for professional historians, to break free from viewing the past from the perspective of their own age.

### III. RECONSIDERING THE RISE OF THE RULE OF LAW

In 1829, at the dawn of the Jacksonian era, Joseph Story delivered his inaugural address as the Dane Professor of Law at Harvard.<sup>202</sup> Earlier that year a paper by Jefferson rejecting the view that the common law embodied Christian values, though written in 1764, had just been published. Story begins by attacking Jefferson's "specious" conclusion, insisting that: "One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the Common Law . . . ." Story supported his assertion on a number of grounds, including that "[f]or many ages [common law] was almost exclusively administered by those, who held its ecclesiastical dignities."<sup>203</sup>

Story also believed that law was a science, akin to the natural sciences.<sup>204</sup> It represented a storehouse of accumulated legal principles: "The gathered wisdom of a thousand years."<sup>205</sup> Like science, then, "every successive age brings its own additions to the general mass of antecedent principles."<sup>206</sup> Although law was founded in "natural reason," it was also a flexible science "adapted and moulded to the artificial structure of society."<sup>207</sup> The enormous changes in contemporary society generated by "commerce, agriculture, and manufactures, and other efforts of human ingenuity and enterprise[,] required the clearing out of "old channels," while adding "new increments and

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will make abortion illegal. The activist must save lives now." But on the following page it suggests that those who have questions about the legality of the methods discussed in the manual to consult a lawyer. See *id.* at 148 (quoting JOSEPH M. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION (Tan Books & Publ. rev. ed. 1993) (1985)).

202. JOSEPH STORY, DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY (Aug. 25, 1829), *reprinted in* THE LEGAL MIND IN AMERICA, *supra* note 87, at 177.

203. *Id.* at 178. Other evidences of its basis in religious values was that common law refused to enforce contracts offensive to its morals; it recognized religious holidays; and it gave its greatest trust to witnesses who swore their belief in divine authority. For Story the fault of the common law was that it too narrowly defined religious orthodoxy, and persecuted conscientious heretics. *Id.* at 178-79.

204. *Id.* at 184. White wrote: "Science provided the metaphor through which the nature of American law and the role of the legal profession could be recast." White, *supra* note 132, at 155.

205. STORY, *supra* note 202, at 183 (quoting JOHN SHORE TEIGNMOUTH, MEMOIRS OF THE LIFE, WRITINGS, AND CORRESPONDENCE OF SIR WILLIAM JONES 100 (London, John Hatchard 1804)).

206. *Id.* at 184.

207. *Id.* at 183.

deposits.”<sup>208</sup> Story further observed that the moral and scientific character of law justified the broad and arduous study of all the major branches of human learning needed to become a perfected lawyer.<sup>209</sup>

Casting the study of law as both a moral and scientific enterprise provided a basis for Story’s noble view of the legal profession. In contrast to “the sneers of ignorance, and the gibes of wit,”<sup>210</sup> the result of a genuine immersion in the study of law was a learned, virtuous and disinterested citizen. Story believed that “no men are so constantly called upon in their practice to exemplify the duties of good faith, incorruptible virtue, and chivalric honor, as lawyers.”<sup>211</sup> Recalling the image of the lawyer as stirring up lawsuits and fomenting discord within the community, Story disclaimed that “any man, standing in the temple and in the presence of the law, should imagine that her ministers are called to such unworthy offices. No. The profession has far higher aims and nobler purposes.”<sup>212</sup>

Story’s claim for the high purpose of the legal profession was related to his conviction that no less than “the welfare of the whole community” depended upon “the actual administration of justice in all governments, and especially in free governments.”<sup>213</sup> The major basis for this claim was the view that America’s rule of law stood as a buffer to the threat posed by the passions of excessive democracy to the survival of its free community.<sup>214</sup> The law restrained the passions of democracy by jealously protecting rights of property, without which “all other rights become worthless or visionary.”<sup>215</sup> Story also viewed the Constitution as the “great bond and bulwark of the Union,”<sup>216</sup> and believed that a strong federal government and judiciary were absolutely necessary to maintaining a rule of law in a democracy.<sup>217</sup> Story, then, believed that the lawyer “stands alone, to maintain the supremacy of law against power, and numbers, and public applause, and private wealth.”<sup>218</sup> Like “a public sentinel,” the lawyer was

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208. *Id.* at 184.

209. *Id.* at 184-89.

210. *Id.* at 179.

211. *Id.*

212. *Id.* at 181.

213. *Id.*

214. *Id.* See also Joseph Story, Address Delivered Before the Members of the Suffolk Bar, Boston (Sept. 4, 1821), in *THE LEGAL MIND IN AMERICA*, *supra* note 87, at 67, 71-73.

215. STORY, *supra* note 202, at 180. Story asked his audience: “What is the privilege of a vote, if the majority of the hour may sweep away the earnings of our whole lives, to ratify the rapacity of the indolent, the cunning, or the profligate, who are borne into power upon the tide of a temporary popularity.” *Id.*

216. Story, *supra* note 214, at 74.

217. Story stated this view in his address delivered to the Suffolk County Bar: “If the union of the states is to be preserved . . . it can only be by sustaining the powers of the National Government in their full vigor, and holding the judicial jurisdiction . . . co-extensive with the legislative authority.” *Id.* at 75.

218. STORY, *supra* note 202, at 181.

placed “upon the outpost of defense . . . to watch the approach of danger, and to sound the alarm, when oppression is at hand.”<sup>219</sup>

Story’s address embodied the main arguments made by the new nation’s legal elite for the legitimization of the rule of law in the new American republic. A contemporary of Story, James Kent, who like Story was a judge, legal educator and commentator, declared that law was a “moral science.” It therefore enjoyed the sanction of traditional religious authority and the prestige of science in a culture whose development was vitally linked to advances in applied sciences.<sup>220</sup> While by the late Nineteenth Century claiming the authority of both religion and science would be problematic, how did legal thinkers earlier in the century make such a broad claim of authority for law?

Critical to the assertion that law was a moral science was the view that law was a discipline of reason. This conclusion seemed readily apparent to a generation of lawyers weaned on Blackstone, who not only associated common law with natural reason,<sup>221</sup> but whose *Commentaries* represented a gigantic effort to order this body of law. According to Jesse Root, common law was “the perfection of reason.” He could have said the same of constitutional law, for many of Root’s contemporaries considered John Marshall to be the paragon of legal reasoning.<sup>222</sup>

The intellectual methodology of this early legal elite also represented the application of reason, creating general principles of law. Critical to the work of the new nation’s lawyers was the task of arranging and systematizing law. The leading legal educator David Hoffman is illustrative. He believed that, even more than other sciences, it was important “to methodize and arrange” law “as she enlarges her acquisitions.”<sup>223</sup> In a memorable passage Kent lauded the work of the “learned [Hugo] Grotius. He found the law of nations . . . in a frightful chaos.” But he recovered “it from the darkness of feudal barbarism” by digesting public law “into one systematic code.”<sup>224</sup> The systematic arrangement of law ultimately led to the elaboration of universal principles of law. The great legal treatises of the period, like Kent’s *Commentaries* and Story’s many legal treatises, were efforts to organize the law of the American states around uniform

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219. *Id.* Story also evoked the image of the lawyer as martyr, sacrificing himself to save the polity. *Id.* at 181-82.

220. JAMES KENT, A LECTURE, INTRODUCTORY TO A COURSE OF LAW LECTURES IN COLUMBIA COLLEGE (Feb. 2, 1824), reprinted in *THE LEGAL MIND IN AMERICA*, *supra* note 87, at 95, 95-96.

221. See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VILL. L. REV. 1387, 1395 (1997).

222. For example, Horace Binney believed Marshall was a master of the lawyer’s ability “to compare, discriminate, adopt, reject.” MILLER, *supra* note 16, at 118, 120. Story celebrated the structure of Marshall’s reasoning: “[O]nce admit his premises and you are forced to his conclusions.” *Id.* at 120.

223. DAVID HOFFMAN, A LECTURE, INTRODUCTORY TO A COURSE OF LECTURES, UNIVERSITY OF MARYLAND (1823), reprinted in *THE LEGAL MIND IN AMERICA*, *supra* note 87, at 84, 90, 87-91.

224. KENT, *supra* note 220, at 100-01.

legal principles.<sup>225</sup> All the legal writers of the early republic sought to synthesize a wide variety of historical sources of law, including Roman and civilian law, ecclesiastical law and international law, providing another reason for the breadth of a proper legal education during this period.<sup>226</sup> As Daniel Coquillette observed about the writing of John Adams, a cosmopolitan knowledge of law “encouraged a provincial lawyer to dare to think ‘big,’ to aspire to have universally valid ideas.”<sup>227</sup>

The arrangement of law leading to the formulation of general legal principles was also a moral effort. As St. George Tucker observed: “[T]he *cultivated reason* of mankind” was the best guide to moral correctness.<sup>228</sup> Kent believed that the works of Grotius, along with other works organizing international law, lay an essential foundation for the peace and morality of modern European civilization.<sup>229</sup> Kent was also certain that: “The sure and certain consequence of a well-digested course of juridical instruction, will be to give elevation and dignity to the character of the profession.”<sup>230</sup> Rufus Choate pictured judges, in contrast to the age-old allegation that the legal profession represented the interests of the wealthy and powerful, as disinterested administrators of a moral and just law.<sup>231</sup>

An important source for the claim that law, as a discipline of reason, was a moral science was moderate Enlightenment thought, and especially Isaac Newton’s belief that science and religion were harmonious. For example, in a Newtonian vein Hoffman claimed that every law, even one local and temporary, had “foundations in the universal laws of our moral nature,” and that the moral ordering of law demonstrated the divine “harmony of the world.”<sup>232</sup>

There was another important basis for claiming that law was a moral science. Post-revolutionary lawmakers consciously sought to shape law so that it would be suitable to, and indeed contribute to the development of, a new American community. The initial basis for this approach to lawmaking was the recognition that old English legal precedents needed to be altered to render them suitable to the circumstances of the new nation. In his *Sketches of the Principle of*

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225. See White, *supra* note 132, at 96-99.

226. See *id.* at 87, 99-100.

227. Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, in COLONIAL SOCIETY OF MASSACHUSETTS, LAW IN COLONIAL MASSACHUSETTS, 1630-1800, at 359, 416-18, (Daniel R. Coquillette, ed., 1984).

228. MILLER, *supra* note 16, at 118 (emphasis in original). Miller also cited Judge Johnson for this proposition. *Id.* at 120.

229. See KENT, *supra* note 220, at 100-02; THE LEGAL MIND IN AMERICA, *supra* note 87, at 94.

230. KENT, *supra* note 220, at 98. See also MILLER, *supra* note 16, at 118.

231. RUFUS CHOATE, THE POSITION AND FUNCTIONS OF THE AMERICAN BAR, AS AN ELEMENT OF CONSERVATISM IN THE STATE: AN ADDRESS DELIVERED BEFORE THE LAW SCHOOL IN CAMBRIDGE (July 3, 1845), *reprinted in* THE LEGAL MIND IN AMERICA, *supra* note 87, at 260, 270-71.

232. HOFFMAN, *supra* note 223, at 90, 87-91.

*Government*, written in 1793, Nathaniel Chipman identified the reshaping of established law to a new American polity as the essential challenge to the genius of the American lawyer.<sup>233</sup> According to Story, a characteristic of legal science was the ability of the science of law, both old and new, to adapt to the conditions of their fast-changing society. Much of the lawmaking of the new nation consciously sought to foster the development of the American economy. The instrumentalism of this lawmaking paralleled the utilitarian view of applied science popular in Nineteenth Century America.<sup>234</sup>

By any measure the intellectual framework constructed by early America's legal elite justifying the rule of law, as well as its output of legal literature in accordance with it, was most impressive. That it provided an ideology for the new nation's legal professionals who used it to parry antilegalist alternatives to the emerging rule of law, is undeniable. But did its force establish popular faith in the rule of law? Although its claim of authority from both science and religion was a powerful one, this seems unlikely, at least acting alone, for a number of reasons. Undoubtably of least importance was that all of these diverse ideas of the legal elite's claim that law was a moral science, nobly serving the community's highest interests, were not easy to bring together into a coherent body of thought, or to render consistent with a stable rule of law.<sup>235</sup> More importantly, several factors reduced the influence of the new legal ideology in antebellum popular culture. First, as Perry Miller recognized, the legal elite's association of law with reason ran up against the rising tide of evangelicalism emphasizing the importance of sentiment in human experience.<sup>236</sup> It wanted more than a historical assertion of connections between law and Christianity. Further, evangelicalism was closely connected to a rising swell of popular democracy during the antebellum period that, as Story's Inaugural made clear, the legal elite was trying to restrain. Related to the rising democratic sentiment was that the neoclassical culture of law and letters that had nurtured the outburst of legal

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233. NATHAN CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* (Rutland, 1793), reprinted in *THE LEGAL MIND IN AMERICA*, *supra* note 87, at 21, 29-30. A recurring theme of St. George Tucker's edition of Blackstone's *Commentaries* was the need to adapt English law to the spirit of America's republican government; to the circumstances of the varied jurisdictions of American federalism; and to the many changes in the system of property, penology, and other forms of American society. See White, *supra* note 132, at 83-84.

234. See MILLER, *supra* note 16, bk. 3, ch. 1, §§ 4-5. There is an enormous and important body of legal history that emphasizes the role of law in fostering the economic growth of Nineteenth Century America. See, e.g., *supra* note 2.

235. The process of "Americanizing" old law, of instrumentally shaping it to foster the development of American economy and society, entailed a potentially disordering process of legal change that would unsettle established precedents and potentially undermine a strict rule of law. Could the utilitarian spirit of an instrumental law be rendered consistent with a morally elevated view of law, even if both were rooted in the exercise of reason? Hoffman expressed the wish that American lawmaking would allow law, during "many revolutions of manners," to retain "its *form*, while it has altered its *spirit*." HOFFMAN, *supra* note 223, at 89.

236. MILLER, *supra* note 16, at 186-88, 193.



thought collapsed. Finally, Part II of this Essay suggests that popular antilegalism persisted well into the Nineteenth Century. We should not discount the popularity of Cooper's simple and pure-hearted hero, Natty Bumppo whose support for natural justice had wide appeal to Jacksonian Americans.

Further, by this period the legal elite perceived at least two imposing threats to the rule of law. One was the spreading web of commercial transactions. At least by the 1840s and perhaps earlier, historians have discerned the existence of a popular legal ideology of free market exchange. There exist very different historical accounts of the formation and significance of the new legal ideology. James Willard Hurst's monumental studies of Wisconsin law suggest that law adopted its basic premises, the most important being the release of energy of individuals, from the general culture of the community. The sources of these ideas could be traced to the emergence of classical political economy, whose most influential proponent was Adam Smith's *The Wealth of Nations*,<sup>237</sup> as well as further back to the Enlightenment, the Reformation and the Renaissance. Hurst pictured a wide popular acceptance of the law's positive role in fostering free market enterprise.<sup>238</sup> In contrast, Jay Feinman and Peter Gable argue that law itself was critical to the creation of the free market ideology. They suggest that law was one of a number of powerful tools in gaining popular acquiescence to an economic system that unfairly favored accumulations of wealth by the rich and powerful.<sup>239</sup>

What is important to appreciate for a study of the emergence of faith in the Nineteenth Century rule of law is the major divergence between the popular legal ideology of the free market and that of America's legal elite. At most they coincided only partially in a shared support of economic instrumentalism. But not even this is historically accurate, for the legal elite feared that the frenetic commercialism of the Nineteenth Century would destroy a community ordered by a rule of law. The legal elite did, of course, help to create law that supported the economic growth of the new nation. But rather than supporting the pell-mell rush of the free market, it sought to establish a stable rule of law that would facilitate commercial development within an ordered community.

Story's case opinions and scholarship provide an excellent example of such lawmaking. In *Swift v. Tyson*,<sup>240</sup> in the context of a decision that fostered the free circulation of commercial paper, he finally established the doctrine of a federal commercial law. Story also wrote a treatise on commercial paper that sought to

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237. ADAM SMITH, *WEALTH OF NATIONS* (2d ed. 1937).

238. Paraphrasing Jefferson, Hurst wrote: "We were all Republicans, we were all Federalists, in possessing a common instrumental belief which shaped the nineteenth-century legal order." JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 33 (1956). See generally *id.*, ch. I.

239. "The law is one of many vehicles for the development and transmission of ideological imagery." Jay Feinman & Peter Gable, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 373, 374 (David Kairys ed., 1990).

240. 41 U.S. (16 Pet.) 1 (1842).

reconcile varying state laws in a more uniform law of commercial paper.<sup>241</sup>

The goal of restraining economic development within the framework of the a stable rule of law is also represented by the lawmaking of the young Lewis Cass, while he was governor of the Michigan Territory. He was a highly educated lawyer who chose a political career that culminated in an unsuccessful candidacy for the presidency of the United States. In an address Cass delivered to the alumni of Hamilton College in 1830 he recognized "important changes, affecting the whole system of society, whose advance is no less certain, salutary, or irresistible."<sup>242</sup> Critical to the changes was applied science, most especially the development of steam power. But Cass also feared "the trading mart of Detroit" and the individual selfishness it unleashed.<sup>243</sup> Instead, he favored the economy of moderate yeoman farmers. While recognizing the need to adapt law to changes in society and economy, Cass warned against upsetting "the great principles, which protect the rights of persons and property in our country, [and] are too firmly established and too well understood to require or even to admit frequent or essential alternation."<sup>244</sup>

Meanwhile, during the decades preceding the outbreak of the Civil War abolitionists were increasing their attacks upon the Federal Constitution. The incendiary demand of Garrison and others for the immediate abolition of slavery seemed to threaten the survival of the American nation itself. As the federal judiciary adamantly resisted antislavery legal advocacy, popular sentiment outside of the South became restive with the rule of law. By the 1850s, events like the Kansas-Nebraska controversy and John Brown's raid, as well as desperate lawmaking like the passage of a strengthened Fugitive Slave Law and the *Dred Scott* decision, demonstrate that the damage done to the rule of law was serious. The Civil War, replacing the rule of law with military power, would soon follow.<sup>245</sup>

The cumulative impact of these two threats to the rule of law suggest again why members of the early republic's legal elite, as they grew old, became pessimistic about the impact of their work.<sup>246</sup> There were, however, two forces during the antebellum period that were working to foster popular faith in the rule of law. The first of these circumstances was economic and sociological change, most especially the expanding tentacles of the market economy in Nineteenth Century America. Again Cooper is a helpful commentator upon American society. In his *Notions of the Americans: Picked Up By a Travelling*

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241. JOSEPH STORY, COMMENTARIES ON THE LAW OF PROMISSORY NOTES (1845).

242. *Law and Community*, *supra* note 18, at 236. See generally Konefsky, *supra* note 34 (discussing the attitudes of lawyers, as well as of merchants and men of literature, toward a commercialized economy in antebellum Boston).

243. *Law and Community*, *supra* note 18, at 246-47.

244. *Id.* at 236.

245. See DAVID DONALD, AN EXCESS OF DEMOCRACY: THE AMERICAN CIVIL WAR AND SOCIAL PROCESS 21-22 (1960).

246. See *supra* note 173 and accompanying text.

*Bachelor*,<sup>247</sup> Cooper emphasized three important material changes occurring in American life at the dawn of the Jacksonian era. One was a rapid growth and diffusion of American population. By 1840 America's population had grown to 17.1 million persons, about one-third of whom lived west of the Appalachian Mountains. Cooper estimated that by 1920 America's population would be 100 million persons, a prediction that would prove too conservative.<sup>248</sup> Had Cooper written his book even a decade later he might also have emphasized the growing diversity of the American people. During the antebellum generation a large immigration from northern Europe began, and during the last generation of the century large numbers of immigrants from eastern and southern Europe would settle in America.

Cooper attributed the diffusion of America's population to what later historians would call the "transportation revolution." It had three phases, beginning with the building of roads, called turnpikes. Its second phase was the building of canals, including the completion of the Erie Canal connecting New York to the Great Lakes waterway system in 1825. The third phase was the building of railroads, which by the 1840s was proceeding at a rapid pace in the North and Midwest. Scientific advances in steam power, embodied in the steamboat and locomotive, underlay the last two phases of the transportation revolution.<sup>249</sup>

The mechanization of transportation, as well as of many facets of the processes of production in both agriculture and manufacture, was critical to the dramatic development of "commerce" in Nineteenth Century America. The major changes that Cooper identified were its rapidly rising volume and its increasingly internal character. There was developing in America an economy of complementary regional markets. The Northeast was becoming the financial, manufacturing and shipping center of the nation's economy; the South remained an economy of agriculture for primarily international markets; and the West was in the process of becoming the leading producer of foodstuffs in the world. Although older forms of social relations and economy persisted,<sup>250</sup> during the half-century from 1790 to 1840 there occurred a massive commercialization of the American economy that, as each decade passed, was affecting the lives of

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247. JAMES FENIMORE COOPER, *NOTIONS OF THE AMERICANS: PICKED UP BY A TRAVELLING BACHELOR* (Ungar 1963) (1828).

248. See White, *supra* note 132, at 12-15.

249. GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION, 1815-1960* chs. II-V (1951).

250. This point is very well made by White. He wrote: "Geographic diversity, provincialism and stratification coexisted in early nineteenth-century America with the turnpike, the canal, the steamboat, and the infant railroad." White, *supra* note 132, at 20-21. He emphasized continuities in the economy of the Nineteenth Century South. Though the "interaction of slave labor and technological developments," namely the cotton gin, was new in the Nineteenth Century, "both slavery and an externally oriented traffic in agricultural commodities had been fixtures of the eighteenth century." *Id.* at 23.

increasing numbers of Americans.<sup>251</sup>

The cumulative effect of these changes was to undermine institutions of popular justice. What had happened during the Eighteenth Century repeated itself a century later, and now even more widely and irrevocably. As America's population became more pluralistic, and the web of commercial exchange widened and became regional, and as middlemen like railroads and wholesaling companies became involved in this process of exchange, local institutions of justice could presumably no longer resolve commercial disputes arising among such diverse and far-flung parties. Jacksonians were living in a period of monumental changes, and this was one of them.<sup>252</sup> In order for increasing numbers of Americans to engage in market exchange, they needed a framework of law to define when commercial transactions were enforceable and the consequences of these agreements.<sup>253</sup> It was in this way that large numbers of Americans initially became accustomed to the rule of law.

The other force of this period encouraging popular acceptance of the rule of law was the work of America's last great lawyer bred in the neoclassical culture of law and letters, Abraham Lincoln. Lincoln's neoclassical lineage is unmistakable. The works that most influenced him were the *Bible*, Blackstone and Shakespeare. He recoiled from Stephen Douglas' resolution to the slavery controversy, seeing it instead as a matter of principle, not popular will. Lincoln unreservedly embraced the rule of law, but unlike the old legal elite, his attachment to it was founded upon a faith almost mystical in nature, not reason.<sup>254</sup>

In dealing with the slavery controversy, Lincoln sought to synthesize the rule of law and the demand of evangelicals that law reflect moral values. Unlike abolitionists, he insisted that adherence to the rule of law, even to unjust decisions like *Dred Scott*, was the best course.<sup>255</sup> But like evangelicals of his era,

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251. See DOUGLASS NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES, 1790-1860* chs. VII-IX (1966).

252. See *id.*; PESSEN, *supra* note 171, ch. 1.

253. See HURST, *supra* note 238, ch. II.

254. This is suggested by Lincoln's reverence for the Declaration of Independence as the primary, and the Federal Constitution its secondary, linchpins of American constitutional law. See FERGUSON, *supra* note 14, at 308-14.

255. In his first inaugural address, Lincoln stated:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to the particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.

ABRAHAM LINCOLN, *FIRST INAUGURAL ADDRESS* (Mar. 4, 1861), *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS 5, 9-10 (James D. Richardson ed., 1897). In 1856 Lincoln urged an audience at Kalamazoo, Michigan not to "interfere with anything in the Constitution. . . . [I]t is the

Lincoln wanted more than assertions of historical connections between law and morality. In a sustained way he wished to infuse law with current moral sentiment, including a moral condemnation of slavery. Like Cooper, for example, he contemplated an amendment to the Constitution recognizing God within the polity. A synthesis of a rule of law and morality provided the basis for Lincoln's famous call for a political religion in 1838:

To the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor . . . . Let reverence for the laws, be breathed by every American mother . . . . Let it be taught in schools, in seminaries, and in colleges . . . let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation.<sup>256</sup>

The impact of Lincoln's undeviating advocacy for a constitutional rule of law upon pre-Civil War popular culture remains uncertain. It would require patience, and a terrible bloodletting, but Lincoln finally got what he wanted, both the preservation of the union and the abolition of slavery. It is possible to conclude that Lincoln's thinking finally prevailed during the late Nineteenth Century and provided a critical basis for the popular reverence of the Federal Constitution of that period. The Civil War had also weakened the American tradition of localistic lawmaking. Postwar law, most especially the Fourteenth Amendment, began to reshape American Federalism. While the attachment to localism remained vital throughout the late Nineteenth Century, and the full impact of the Fourteenth Amendment would only be felt in the Twentieth Century, during the generation after the Civil War the beginnings of a transfer of lawmaking power to the national government are unmistakable.<sup>257</sup>

During the late Nineteenth Century a new legal elite worked assiduously to establish what would become known as classical legal thought, a more strict and formalistic form of judicial lawmaking. The postwar legal elite continued to view law as a science. The leading legal educator of the era, Christopher Columbus Langdell, appointed Dean of the Harvard Law School in 1870, compared it to geometry. This analogy, as well as the view that lawmaking should be strictly separated from political influences, suggested an internal process of reasoning in its elaboration of legal doctrine that was alternatively inductive and deductive.<sup>258</sup> The result of this process was the conceptualization of abstract and objective general principles of law. In contrast to prewar law, these general legal principles applied without regard to the status of the parties involved in a case, or the particular transaction entered into by them. Good

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only safeguard of our liberties." KAMMEN, *supra* note 22, at 102.

256. 1 ABRAHAM LINCOLN THE COLLECTED WORKS OF ABRAHAM LINCOLN 112 (Roy P. Basler ed., 1953).

257. See NELSON, *supra* note 170, ch. VII.

258. See Thomas C. Grey, *Landell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13, 16-20, 6 (1983); M. H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 96 (1986).

examples of the new law were the conceptualization of the negligence principle to replace the more specific legal duties of earlier law, and the development of a general law of contract formation applicable to all sorts of agreements. Indeed, it is in this period that the law of tort and contract, as modern law now conceives of them, formed.<sup>259</sup> By the end of the century Oliver Wendell Holmes had articulated a positivist jurisprudence that radically separated morality from lawmaking.<sup>260</sup>

Had classicism of the late Nineteenth Century legal elite finally popularized the rule of law? Again, this appears to be unlikely. Recent literature suggests that the rise of classical legal thought constituted part of a "search for order" in late Nineteenth Century America. The conceptualization of generalized legal principles like negligence constituted a reordering of legal thought required by the collapse of the common law's traditional mechanism for ordering law, its system of writs. This was an ordering specifically useful to the profession. More generally, under the pressures of Darwinian evolution and radical changes in society and economy, religion was losing influence as a source of ordering of culture. Victorian thinkers sought new mechanisms to reorder the world, and in late Nineteenth Century America, law became one of these devices. Law offered a utopian vision of a rational and neatly ordered world. But it was a rather cold and disengaged one,<sup>261</sup> having its greatest appeal to the late Nineteenth Century legal elite, and perhaps America's emerging professional class. The new jurisprudence's impact upon popular culture remains problematic. For example, it seems quite likely that popular culture maintained a greater adherence to traditional religion as a source of authority than did educated professionals like lawyers.

By the late Nineteenth Century, however, the expansion of the market economy had further transformed American life. That it had made law an unavoidable aspect of modern life was persuasively argued by the writing during this period of the great German legal scholar, Max Weber. The American economy had become thoroughly industrialized and increasingly enmeshed in exchange in international markets.<sup>262</sup> In this context the new law of contract was of particular importance. According to Weber, the modern market economy "could certainly not exist without a legal order . . . . The tempo of modern business communications requires a promptly and predictably functioning legal system . . . guaranteed by the strongest coercive power."<sup>263</sup> Weber's view of the indispensability of the rule of law to the modern market suggests why antilegalism by the late Nineteenth Century had become a lost cause.

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259. See GRANT GILMORE, *THE DEATH OF CONTRACT* 13-14 (1974); *CRISIS OF LEGAL ORTHODOXY*, *supra* note 2, ch. I.

260. See OLIVER WENDELL HOLMES, *THE PATH OF THE LAW*, 10 HARV. L. REV. 457 (1897), reprinted in part in *AMERICAN LEGAL REALISM* 15-24 (William W. Fisher, III et al. eds., 1993).

261. See Grey, *supra* note 258, at 39-40, 53; White, *supra* note 132, at 4-12.

262. See ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* ch. 1 (1967).

263. MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 39-40 (Max Rheinstein ed., 1967).

To the extent that the market was the basis for popular acceptance of the rule of law, Americans did not embrace it, but rather acceded to it as a necessity of modern life. In contrast, by this period popular culture positively embraced the Federal Constitution. Although this Essay suggests a basis for the different views of common and constitutional law in the late Nineteenth Century popular culture, this point deserves further study that lies beyond its scope. There is still much to learn about how popular legal faith in the rule of law became a central feature of American legal culture.

#### IV. LOOKING BEYOND *HERETICS*

The intrinsic merits of Papke's study of legal heretics are great. But undoubtedly its greatest contribution to scholarship is the valuable perspectives that it provides for continuing to study the rise of the rule of law, and the deep popular faith in it, in American history. Legal historians must begin their study of this important subject of American legal history with traditional sources, internal and elite legal texts. There is still much useful debate occurring concerning the significance of these legal texts.<sup>264</sup> But Papke urges us to move beyond traditional sources to explore the new perspectives he incorporates into his study. We must be concerned with losers who supported popular justice as well as winners who supported the rule of law; with popular as well as elite culture; and with law as it relates to other institutions of culture, including religion. Considering such questions will entail the use of not only the traditional sources of intellectual history, but also sources of sociological history.<sup>265</sup> Writing a richly contextual history of the rule of law is daunting. Study of the diverse sources for such a history will be arduous. Further, the sources for the history of popular culture, and for reconstructing sociology, will be incomplete. But however challenging it is to explore the perspectives suggested by David Papke, pursuing them will deepen our understanding of the rule of law, and why it is that Americans are imbued with a deep legal faith.

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264. See Feldman, *supra* note 221.

265. What I am suggesting is similar to what Professor Gabriel Chin and myself suggested for the future study of the contributions of diverse cultures to American law in Cole & Chin, *supra* note 186, Part IV.