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BOOK REVIEW

Law and Culture in Antebellum Boston

Alfred S. Konefsky*


Almost from the moment that Alexis de Tocqueville, seeking a comparison that appealed to his continental sensibilities, proclaimed that the American bar was an American version of an aristocracy, historians have set out, sometimes rather uncritically, to investigate and often to validate his impression. It is in a sense ironic that de Tocqueville ended up lending a stamp of legitimacy to this thesis, because, for at least several generations before his insight, some American observers had been severely critical of the prominent place of the legal profession in American society. Nevertheless, de Tocqueville's underlying assumption has always been accepted, and I do not wish to quarrel with it

* Professor, Law School, State University of New York at Buffalo. I am very grateful for the valuable comments of Dianne Avery, Guyora Binder, David Engel, David Filvaroff, John Henry Schlegel, Robert Steinfeld, and Ted White. The usual disclaimer about their responsibility applies. I am particularly indebted to the John Simon Guggenheim Memorial Foundation and the American Bar Foundation Program in Legal History for fellowships that allowed me to begin research for a study of Simon Greenleaf, an antebellum law professor at Harvard. A portion of this essay will be part of a chapter in that book.

1. The statement from Democracy in America reads in its most distilled version: "It is at the bar or the bench that the American aristocracy is found." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835), quoted in K. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 262 (1985). The quotation has been reproduced in countless editions in the last 150 years.

now. Instead I would like to examine the assertions about how American lawyers became so powerful in American life.

To a certain extent, most of the academic literature has assumed that the American bar, like most of American society generally, was remarkably transformed between the eighteenth and nineteenth centuries. Yet the crucial connection—between the economic, social, and intellectual history of America and the place of lawyers within that framework—is most often ignored. The historians of the legal profession, however, believe they have identified a shift in the status of the legal profession, occurring between the mid-eighteenth and mid-nineteenth centuries, a period when lawyers grew in number and increased their influence over events in American life. Almost unanimously these historians have chosen a single metaphor with which to describe the story: They say that, like Lazarus, the legal profession “rose.”

The titles and subtitles of many of the works dealing with the late eighteenth and early nineteenth century profession illustrate this point. I do not mean to belittle these articles and books; many are fine studies and contain much useful information, but they do demonstrate a pattern. They range from the very broad *Rise of the Legal Profession in America* to the more parochial *Rise of the New York Bar*. Occasionally, just to break the monotony, the legal profession “emerged” or “developed.”

Embedded in these works are two ideas about the meaning of the term “rise.” First, it suggests that lawyers over time and for whatever reason attained political power and prominence in American life. “Rise” in short means lawyers began to exercise political power. Second, “rise” also seems to include some sense of social status—the idea that the rise illustrated in part an increase in the socioeconomic level of those people who chose to become lawyers instead of clergymen, physicians, or teachers.

Historians have written about lawyers as if the relationship between these two ideas, between power in society and social status, was simple and direct. The fit between power and social status is much more complex, though, and there are clues to that fit scattered throughout recent studies both in legal history and social history. Using these studies, I will try to recreate the world in which these lawyers prospered and suggest ways to broaden the inquiry into the history of the profession.


4. For instance, we are all familiar in the bicentennial glow with the steady invocation of the number of lawyers who signed the Declaration of Independence and the Constitution.
the process, I will look at nonlawyer elites functioning within the same society.

The relationship between elite lawyers and other elites has been largely ignored. This vacuum may be explained in a number of ways, all deeply affected by traditional views of lawyers and their role in history. Much of the literature implicitly assumes that lawyers are directly drawn towards power out of economic self-interest, that they are endowed with some parasitic reflex, or that lawyers simply are not very interesting people. Where the symbiosis is so obvious, how can the study of lawyer-nonlawyer relationships be significant, meaningful, or illuminating?

I think it can be shown that lawyers fit into a more complex relationship with other social elites, particularly merchants and industrialists, than simply that dictated by economic self-interest, though lawyers and nonlawyers unmistakably “profit” and prosper as the relationship grows stronger over time. The strength of the attraction among these elites can ultimately be traced to a cultural nexus that incorporates economics instead of relying on it. In this essay, I will explore the interconnected nature of the social visions expressed and the social ties woven by lawyers and other elites in the world of antebellum Boston.

I. INTRODUCTION: LEGAL DOCTRINE AND SOCIAL HISTORY

No community in American history has been as thoroughly scrutinized as Boston from the Revolution to the Civil War. Few aspects of antebellum Boston society have escaped notice and cataloguing—its political, economic, social, religious, cultural, and legal life and institutions, and both inter- and intra-class relations. In particular, the for-

5. By Boston, I mean to include not only Boston proper (as well as proper Boston), but also contiguous communities like Cambridge, whose inhabitants closely interacted with Boston, and more distant communities like Lowell, whose residents were affected by decisions made every day in Boston, though they maintained a more passive interaction with Boston than did Cantabrigians.

6. For discussions of politics in nineteenth century Boston, see K. Brauer, Cotton versus Conscience (1967); A. Darling, Political Changes in Massachusetts (1925); R. Formisano, The Transformation of Political Culture: Massachusetts Parties, 1790s-1840s (1983); T. O’Connor, Lords of the Loom (1968).


For descriptions of social, religious, and cultural life in Boston, see L. Buell, New England Literary Culture (1986); The Federalist Literary Mind (L. Simpson ed. 1962); D. Howe, The Unitarian Conscience: Harvard Moral Philosophy, 1805-1861 (1970); W.
formation of an elite culture has received extraordinary attention. Indeed, historians have investigated almost every conceivable aspect of elite structure and development.

Given this extensive body of social history, it seems strange that the most significant recent attempt to establish a relationship between legal elites and other elites in the early nineteenth century comes in a work of legal history. In a chapter entitled "The Relation between the Bar and Commercial Interests" in his important book, The Transformation of American Law, 1780-1860, Morton J. Horwitz makes the following bold assertions: (1) "In the period between 1790 and 1820 we see the development of an important new set of relationships" that established the "political and intellectual domination" of lawyers—"the forging of an alliance between legal and commercial interests," and (2) "The active involvement of lawyers in commercial affairs marks a major transformation in the relationship between legal and mercantile interests." Horwitz makes several problematic assumptions: the dating of the alliance between lawyers and commercial interests after 1790 and not before, the location of the communities in which the alliance or alliances reached fruition, and the unity rather than multiplicity of "commercial interests." Nevertheless, the assertion of an "alliance" is arresting. However, Horwitz uses a peculiar species of evidence to establish the chapter's major insight: His evidence is almost all purely legal in character.

One would expect a doctrinal method of argument in a work of legal


On class relations, see O. Handlin, Boston’s Immigrants (rev. ed. 1979); S. Thernstrom, Poverty and Progress (1964).


8. The explanation of this exercise in scholarly preoccupation is certainly worth a historiographical essay by now, in part to explain the fascination of several generations of historians. The richness of the sources, the importance and contributions of the main actors, and the allure of the protagonists can only partly explain this ethnocentrism. Perhaps it has more to do with the fortuities of time, location, and mode of historical training.


11. For purposes of this discussion, I will accept Horwitz’ characterization of merchant opinion. His argument, of course, would fail if someone could establish that merchants were not nearly as antilegal as he contends. See Moglen, Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law, 93 Yale L.J. 135 (1983) (student author).
history—particularly in a work that depicts changes in legal doctrine as episodes in the history of ideas, a point often misunderstood by his critics. However, reliance on this species of evidence immediately presents a methodological problem that can be readily grasped as a simple conceptual paradox. Horwitz sought to prove his social historical point, what he identified as a significant shift in social relations, and the subsequent development of an important set of social relationships, by pointing to shifts in legal doctrine. Can legal doctrine be used to identify shifts in social relations? The problem is not that legal doctrine cannot illuminate social relations, for it certainly can, but that at least in Horwitz’ hands the link between social forces and legal doctrine is left fundamentally ambiguous. It is not clear whether Horwitz is arguing that shifts in legal doctrine brought forth changes in social relationships (he comes close to making such an argument, which would make law much more autonomous than it appears he would generally be willing to contend), or simply that an alteration of legal doctrine is strong evidence of a social change that “must have” occurred within whatever community he would like to find it. It is also possible that he is making both arguments. This basic ambiguity undermines the strengths of both of his major points: first, that a social alliance was forged, and second, that legal doctrine changed—both quite useful historical insights. Unfortunately, the murky relationship between them undercuts their power.

The question of the kind of evidence necessary to support these general observations of the social facts is puzzling. Let me focus on only one aspect of the use of evidence. Horwitz seems to maintain that evidence of the change in social relationships may be found in two kinds of sociolegal facts. First, “the mercantile classes shed a virulent antilegalism often manifested during the colonial period by a resort to extralegal forms of dispute settlement.” I understand this to mean that we can expect to find in the relevant period an increased reliance by merchants on legal, as opposed to extralegal, dispute resolution, a shift in the direction of a greater use of lawyers and litigation. Second, at the time of the merchants’ change in behavior, “the Bar first becomes active in overthrowing eighteenth century anticommercial legal doctrines.” Now, we have three independent propositions that could just as easily turn out to be dependent. First, we have an observation that an alliance was forged; second, that the attitude of merchants toward law changed; and third, that lawyers’ conduct altered over time. All three can stand alone as historical observations. One need not argue that social relationships changed because legal doctrine did, or vice versa, or that merchants’ attitudes changed because lawyers’ conduct or

13. M. Horwitz, supra note 9, at 140.
14. Id.
attitudes changed, or vice versa. One can argue that things changed without suggesting why they did—the cataloguing of change is valuable enough, especially in this era of the death of causation. The correspondence between the three social phenomena may be interesting enough to be worth stating on its own. But Horwitz seems to imply that the social relationships are determined by legal changes and/or attitudes toward a nascent legal ideology. Perhaps only the structure of the chapter is at fault, but it nevertheless appears that he is either consciously or unconsciously suggesting a causal relationship between the three historical observations, and not simply establishing the historical validity of their independently verifiable existence.

An examination of Horwitz' evidence reveals some of this latent ambiguity in his argument. "[O]ne of the leading measures of the growing alliance between bench and bar on the one hand and commercial interests on the other," he writes, "is the swiftness with which the power of the jury is curtailed after 1790." Merchants before 1790 supposedly sought extralegal forms of dispute resolution because of their antipathy to juries, whom they suspected had little understanding of or sympathy for the commercial world. Therefore, Horwitz points to three procedural devices designed to "restrict the scope of juries": first, the "vastly expanded" rise of the "special case" or "case reserved" vehicle, invoked to strengthen the power of judges at the expense of jurors; second, the increased frequency with which post-verdict remedies were used in civil cases, particularly in awarding a "new trial for verdicts 'contrary to the weight of the evidence'"; and third, the very important curtailment of the jury's power to determine law as well as fact, with a resulting reallocation of power favoring the judge over the jury. Now, if we return to his original point—that these changes are measures of the growing social alliance—we must squarely face a problem. Since merchants presumably did not like juries, any change in legal doctrine diminishing the jury's role would have met with approval by the men of commerce. The implication, therefore, is that merchants approved of the anti-jury legal change. But does that mean that we can infer a social alliance? Horwitz clearly establishes that the jury was increasingly constrained by the judiciary during this period. Is he therefore entitled from the legal evidence to draw the conclusion that social lives changed? The puzzling and elusive problem of causation, which might very well paralyze us, is left to tantalize us. We cannot tell from the use of legal evidence whether the social relationships were instrumental in leading to legal change, whether the legal changes were a necessary precondition to the alliance, or whether a change in consciousness led to a reformulation of social relations. Horwitz, there-

15. Id. at 141.
16. Id. at 141-42.
17. Id. at 142.
18. Id. at 142-43.
fore, leaves the relationship between legal history, as it is traditionally conceived (emphasizing legal doctrine), and social history somewhat muddled, and in so doing threatens the integrity of both the social historical and legal historical insights.

Making legal doctrine accessible and understandable, as well as giving it historical flesh, is no mean achievement, nor is demystifying legal rules and suggesting their social impact. Yet Horwitz stumbles when he uses doctrine to assume a social universe. I do not think that universe need be assumed. It can be rendered in detail. The rest of this essay will be devoted to reinforcing Horwitz' point about a social alliance between the bar and other elites, primarily commercial and industrial, by using the sources of social history and not purely legal history. The essay will strengthen his insight as applied to one community, Boston, in one time period, from about the turn of the nineteenth century to the advent of the Civil War. I will look first at literary culture, then at legal culture through one of its representative figures, Joseph Story, and finally at merchant culture. I will also suggest through my examination how each of these aspects of elite Boston life worked together to shape a common culture. By thus broadening Horwitz' canvas, I hope to improve the overall portrait and in the process bring us closer to understanding the social position of lawyers in pre-Civil War Boston. In fact, this essay is framed by two portraits—one imaginary and one real.

II. LITERARY, LEGAL, AND MERCANTILE CULTURE: THREE PICTURES OF ELITE SOCIETY

The first portrait is imaginary, but it depicts an actual historical event. Imagine, if you will, a posed portrait of a group of men sitting around a table in the attic of a Boston tavern circa 1805. There are fourteen of them this evening, and they are supposed to meet weekly, although it is a rare occasion when they all attend. Their purpose is to publish a literary journal of sorts. And they include men whose family names are already readily recognizable or will shortly become quite familiar in the history of Boston. They are members of the Anthology Society of Boston, guardians of the Monthly Anthology, predecessor of the North American Review. Their president is John S.J. Gardiner, rector of Trinity Church, schoolmaster, literary critic, and, at one time but only briefly, a practicing lawyer. William Emerson is vice president, and also a minister of the First Church of Boston—he is better known as the father of Ralph Waldo Emerson. Two other clergymen are present: John Kirkland, minister of Boston's New South Church, soon to be named President of Harvard, and Joseph Buckminster, the young, shining light of Boston's aspiring literary culture, its "central figure," and
minister of the Brattle Street Church. Three physicians are included—John Warren, James Jackson, and Jacob Bigelow, members in good standing of Boston's medical establishment. Six others are lawyers, although with varying degrees of aptitude and interest—Benjamin Welles, Arthur Maynard Walter, William Smith Shaw (also clerk of the federal district court), Alexander H. Everett, James Savage, and Peter Thacher. Edmund Dana, the final member of the group, can best be described as a confirmed dilettante.

A. The Shaping of Cultural Values

1. Literature.

Who were these men and what were they trying to accomplish? And is it not peculiar that almost half of the members of a literary society were lawyers? The group (lawyers, clergymen, and physicians) produced a literary quarterly. All the members were federalists, all orthodox in their politics. They were mostly Unitarian and therefore liberal in their religious sentiments, and were drawn together because they had a certain impression of what they perceived to be an emerging American culture. Moreover, they wished to form guidelines for appropriate conduct, style, and taste for American society, and "to mediate for the new nation between two visions of its cultural fate: a vision of the progress of letters in America and a prospect of the barbarization of letters in America."

The symbol for much of this was Joseph Buckminster's 1809 Phi Beta Kappa address entitled "The Dangers and Duties of Men of Letters" published in The Monthly Anthology. Invoking the fearsome French Revolution, Buckminster noted:

The fury of that storm . . . is passed and spent, but its effects have been felt through the whole system of liberal education. The foul spirit of innovation and sophistry has been seen wandering in the very groves of the Lyceum, and is not yet completely exorcised, though the spell is broken . . . .

. . . Our forms of education were becoming more popular and superficial; the knowledge of antiquity began to be despised; and the hard labour of learning to be dispensed with. Soon the ancient strictness of discipline disappeared . . . and a pernicious notion of equality was introduced . . . .

Pronouncements like Buckminster's have led to descriptions of the members of the Anthology Society as "clumsy, confused, even na-

20. Id. at 230.
21. Id. at 10-12, 229-33.
22. On federalism, see THE FEDERALIST LITERARY MIND, supra note 6, at 11; on religion, see id. at 26-27.
23. Id. at 40.
24. The address is reprinted in id. at 95-96.
ive,” and yet these men helped to shape the cultural tradition of America. Attempting to make art respectable and separate it from its association in Puritan times with excess and luxury, they also tried to shape a universe founded on “literary aspiration” which would somehow guide Americans away from too full a submergence in unchecked democratic values. They were a group that “determined . . . the academic manner of the Brahmins” in Boston life for the rest of the nineteenth century. They were also a thoroughly boring group. Ralph Waldo Emerson wrote of them (one has to appreciate that he was talking about his father): “To write a history of Massachusetts, I confess, is not inviting to an expansive thinker . . . . Since, from 1790 to 1820, there was not a book, a speech, a conversation, or a thought in the State.” Although the observation may be a little harsh, I think it captures some of what they tried to do. They were “commonplace, imitative, and docile.” Their emphasis was on “the continuity of letters in Western civilization.” They managed to achieve “a stuffy, late-Augustan hegemony.” Yet out of this group “emerged the Boston of Longfellow, Holmes, Lowell, and the later Emerson, the Boston of the North American Review, the Athenaeum, the Saturday Club, and the Atlantic Monthly, the Boston called the ‘American Athens.'” But what did this group of people sitting around the attic of a tavern have to do with American law?

Robert Ferguson, in his interesting and important work, Law and Letters in American Culture, helps answer the question. “[L]awyers across three succeeding generations,” Ferguson argues,

were part of a now-forgotten configuration of law and letters that dominated American literary aspirations from the Revolution until the fourth decade of the nineteenth century, a span of more than fifty years. Half of the important critics of the day trained for law, and attorneys controlled many of the important journals. Belles lettres societies furnished the major basis of cultural concern for post-Revolutionary America; they depended heavily on the legal profession for their memberships. Lawyers also wrote many of the country’s first important novels, plays, and poems. No other vocational group, not even the

25. Id. at 40.
26. Id.
27. Id.
28. VIII JOURNALS OFRALPH WALDO EMERSON 339 (E. Emerson & W. Forbes eds. 1914), reprinted in THE FEDERALIST LITERARY MIND, supra note 6, at 6. This statement is quoted over and over again. See L. BUELL, supra note 6, at 85 (arguing that until recently, “Emerson’s dictum” was taken too seriously, eventually leading to what “Lewis Simpson called the ‘myth of New England’s intellectual lapse’” during that period); R. FERGUSON, supra note 3, at 7; 2 V. PARRINGTON, supra note 6, at 317.
29. THE FEDERALIST LITERARY MIND, supra note 6, at 5 (summarizing Emerson).
30. Id. at 40. But on provincialism in American literature, see A. VON FRANK, THE SACRED GAME (1985).
31. L. BUELL, supra note 6, at 32.
32. THE FEDERALIST LITERARY MIND, supra note 6, at 40.
At times, Ferguson also contends that as part of the "configuration," there was a "subordination of literature to law."34 By this he seems to mean that the broad idea of law (as opposed to technical legal concepts) and its place within a republican culture was central to the literature of the period, if not its driving intellectual force. At other times, the claim appears to be simply that there was "a remarkable symbiosis between law and literary aspiration."35 There is a certain tension between "subordination" and "symbiosis," particularly since one might argue that the "configuration" itself, and law's place within it, might be part of a wider movement, like neoclassicism or the Scottish enlightenment, that encompasses law as well as literature, art, or for that matter any of a number of things. But I do not wish to quibble with Ferguson's argument. That there was a relationship between law and literature now seems inescapable thanks to Ferguson's work. I would like to draw on his skillful portraits of the infusion of law into the literary efforts of the young republic to help establish that certain cultural attitudes and values were widely disseminated.

Ferguson finds that

[t]he greatest difficulty for the writer of the period was to resolve and, failing that, to circumscribe the unknowns within his experience. . . . Creativity really meant the ability to impose order upon unruly material. Hence, the vision of control within eighteenth-century legal thought and the lawyer's faith in universally applicable forms provided ready answers to a serious literary problem.36

As an example of this insight, Ferguson rescues from "obscurity" Jefferson's Notes on the State of Virginia, published in 1787.37 This work helps illustrate the pervasiveness of and preoccupation with problems of order, for Jefferson's political beliefs could not have been any further from those of the members of the orthodox Anthology Society meeting in Boston a few years later. Yet Jefferson and his intellectual and political enemies shared a concern that identified "order" as a critical problem in the new republic. Where they differed was in the working out within republican theory of the details and implementation of the design.

Jefferson's Notes, according to Ferguson, demonstrated that "legal formulation offered stability, a marriage of solution and problem that would keep the lawyer at the center of American literary aspirations," and that "legal thought controls mental adventure."38 The "legal for-

33. R. FERGUSON, supra note 3, at 5 (footnote omitted); see also id. at 68, 71-72, 244, 291.
34. R. FERGUSON, supra note 3, at 5.
35. Id. at 25.
36. Id. at 33.
37. Id. at 34, 36.
38. Id. at 54.
ulation,” through Jefferson’s hands, “dealt in a prudence of means that reached toward ideal totalities, and it cemented the issue of individual freedom within a construct of social order,” a construct that owed much to “neoclassical beliefs in fixed standards, hierarchical order, and man’s place within society.”

Ferguson moves beyond Jefferson to assert that Americans of the formative period were searching for unities, and a combination of classical and neoclassical values served this end well. Common assumptions such as the harmony of nature, the efficacy of reason, the importance of hierarchy and decorum, and the inherent structure of all knowledge were especially useful in an American aesthetics of order and control. . . . The lawyer held republican podiums and dominated republican literature because he offered a vital concept of solidarity and a useful faith in universally applicable forms.

It is not always clear what was meant by the rhetoric of “order and control.” At one point, Ferguson comments somewhat laconically that “[i]t was an age of broad definitions.” But he does give us some useful examples from the literature of various images of order and control, and the manner in which they contributed to the configuration of law and letters.

The six post-Revolutionary “major writers” Ferguson analyzes are divided into two groups—three who remained lawyers and retained literary ambitions, contributing as time and inspiration allowed, and three who abandoned the practice of law to pursue literary careers more directly. Ferguson finds in all six the unmistakable stamp and influence of legal thought, although in each of their works the influence emerges somewhat differently.

The three who stayed in law, John Trumbull the poet, Royall Tyler the playwright, and Hugh Henry Brackenridge the novelist, “shaped imaginative literature in the immediate post-Revolutionary era,” and were “the first realists in American literature.” Although different in their social origins and destinations, they tended to write to “control passions, not to stimulate them,” and “instinctively took and defended a conservative position in the midst of change.” Ferguson sees Trumbull as being “for the Revolution but against revolution. . . . The democratic tendencies in Revolutionary politics had to be resisted because only a balance of aristocratic and popular components could hope to produce a responsible government.” His poetry “points to a crying need for civic balance and respect for law,” and he “turned for

39. Id. at 57, 55.
40. Id. at 76.
41. Id. at 26-27.
42. Id. at 97.
43. See id. at 97-98.
44. Id.
45. Id. at 107.
46. Id. at 109.
answers to a conservative and legalistic republicanism. 'The friends of order, justice, and regular authority' . . . were certain that a proper respect for law would supply leadership and insure virtue.'47 In Tyler's work, Ferguson identifies "his generation's placement of law at the ideological center of the republican experiment."48 In his comedy, The Contrast, written in 1787, Tyler presents "[l]uxury and materialism versus virtue and patriotism, rank versus the leveling impulse, experience versus innocence, modernity versus tradition, city versus country, humor versus sentiment."49 In the contrasts, the characters "play off of an obsessive insecurity of the period: the problem of correct behavior."50 And Ferguson notes that "[d]efinitions of good behavior always present difficulty, but the bottom line for early republicans must be whether or not a correct code of conduct will pay off in a changing society."51 "Correct behavior" is another manifestation of order and social control. And in Brackenridge's novel, Modern Chivalry, Ferguson finds, among other things, "the presumed power of law to instill virtue."52 These literary works impart the lessons of balance, order, virtue, sound behavior, and the fear of chaotic or unchecked change. It is a literature with a purpose.

In contrast stand the three who left law for literature—Charles Brockden Brown, "the country's first important novelist"; Washington Irving, "its first prominent author"; and William Cullen Bryant, "its first national poet."53 Unhappy in law, Brown left practice, thereby triggering "permanent disapproval from family and friends," and a long period of "aimless unhappiness."54 When he began writing, he did not forget his exposure to law. In fact, "[i]n each work, central characters are forced to cope with a new level of reality after the rules and laws of society no longer apply." In short, Brown had a "need to trivialize the law."55 And his "repeated theme is the inability of law to control or even to define behavior."56 In the guise of one of his main characters, "[h]e consciously seeks to test and disrupt the rationalism, tranquillity, and decorum—hallmarks of neoclassicism"57—of established society. "[A] reliance on emotion"58 replaces reason. "The need to disrupt is a potent force in all of Brown's novels . . . ."59 In short, Brown assails the well-oiled machine of social order, seeking to

47. Id. at 110.
48. Id. at 114.
49. Id. at 115.
50. Id. at 118.
51. Id.
52. Id. at 126.
53. Id. at 89.
54. Id. at 130.
55. Id. at 138.
56. Id. at 139.
57. Id. at 142.
58. Id.
59. Id.
“disrupt” it from the dark side of law. Although this alternative vision is interesting, one point seems inescapable and striking. As with those who emphasized control and order, Brown recognized its force. He just disagreed with its power and registered a dissenting voice.

Similarly, Washington Irving, on the verge of abandoning the practice of law, “directed his remaining energies away from—indeed, against—the Law”\(^60\) in his early literary works. Irving’s *A History of New York*, published in 1809, is “‘a comedy of confusion,’ ” designed “to ridicule order and system within the world,”\(^61\) in part “by unmasking republican pretensions to order and control,” and “undermin[ing] all faith in the saving virtues of law and order.”\(^62\) In rejecting the Jeffersonian legal vision, Irving, according to Ferguson, “rejects the Enlightenment’s assumption of a discernible relation between natural order and social harmony—an assumption that encourages an epistemology based on the connection of natural law with positive or man-made law and that supports the theory of social contract from Locke to Rousseau.”\(^63\)

Bryant, on the other hand, although “a young and rather angry lawyer in western Massachusetts just after the War of 1812,”\(^64\) nevertheless maintained in his early poetry an “insistence on calm control,” and a “search for order [that] emphasized self-control.”\(^65\) Bryant’s “masterpiece” of 1815, “Thanatopsis,” is “a deliberate movement away from nature by a nineteenth-century American in search of other controls.”\(^66\) Somehow, Bryant sensed “a chaos and potential for evil in nature” that offended his search for order.\(^67\) His poetry represented “an early republican searching for controls.”\(^68\)

Ferguson regards the literary experience of the three who left the practice of law as having been influenced powerfully by a kind of “vocational anxiety” associated in a republican society with leaving a productive calling like law (with its opportunity to pursue literature) for a kind of luxuriant, potentially unproductive idleness devoted purely to literature.\(^69\) Yet moving away from the mainstream in each case seems to have followed unhappy experiences in the actual practice of law that apparently demonstrated to the practitioners turned litterateurs that there might be a gap between the idealization of law and its realization. There is thus a curious, unresolved tension between Ferguson’s portrayal of the centrality of law to the creation of a virtuous republican

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60. *Id.* at 154.
61. *Id.* at 166 (quoting W. Hedges, *Washington Irving* 262 (1965)).
62. *Id.* at 161, 158.
63. *Id.* at 159.
64. *Id.* at 173.
65. *Id.* at 175.
66. *Id.* at 193 (emphasis in original).
67. *Id.* at 186.
68. *Id.* at 182; see also *id.* at 187.
69. See *id.* at 91-95.
literature, and the rejection of law by so many of the lawyers/writers as inapposite and threatening, if not in theory, then in the reality of its practice. Ultimately, the tension may be resolvable by noting that for both sets of writers, the critical question was one of defining social order. Both for those who embraced order, and for those who set themselves in opposition, a conception of social order determined where they stood in relation to the social scheme. They simply could not escape its pull. Thus the ideals of the literary culture in the new republic revealed a connection with law that emphasized order, balance, acceptable behavior, and control.

But a literary interest in order and control by an unexpected group of lawyers-turned-authors is only part of the cultural picture. There are still the lawyers as lawyers and the merchants to consider. How then were these values translated into what appears to be the lawyers' strictly legal universe?

2. Law and lawyers.

The lawyers in the Anthology Society began to write—not in legal periodicals, which did not exist in America at this time, but in literary periodicals. What did they write about? They occasionally wrote about law, oddly enough, and they did so in a literary context. They wrote book reviews on legal treatises and sprinkled them with literary allusions, showing off their classical educations. They thereby transformed legal issues into larger images.

When they wrote, they emphasized two themes in particular. First, they discussed the growth of American law, which they considered an example of a maturing America, setting out on its own, free and independent, forging its own traditions. Second, they emphasized an aspect of law that they felt was most important for the survival of a bourgeois social order. They talked about an internal, orthodox order growing out of law which pulled communities together by focusing them on norms. Thus a young Daniel Webster, reviewing a book of law reports in 1807 in the Monthly Anthology, wrote: "Adjudged cases, well reported, are so many land-marks, to guide erratick [sic] opinion." The book review then extolled the virtues of precedent: "Precedents not only assist the judge; they, in a good measure, control him . . . . They prevent the substitution of personal opinions for the doctrines of the law." The review then concluded with an assault on New York judges for publishing seriatim opinions. Webster criticized the seriatim custom because diversity of opinion within a decided case undermined stability and undercut the power of precedent. The review implied that the function of law should be to generate stability and to guarantee

70. 1 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 172 (A. Konefsky & A. King eds. 1982).
71. Id. at 173-74.
order. What appeared as purely a lawyer’s issue was also laden with political content, clearly understandable by federalist readers concerned with order during the Jeffersonian period. Although the book review was a piece of legal rhetoric, its message and tone were otherwise indistinguishable from similar contemporary efforts in art, literature, or politics.

By placing legal issues in a literary journal, the editors emphasized the continuity of the new world tradition with the old world tradition. The idea that law’s role was to foster stability was not unique to the literary aspirants of the period. An example of this general jurisprudential view can be found in the editor’s preface to the first volume of Hall’s American Law Journal, published in 1808, the first American legal periodical:

If a Law Journal have been found to be so useful and necessary in Great Britain, where notoriety and uniformity may be established by an appeal to the supreme tribunal, how important would such a publication be in our country, governed as it is by the various and conflicting laws of different states, which are yet so intimately connected by commercial and political relations?

An act may be legal in one state which is not so in another. Every merchant must sensibly feel the inconvenience and perplexity which result from his ignorance of those laws by which his dearest rights and most important privileges are regulated. If he apply for advice respecting a contract which has been made in a different state, his counsel may not be able to procure the statute by which that transaction is governed: and if it be in his possession, he is still ignorant of the exposition or limitation which it has received from juridical adjudications.

At the instance of several professional friends, the Editor has been induced to propose the publication of a Law Journal, on a plan which is calculated, in some measure, to remove the inconveniences which have been detailed. If he should be so fortunate as to attract the attention of professional gentlemen throughout the country, and be aided by the communication of such laws and decisions of general importance, as are enacted or adjudged in the respective states, the work, which is now submitted to their patronage, may, in time, comprise the rudiments of a complete system of American jurisprudence.

All persons engaged in commercial transactions, as well as those who are attached to the bar, are interested in a publication of such extensive usefulness: and when it is promised that every effort of perseverance shall be brought to the task, the Editor may be permitted to express a hope, that his purpose will not be frustrated by indifference.

Hall's purpose was to show in some way that there should be uniform and predictable commercial rules that can contribute to stability and continuity. The literary preoccupation with social order, therefore, was only one aspect of a general movement in Boston at the beginning of the nineteenth century towards uniformity and predictability in all aspects of culture, be it literary or legal. Not insignificantly, Hall's statement recognized the particular importance to merchants of order and predictability. The alliance that Horwitz noted between the bar and commercial interests was, in part, forged by the perceived need for order; that is, the lawyers were charged with a special responsibility, in a political sense, to insure a particular aspect of social order. Those people who were writing in literary journals looking for standards were charged with another aspect of that same responsibility. So there was a deep agreement among elites about what was important and significant. Law was only one part of this deeper fit—only one expression of cultural views widely held at that time and place. Lawyers in their work also tended to reflect those views derived from the wider society, and their role in that society therefore stemmed from their shared values. In that sense, they did not really "rise" as much as participate in a kind of cultural hegemony, as one aspect of the general movement in elite culture toward order and uniformity.

No one in New England's legal culture better symbolized that cultural hegemony than Joseph Story. It is Kent Newmyer's significant achievement in his biography, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*, to place Story's accomplishments firmly within their cultural context. The context was New England's own version of republicanism—a republicanism for Story that was steeped in the lore and lessons of the American Revolution. Thus, Newmyer locates Story within the republican attributes of "patriotism, a belief in virtue, and the tradition of public service," a set of ideals in which "individualism was inseparable from community responsibility . . . . Public service, as in the classical *res publica*, ennobled private ambition." Despite the difficulty of translating classical republicanism into the American experience, Story seemed to believe by his upbringing and training that he was destined for a life of civic virtue—to participate in the life of his community, as an individual contributing to the whole.

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73. J. Hall, 1 American Law Journal v-vii (1808).

74. K. Newmyer, supra note 1, at 11.

According to Newmyer, "[l]aw was the cement of republicanism," the "cement" that kept a virtuous society together when faced with the possibility of being torn apart by individual interests arrayed against each other. Story was attracted to law because of the balance within society he perceived it could provide. But not just any conception of law would do. Republican law had to be "scientific." Newmyer points out that

[[legal science was a cultural given in the early nineteenth century, which is to say that it was rarely defined with precision. ... Most often it meant simply systematic law ... . In this respect, legal science stood for legal reform: the clarification and rational ordering and effective dissemination of legal principles. ... This moral, ordered legal universe was also—for Story, at least, ...—infused with practical purpose. Legal science was applied science ...]77

For Story, therefore, legal science strove for uniformity, certainty, and predictability, in other words, "order," at the same time that it aspired to be flexible and adaptable, practical and applied. This tension in Story's thought sometimes pulled him apart, sometimes left him to be held together by bailing wire, and sometimes led to a certain amount of synthetic insight on its own terms, as when he seemed to be arguing for a slow, controlled, measured, orderly adaptation and change.

The republican lessons internal to "scientific" law called for someone who, first, could order increasingly complex legal rules so that they

(1982); Shalhope, Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography, 29 WM. & MARY Q. (3d s.) 49 (1972).


For an excellent presentation of republicanism as the backdrop against which the Marshall Court must be understood, see White, The Marshall Court and Cultural Change, 1815-1835, in 3 The Holmes Devise History of the United States Supreme Court (forthcoming 1988).

Nevertheless, there are lawyers whose considerable understanding of republicanism informs their work. See, e.g., Mensch, The Colonial Origins of Liberal Property Rights, 31 BUFFALO L. REV. 635 (1982); R. Gordon, Lawyers as the American Aristocrats (Feb. 19 & 20, 1985) (unpublished Holmes lecture, Harvard Law School) (including an eloquent cri de coeur for a return in part to a world of civic virtue as a model for late twentieth century lawyering); F. Michelman, Republican Property 5 (1986) (unpublished manuscript) (expressing "sympathies for (or should I say yearnings toward) the republican view" as he defines it).

On the dangers of lawyers writing legal history, see Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. LEGAL HIST. 275 (1973), which was a review essay of two earlier works on Story, neither of which, I believe, measures up to Newmyer's biography. See G. Dunne, Justice Joseph Story and the Rise of the Supreme Court (1970); J. McClellan, Joseph Story and the American Constitution (1971).

76. K. Newmyer, supra note 1, at 234.
77. Id. at xiv.
could be certain and reliable (but not necessarily static or fixed); and second, who could understand the practical need for

new technically sufficient law effectively administered . . . . Businessmen who sought to deploy capital efficiently needed a body of rational rules that they knew in advance and that they knew would be enforced. The lawyers and judges who succeeded were those who could deliver that kind of law. Legal science and legal scholarship, it followed, were good for business . . . .

"Practical," therefore, meant learning from the business community what matters were important to its interests, and seeking to adapt legal rules accordingly. Story was admirably suited to both tasks; both furthered the republican impulse to balance and control.

External to things purely legal, "law pursued as a science" also had political connotations in republican thought, for "administered by lawyers and judges," scientific law "was a corrective to party government and possibly even an alternative to it."79 Party government could lead to unrestrained factionalism as the expression of individual interests. Theoretically, law tended to restore the balance between individual and community, tying one to the other, and harnessing the individual in the pursuit of public good.

Early in his career, Story had learned about the dangers of party. After Harvard College, reading law, and dabbling in poetry (his first book, *The Power of Solitude*, published in 1801, was reviewed in the *Monthly Anthology*),80 Story launched a legal and political career in Essex County, north of Boston. As a Republican in Federalist Massachusetts, he swam against the tide. But he also experienced difficulty within his own party as a congressman ambivalent about supporting Jefferson's embargo.81 Jefferson never forgave Story, and indeed attempted to persuade Madison not to appoint Story to the Supreme Court, branding Story as a "pseudo-republican" and a "Tory." Madison listened to a degree; three others were offered the position before Story. Two, Levi Lincoln and John Quincy Adams, rejected the offer; one, Alexander Wolcott, the Senate rejected.82 And so Joseph Story came to the Supreme Court in 1812 and embarked on a career that gave him the broadest possible opportunity to implement his republican vision.

His career can best be divided into three overlapping areas, spanning thirty years as judge and over fifteen years as both legal educator and legal treatise writer. The three careers are remarkably unified and interconnected. Each illustrates Story's reliance on republican law

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78. *Id.* at 66-67.
79. *Id.* at 38.
80. *Id.* at 59, 70, 400 n.75.
81. *Id.* at 52-63.
82. *Id.* at 70-71. Jefferson's views of Story were, of course, confirmed when Story embraced conservative Massachusetts Whig politics later in his life.
while simultaneously highlighting the ways in which that law was changing.

a. Story as judge.

Newmyer has presented us with numerous examples of Story’s craft as a judge, both on the Supreme Court and as a federal circuit court judge (part of his Supreme Court responsibilities). Certain themes unite Story’s work in both the private law and public law areas. I have chosen a few examples to illustrate how he gave expression to his search for republican order.

i) Federal common law of crimes.

Story generally sought enhanced jurisdiction for the federal courts. In particular, he launched several forays into the problem of whether or not the federal courts had any type of common law jurisdiction—a “subject of searching and heated partisan debate in the first decades of the new nation.” Generally, legal sentiment was ambiguous, and arguments and cases on both sides of the proposition could be found. But in 1812, the Supreme Court, in an opinion by Justice Johnson in United States v. Hudson and Goodwin, rejected “the existence of a federal criminal common law.” Story remained undaunted, and shortly thereafter, sitting on circuit, launched a rearguard action. In United States v. Coolidge, he tried to use the federal courts’ recognized admiralty jurisdiction to accomplish what apparently could not be achieved directly. The issue, Story argued, “was not ‘whether the United States as a sovereign power, had entirely adopted the common law,’ but whether the ‘rules of the common law’ shall define the ‘nature and extent’ of authority bestowed by the Constitution [i.e., admiralty jurisdiction] and determine ‘the mode, in which it shall be exercised.’”

The question remains, however, as to why Story was interested in a federal common law. Notice that first, he seems to have held a generalist’s expansive jurisprudential notion of what the “common law” was; otherwise how could he have thought about tapping such a potentially particularistic body of law for the federal courts? Second, he had the

83. Id. at 98.
84. Id. at 100; see 11 U.S. (7 Cranch) 31 (1812).
86. K. NEWMYER, supra note 1, at 104. Story’s circuit views were later rejected by the full Supreme Court. See id. at 105.
87. Justice Chase’s statement of the particularistic rather than the general view of the common law is illustrative:
Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been no where introduced; that some states have rejected what others have adopted; and that there is in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application.
United States v. Worrall, 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766). For a scholarly disagreement along these lines compare M. HORWITZ, supra note 9, at 9-16, with Presser, A
obvious concerns about encouraging broad federal jurisdiction. But what drove Story was the view that putting in place a federal common law meant that

judges would be bound by clear and fixed rules, by the science of the common law. As [Story] put it, 'upon any other supposition the judicial power of the United States would be left, in its exercise, to the mere arbitrary pleasure of the judges, to an uncontrollable and undefined discretion.' Legal science, it would seem, justified judicial power.\(^8\)

To combat discretion, and to insure certainty and order, Story attempted to carve out an area of federal common law. In a potentially chaotic system of divided powers, Story sought to bring uniformity and order.

\[\text{ii}) \quad \text{Commercial law.}\]

Newmyer succinctly tells us that

Story was the great champion of uniform commercial law and all that went with it. The necessity of uniform law was a lesson taught him by New England capitalists; uniformity was the essence of legal science: principle and practice merged. And by facilitating uniform commercial law Story could not only serve his section but consolidate the Union along commercial lines . . . .\(^9\)

Newmyer believes this insight helps explain Story's approach in *Swift v. Tyson*,\(^9\) in which he tried through the federal courts to prepare the foundation for a "uniform body of commercial law." Whatever the oft-debated jurisprudential views and the conflict over diversity jurisdiction associated with Story's opinion in *Swift*,\(^9\) Newmyer does well to remind us that at the heart of the matter was a private law "question of negotiability,"\(^9\) easily recognized by commercial lawyers as well as merchants. The jurisprudential gymnastics were seemingly in service of the applied science of law. Newmyer notes that "Story did in *Swift* . . . what he had been doing on circuit: He gave interstate merchants consistent economic rules that suited their own interests and that they had in part created."\(^9\)

Rebuffed in his earlier attempts at an expansive common law jurisdiction, Story regrouped in *Swift* to create the beginnings of a general commercial law. This generality promised certainty, predictability, and uniformity. Harmony and balance would result. Newmyer observes that

[n]ational commerce unleashed by uniform commercial law, it was as-

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88. K. NEWMYER, *supra* note 1, at 105.
89. Id. at 333.
90. 41 U.S. (16 Pet.) 1 (1842).
91. K. NEWMYER, *supra* note 1, at 339-41 & nn.136-144.
92. Id. at 337-38.
93. Id. at 340.
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sumed, would strengthen the fabric of national union. Working for national commerce and national union outside the structure of sovereign states and beyond the selfishness of party, Story saw a phalanx of lawyers, judges, and businessmen of vision and energy. In Swift, individualism and community, the common law and the Constitution, were mutually supportive, just as republican theory said they should be.94

iii) Property, monopoly, and the problem of first users.

Story shared, according to Newmyer, in “the almost religious belief in the civilizing impact of property when placed in the hands of entrepreneurial statesmen.”95 To the modern eye, Story’s views on the ability of property and commerce to mediate between social classes seem at the very least quaint and naive, particularly in light of what we know about developments and events even within his own lifetime. He must have sensed the tension, however, when confronting the claims of litigants asserting competing property rights. “Progress” meant that in some ways the old must give way to the new. For Story, however, old rights and old rules were entitled to a certain deference, and accommodation to change was to proceed very slowly. Two examples, one from water rights law, and the other the great Charles River Bridge case, illustrate Story’s dilemma.

Water Rights. Newmyer lucidly describes the complex and important water rights case of Tyler v. Wilkinson,96 decided on circuit by Story in 1827. The case “pitted the old doctrines of absolute ownership against the demands of a new class of dynamic businessmen.”97 In the language of water law, the plaintiffs in equity were seeking an injunction to prevent further injury to their legal right to the flow of water established under the controlling principle of the old law[,] . . . the doctrine of natural use, which held that owners of riparian land were entitled to equal use of the water in its natural course: Any use of water by owners of riparian property that injured other owners either by depriving them of water or by tortiously injuring adjoining land was actionable under the common-law doctrine of nuisance.98

In short, the natural use theory, generated in periods of minimal economic development, had antidevelopment, anticompetitive implications that were now placed under stress by the increased pace of economic life.

Story set out to recast the terrain. In his characteristic manner, he began by attempting to systematize the current learning on water law,

94. Id. at 343.
95. Id. at 118.
96. 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312).
97. K. NEWMYER, supra note 1, at 144.
98. Id. at 144-45. For a superb discussion of the development of water rights law in early nineteenth century America, see M. Horwitz, supra note 9, at 34-42.
drawing on all the theories to conclude that, in the abstract, a "reasonable use" of the water should be allowed to all. The problem was not just abstract, however, as mills and factories were beginning to proliferate on New England's streams, and decisions had to be made about who owned the water power to drive the enterprises. So when he came to decide this case and others, Story confronted a choice between the old users and their rights, and the new users and their theories. "The logic of economic growth," Newmyer perceives, "was for the law to favor outright dynamic over static property, but this is exactly the unconditional choice that Story refused to make." He reserved the right to make the choice in the modern-sounding phraseology of "reasonable use," but when he actually made the choices, he tended to limit the reach of "reasonableness" to the absence of injury. Therefore, if injury was present, the use could not be reasonable, and the first developer would be extended a preference which could translate into a "static" property use. Newmyer concludes that Story was "reluctant to abandon old law." While change was to be accommodated, Story was concerned about the economic and moral dilemma of treating original developers who had relied on a system of rights now under assault. The Charles River Bridge case provides us with another example of the clash of competing economic rights.

The Charles River Bridge Case. The Charles River Bridge Company had been chartered by the Massachusetts legislature in 1785 "to build a bridge between Boston and Charlestown. . . . In 1828, while the toll rights of the old bridge were still in force, the legislature chartered the Warren Bridge Company and authorized it to build a toll-free bridge only a few yards from the old bridge." Litigation ensued and when the case reached the Supreme Court, "[t]he question before [it] was whether the imprecisely worded old charter implicitly conferred a monopoly on the old bridge company, upon which the new bridge encroached, so that the new charter violated the contract clause of the Constitution . . . ." Story was now faced with an opportunity in the public law sphere to place constitutional barriers in the way of subsequent developers supplanting original users. But he was spurred on by practical considerations. The pace of development was at stake.

If the Court permitted state legislatures to go back on their promises to investors in corporations then no one would invest; progress would come to a standstill . . . .

. . . . Would any sensible businessman venture capital in a risky enter-

99. K. NEWMYER, supra note 1, at 146.
100. Id. at 414 n.113; see also Webb v. Portland Mfg. Co., 29 F. Cas. 506 (C.C.D. Me. 1838) (No. 17,522).
102. K. NEWMYER, supra note 1, at 224.
103. Id.
prise in which the sole profit was the right to collect tolls if the legislature reserved the right to destroy these tolls at any time by chartering an adjacent free bridge? Impossible.\textsuperscript{104}

Story was concerned with the security and stability of investment. Violating promises, public or private, led to chaos. "To hold legislatures morally and legally accountable for their promises to corporations was to provide a stable, dependable environment essential to the efficient deployment of capital."\textsuperscript{105} "[T]he amoral chaos of the marketplace"\textsuperscript{106} was undermining republican virtue in an unprincipled manner as new property threatened old property. Story's sense of order was deeply offended.

b. Story as treatise writer.

Private law. In no place did Story better express his quest for order than in his legal treatises. As part of his responsibilities as Dane Professor of Law at Harvard, Story was required to publish lectures on a variety of legal topics.\textsuperscript{107} Between 1832 and his death in 1845, Story, in addition to his judicial and teaching duties, found time to publish nine treatises. Except for the Commentaries on the Constitution, "all the works concerned private law and specifically commercial law."\textsuperscript{108}

Newmyer is helpful in explaining this explosion of treatise writing. He reminds us that

\begin{quote}
[the search for system was a controlling theme of eighteenth-century science . . . . Bringing rational order out of apparent chaos was, as Story saw it, the genius of Blackstone, . . . and in this tradition Story made the search for organizing principle the essence of his legal science. . . . If cases might be made to yield principles, then principles, once ascertained, might organize cases. By cutting through the chaos of proliferating case law, principle might save American judges and lawyers from the threatened inundation. It followed that the function of Story's treatises was to ascertain those principles which were settled, to distinguish major principles from auxiliary ones, to arrange them according to the logic of the subject, and 'to illustrate them by general reasoning' and follow them out to 'collateral consequences.' Technique, structure, and tone followed function.\textsuperscript{109}
\end{quote}

Story perceived that different jurisdictions with different rules about similar subjects posed a potential problem. To that end his work on Conflict of Laws helped provide "a set of rules for resolving the conflict

\begin{itemize}
\item \textsuperscript{104} Id. at 225, 227.
\item \textsuperscript{105} Id. at 154. And Newmyer adds, likewise, "[f]or the law to force corporations to keep their promises, and stand by the transactions of their agents, to oblige them to pay their debts, was to mold them into efficient business institutions." Id.
\item \textsuperscript{106} Id. at 234.
\item \textsuperscript{107} Id. at 281.
\item \textsuperscript{108} Id. Story's treatises are Bailments (1832), Conflict of Laws (1834), Equity Jurisprudence (1836), Equity Pleadings (1838), Agency (1839), Partnership (1841), Bills of Exchange (1843), and Promissory Notes (1845).
\item \textsuperscript{109} K. NEWMYER, supra note 1, at 285.
\end{itemize}
of rules . . . until universal scientific law obliterated state legal idiosyncrasies.”

Newmyer notes that “Story ranged widely in search of unifying principle.”

“He distinguished, analogized, and extrapolated if necessary in search of consistent rules to guide social action.”

“This emphasis on universality and rationality puts Story’s commentaries in the tradition of the American Enlightenment . . .”

Through his treatises, Story almost single-handedly provided for American lawyers and businessmen the comforting, and perhaps misleading, thought that rational legal principles and rules could be consulted to plan and order their behavior.

Public law. Story’s clearest exposition of the importance of legal order came in his three-volume Commentaries on the Constitution, published in 1833. Spurred on by the gathering storm of the states’ rights debate, Story “constructed his Commentaries to eradicate both the Virginia ideal that the Constitution was a collection of rights and the South Carolina notion that it was a compact among sovereign states . . .”

Facing the potentially chaotic constitutional argument that sovereignty was indivisible and resided in the states, Story countered that “sovereignty in the United States was divisible, had in actuality been divided between the state [sic] and the central government. It followed that the real problem was to ascertain the manner in which conflict between state and national authority would be settled . . .”

The solution to the problem lay in judicial power—“Story’s message . . . was that the Supreme Court and not the states must be the final arbiter of the Constitution.”

Newmyer points out that “[h]aving established the Court as the guardian and final interpreter of the Constitution, Story was obliged to demonstrate that it would not abuse its power . . . Story’s answer was to show that the justices were bound by ‘some fixed standard’ of construction.”

The resulting “Rules of Interpretation,” nineteen in all, were based on the assumption . . . that the Constitution was not always clear, that the intent of the framers was not always manifest, that judges must judge. The objectivity that would neutralize judicial power would come not from a Newtonian constitution but from uniform rules of construction now made plain for working lawyers and sitting judges. The claim was that the Marshall Court had judged by principle, not whim; the promise

110. Id. at 296.
111. Id. at 286.
112. Id. at 289.
113. Id. at 287-88.
114. Id. at 185; see also R. Ellis, The Union at Risk (1987).
115. K. Newmyer, supra note 1, at 188.
117. K. Newmyer, supra note 1, at 191.
was that the Court, bound by scientific rules of construction, would continue to be above politics.\(^{118}\)

Story, therefore, sought to organize constitutional adjudication around a system drawn together by law to create harmony and balance in the face of competing forces, and to provide orderly rules so that there could be no mistaking how the system functioned. A quest for order permeated the scholarly project.


Story placed "[a] liberal faith in progress through education," although "tempered with a conservative vision of social order."\(^{119}\) His position at the Harvard Law School gave him the occasion "to teach scientific law and to make American law scientific, to reform the legal profession and through law and lawyers save the republic from political parties, professional politicians, and demagogues."\(^{120}\) An emphasis in the course of study on "[l]egal history and comparative jurisprudence, along with a 'severe and scrutinizing logic,' would move the legal system toward symmetry and universality"\(^{121}\) as Harvard-trained lawyers, mostly elites, would go forth with the gospel not just in Boston, but throughout the nation as well.\(^{122}\) Story's theory "rested on the assumption that the study of law imparted conservative values and a common world view that would serve as a practical guide to the great and small issues of the day."\(^{123}\) Armed with this view, lawyers presumably would be vigilant and prepared to act, and would if necessary "use the wisdom of the law to check antiproperty, speculative adventurers like those who destroyed the Charles River Bridge."\(^{124}\)

Story wanted Harvard under his tutelage to accomplish for American law what he viewed Lord Mansfield as having secured for English commercial law. "[A]djust old law to new circumstances; balance change with stability. [Mansfield] reduced," according to Story, "the 'many doctrines of the law to systematical accuracy by rejecting anomalies, refining and limiting their application by the test of general reasoning.' Balancing practical experience, common sense, and logic with the 'philosophizing spirit,' he moved the law toward 'a more comprehensive argumentation and more perfect generalization.'"\(^{125}\) Harvard lawyers were to be nothing if not orthodox.

\(^{118}\) Id.
\(^{119}\) Id. at 238.
\(^{120}\) Id. at 239.
\(^{121}\) Id. at 255.
\(^{122}\) Id. at 255, 262-70.
\(^{123}\) Id. at 269.
\(^{124}\) Id. at 268.
\(^{125}\) Id. at 246.
d. Story as political economist.

What are we to make of this apparent obsession with order that appears in Boston lawyers generally and in Story in particular in his roles as judge, treatise writer, and educator? If one were a true New England republican, then the potential threats of disruption and chaos might be seen everywhere in early nineteenth century American society. Political parties, politicians, the “South,” the perversion of sovereignty residing in “the people,” all might suggest that whatever consensus there once had been under republicanism was now coming apart. To preserve a semblance of order, Story, perceiving too many checks and too many factions hopelessly interlocked, sought a solution transcending the fray—a unifying structure of law to preserve order. But he encountered a problem even beyond political vision—that of political economy. His virtuous republicanism, in which individuals served the community, experienced the after-shock of economic liberalism, with its primary emphasis on pure self-interest. Without the mitigating influence of community, individualism also threatened disorder. Story’s answer to the increased tempo of capitalism was an attempt to control it by stressing certainty and uniformity, while at the same time allowing some flexibility and adaptability for the practical lawyer. Certainty combined with flexibility tended to mirror republicanism modified by economic liberalism.

Robert Gordon has written elegantly of the dangers of taking the nineteenth century rhetoric of “certainty” and “adaptability” at face value. Gordon argues that “one must scrutinize carefully assertions that legal change contributed to making economic decisionmaking more predictable: whose predictions exactly is the writer talking about?” He asks whether “the nineteenth century legal elite’s claim that their changes enhanced the predictability of legal results [can] be reconciled with the broad historical consensus that the same elites spent this period thoroughly transforming the law of private rights.” Gordon’s skepticism is well-founded, but I am, for purposes of this essay, primarily interested in beliefs, or the generation of belief. Not only did Joseph Story seem to believe in “certainty” and “uniformity,” he also acted on his beliefs as a judge, teacher, and writer to create an architecture of legal rules and institutions designed to guarantee the Whig legal elites’ conception of social order.

One should also remember that lawyers did not stand alone in Boston in thinking this way—they were part of a larger cultural matrix concerned with similar problems. Indeed, they were preoccupied with the

127. Id. at 448.
128. Id. at 449.
same themes that concerned the Boston litterateurs. Not surprisingly, Newmyer tells us that “Story’s circuit court was a forum where order, rationality, and practical good sense prevailed,” and that there was a “symbiotic relationship between Story’s court and the business community.” Newmyer demonstrates on a number of occasions in his very perceptive, contextual study that Story moved in a world whose values and institutions were shaped by men of business: the Jacksons and Lees, the Appletons, Grays, Crowninshields, and Lawrences, and more modest versions thereof. The forces of shipping, trade, and manufacturing unleashed and directed by entrepreneurs like these were sweeping New England and Story was swept along as well.

And so it is to the merchants that we turn next.


The literary concerns voiced in legal culture and society at large also found expression in commercial life. And it was not, therefore, accidental that the personal ethic of merchants was very much related to the ideas spread by lawyers or writers. Even though early nineteenth century merchants were ostensibly in their own separate universe making money, they governed their lives by the same principles, spoken or unspoken, as their contemporaries in letters and law. The merchant, the person whom the elite lawyer often helped in the marketplace, actually stood at the center of this environment, the center of this culture. Theodore Parker “proclaimed the gospel” that

the Saint of the Nineteenth century is the Good Merchant; he is wisdom for the foolish, strength for the weak . . . . Build him a shrine in a Bank and Church, in the Market and the Exchange or build it not; no Saint stands higher than this Saint of Trade. There are such men, rich and poor, young and old; such men in Boston.

The merchant “elite shared a common set of values which defined proper behavior,” and they “transmitted goals to the young.” Exposure to shared values started early as “[f]athers, in their daily walks, guided youngsters on trips to the wharves, banks, and counting houses a few blocks from home . . . .” Apparently the lessons were learned early, prompting an “eight-and-one-half-year-old” Appleton to report

129. K. Newmyer, supra note 1, at 123.
130. Id. at 122.
131. Id. at 306; see also id. at 117, 164-65.
132. Goodman, supra note 7, at 438. Charles Sumner echoed this common theme: “[T]he merchant, more than any other character, stands in the very boots of the feudal chief. Of all pursuits or relations his is now the most extensive and formidable, making all others its tributaries, and bending at times even the lawyer and clergyman to be its dependent stipendiaries.” K. Newmyer, supra note 1, at 147.
133. Goodman, supra note 7, at 437.
"that he had 'laid out 1 cent for 8 marbles and one cent for 2 al-
lies.'" 135 Childhood walks were usually followed by boarding schools,
Harvard College, and entry into family-controlled businesses where the
early indoctrination was reinforced.

The elite "shared a common set of values which . . . provided a
measure by which to judge and punish deviance." 136 For example,
Charles Sumner, "a pariah cast out of the elegant parlors of Boston for
the effrontery to challenge the claim of the Hub's elite to set moral
standards," 137 was denied an appointment at the Harvard Law School
because "[t]he conservative Corporation of Harvard College . . . con-
sider Sumner in the Law-school, as unsuitable as a Bull in a china
shop." 138 George Bancroft, who had the temerity to be a political non-
conformist, a Democrat rather than a Whig, found that "old friends
became so rude that at one point he nearly decided to abandon the
city." 139

The merchants were much like the earlier literary aspirants. They
determined and set cultural styles in a variety of ways. Most centrally,
they strove to live by and enforce the duties of fiduciary responsibility—
personal duty. Part of fiduciary responsibility was "cautiousness." 140
The modern law of trusts and fiduciary responsibility arose in Boston in
the 1820s and 1830s. 141 Civic-minded private duty was a primary con-
cern for Boston merchants. "Personal responsibility" and concerns
about elevating standards of trust as merchants managed their own and
other people's money were at "the center of the commercial ethic." 142
They constantly warned against "the evils of speculation," and coun-
selaed "moderation." 143 They tended, for instance, not to favor land
speculation. They created "a highly articulated social order which not
only set standards but encouraged and enforced right conduct." 144
Boston merchants were described by Charles Sumner as "close and
hard, consolidated, with a uniform stamp on all and opinion running in
grooves." 145 These grooves were shaped by shared notions of fiduciary

135. Id. at 151.
136. Goodman, supra note 7, at 437.
137. Goodman, The Politics of Industrialism: Massachusetts, 1830-1870, in UPROOTED AMERI-
CANS: ESSAYS TO HONOR OSCAR HANDLIN 163 (R. Bushman ed. 1979).
138. Letter by William Kent (1847) (written after his resignation as Dane Professor of
Law at Harvard), quoted in D. DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL
WAR 129 (1960).
(1971). On the general problem of social ostracism in Boston, see D. TYACK, supra note 7, at
185-86.
140. Goodman, supra note 7, at 448.
141. See W. PEASE & J. PEASE, THE WEB OF PROGRESS: PRIVATE VALUES AND PUBLIC
STYLES IN BOSTON & CHARLESTON, 1828-1843 20-21 (1985); P. HALL, supra note 7, at 212-13;
L. FRIEDMAN, A HISTORY OF AMERICAN LAW 253 (2d ed. 1985).
142. Goodman, supra note 7, at 440.
143. Id. at 449.
144. Id. at 441.
145. Id. at 437.
responsibility, cautiousness, moderation, antispeculation, and the elevation of standards.

Secular success manuals . . . exhorted young merchants and aspiring shopkeepers to cultivate the substance and the form of 'industrious habits': Always look busy even when no one was there to see. Be diligent. Avoid the snares of sensuous indulgence. Keep clear of the ignorant and the turbulent. Pick a prudent wife who would conduct the home as a business was run.\textsuperscript{146}

The "merchant prince" of Boston, Thomas Handasyd Perkins, to whom Joseph Story dedicated his treatise on promissory notes, was described by his eulogist as someone whose "life was marked by self control [and] an innate purity and love of order that made excess distasteful."\textsuperscript{147} He never stepped outside the accepted bounds.

The importance of "the business ethic which shaped Boston's dedication to achieving . . . growth," an ethic "central to her entire culture,"\textsuperscript{148} is a significant theme in William H. Pease and Jane H. Pease's \textit{The Web of Progress: Private Values and Public Styles in Boston and Charleston, 1828-1843}. The Peases have written a work of comparative urban history, in which they seek to reconstruct the cultural values and styles of Jacksonian Boston and Charleston, South Carolina, that contributed to the different approaches the two cities adopted in analyzing and coping with similar problems. The Peases suggest that across a range of economic and political fronts, Bostonians, primarily driven by economic motives, engaged in a range of dynamic activities leading to "progress," while Charleston's citizens tended to be trapped by traditional solutions leading to a form of "stasis."\textsuperscript{149} The Peases present a richly detailed, generally perceptive, occasionally overdrawn study. For my own purposes, I do not wish to consider their comparative views of the twin worlds of Boston and Charleston, but rather I will draw on their fund of information about the cultural world of Boston, particularly the business world, within which elite lawyers lived.

One of the points the Peases make is that the basic businesslike Brahmin way of constructing and perceiving the world permeated all aspects of community life. The point is not new. Paul Goodman's scholarly career has been devoted, in part, to propounding a similar theme.\textsuperscript{150} But rarely have we had an account of social life which so thoroughly seeks to link the various corners of the world. Whatever

\textsuperscript{146} W. Pease & J. Pease, supra note 141, at 115.
\textsuperscript{147} Goodman, supra note 7, at 444.
\textsuperscript{148} W. Pease & J. Pease, supra note 141, at 219. At an earlier point the Peases noted that "however much she had been shaped by her founders' Puritan faith to be a city upon a hill, her citizens' quest for economic gain and a thriving commerce had always been central to her regional role." \textit{Id.} at 11.
\textsuperscript{149} \textit{See id.} at 23, 40.
\textsuperscript{150} \textit{See generally} P. Goodman, \textit{The Democratic-Republicans of Massachusetts} (1964); Goodman, supra note 7; Goodman, supra note 137; Goodman, \textit{The Social Basis of New England Politics in Jacksonian America, 6 J. Early Republic} 23 (1986).
one may think of the society described, one must first understand how
elite antebellum Bostonians thought and acted.

The reach of the Bostonians did not exceed their grasp. Primary
among their motives, according to the Peases, was profit:

[In] Boston profit was the measure of economic activity. Local folk
sometimes chastised businessmen for being too cautious, for calculat-
ing so closely that they passed up promising future returns because,
while expecting long-term credit for themselves, they seldom extended
it to others. Yet it was their pursuit of sure, steady profit which made
others believe that nowhere were merchants 'more correct or intelli-
genent or respectable' than in Boston.\textsuperscript{151}

Investment strategists followed business innovations into the corpo-
rate, trust, and banking areas, seeking security and productivity as
guidelines. Opportunities were also protected by diversifying. Boston
investors moved beyond the standard "bank, insurance, and transpor-
tation . . . stock" into "wharf, aqueduct, and power companies as well as
manufacturers of textiles, glass, rubber, and metal products."\textsuperscript{152} Diver-
sifying meant "hedging for security," so that "Boston merchants were
satisfied with a sure 6 percent return if they could thus shelter the gains
they had made in high-risk commercial ventures."\textsuperscript{153}

It is important to remember that while investments made men rich,
the investment strategies also revealed a way of life, a way of thinking
about and controlling the social environment. Safety and security as
well as wealth were reflected in investment patterns that were both di-
verse and interlocking. For instance, the Peases note:

[M]ore than half of those who owned stock in wharves had bought into
city banks and insurance companies as well. When they were offered
railroad stock, a third of them were ready buyers, anticipating both di-
rect and indirect returns from the new form of transportation which
would expedite shipments to and from the interior. A quarter of them
acknowledged shipping's reliance on the textile trade by investing capi-
tal in Chicopee and Lowell mills. And one out of five subscribed stock
for city land development, which was often a by-product of the new
transportation facilities.\textsuperscript{154}

The same was true for textiles; by the 1830s "[b]etween two-thirds and
three-quarters of all known Boston textile investors were engaged in
commerce; half of them had invested also in banks and insurance com-
panies; and a third of them owned wharf and railroad stock."\textsuperscript{155} As the
Peases observe, "[t]he point was clear: shipping, trade, banking, and
manufacturing were not just interlocked; they were symbiotic."\textsuperscript{156} The
symbiosis was based on security and risk-spreading in an attempt to

\textsuperscript{151} W. Pease & J. Pease, supra note 141, at 16.
\textsuperscript{152} Id. at 19.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 26.
\textsuperscript{155} Id. at 27.
\textsuperscript{156} Id. at 26.
control the pace of economic growth and expansion through primarily private, not public, activity.\footnote{157}

Railroad investment opportunities in the Boston of the 1830s and 1840s illustrate the investment strategy. Bostonians had a “preoccupation with railroads,” and “her bankers, her investors, her entrepreneurs . . . applied to railroad building the managerial experience” acquired elsewhere to make Boston “a hub city.”\footnote{158} Although railroad investment was in part justified as ultimately providing public benefits assumed to be the by-product of economic growth, Boston’s “first railroads were privately owned and controlled corporations . . . intent on making profits.”\footnote{159} “Speculative gains on stock, however, were not the goal,” of some of the early investors; long term and diversified growth was.\footnote{160} The first railroads exhibited “sound management, [and] careful planning” despite the almost frenetic pace of building.\footnote{161} And yet, as the financial experience of some of the later railroads reveals, “[p]rivate investors and the public as well had resisted railroad investment until it could be demonstrated as a probability if not ‘a moral certainty that it would produce regular and sure dividends.’”\footnote{162} Caution was the byword.

B. The Cementing of Cultural Values

The merchant, the lawyer, and the litterateur agreed about the basic values that were important in their small corner of elite culture. As Goodman noted, “[a]t the same time that the group in its entrepreneurial role promoted and welcomed urbanization, industrialization and heavy immigration, it feared that rapid social change threatened stability by unleashing a chaotic individualism which rewarded those unrestrained by standards of appropriate behavior.”\footnote{163} Therefore, they attempted to translate their standards into a series of social control devices that would insure that various aspects of community life were controlled by the important social actors. How did they do this? They created or altered various types of public institutions—hospitals, public schools, asylums, libraries, prisons, universities—and they forged ties of family, that most private of institutions.

1. Institutions.

The control began with city government. During the 1820s, Josiah Quincy had set the tone as mayor. Under his leadership, “[t]he city’s business had been rationalized, her real estate surveyed, her voting lists

\footnotesize{157. See id. at 39.  
158. Id. at 63.  
159. Id. at 65.  
160. See id. at 65-66.  
161. See id. at 66.  
162. Id. at 69.  
163. Goodman, supra note 7, at 437.}
updated, her streets straightened, her avenues ‘enlarged,’ her public places—including the new market—‘ornamented,’ and her common sewers ‘regulated’ and repaired.’

Public safety, public health, and public order meant, among other things, reorganizing the fire fighting program, regularizing trash collection, altering the water supply system, and creating houses for juvenile offenders and for correction. Experience indicated that when social disorder and violence threatened or occurred, particularly in times of nativist, anti-Irish immigrant sentiment or confrontations over anti-slavery opinion, traditional private fire and police organizations were no longer considered sufficiently responsible. The poor discipline of independent volunteer companies mandated reorganization of fire safety towards “paid civil service,” conceived of as “rational and reliable.”

The local militia, “that bulwark of social order,” was soon also deemed unresponsive and replaced by a salaried police force in the face of “perceptions of steadily growing disorder.”

City government also appropriated money for education, and “throughout the 1830s, from one-eighth to one-quarter of Boston’s steadily increasing annual budgets went for education.” Between 1829 and 1843, the number of primary grammar schools nearly doubled. The schools were to provide the skills and practical knowledge to help the young prepare to contribute their labor to the economic well-being of the community. In addition to skills, “education was also expected to instill . . . attitudes,” such as “‘industry, frugality, and common sense’” and “the ‘patient and moderate labor’ by which the prudent workman succeeded.” Public education was designed in part to nurture the work ethic.

These cultural values were likewise expressed in philanthropic activities. Charity was defended as “maintaining social stability and protecting property.” And yet the threat was that undue charity “might encourage . . . pauperism” and dependency. “So it was to control the unworthy . . . that a dozen charitable organizations and the principal Unitarian churches formed” an organization to “rationaliz[e] private
All "requests for aid" were "channeled . . . through a central office," which "kept 'a Register of those who really need and of those who receive assistance so as not to encourage idleness by maintaining it, & to prevent imposition by obtaining charity from various sources, for the same cause.'"  

As one would also expect, the face of Harvard College, a pivotal institution in Boston's culture, began to change. For all of its history until the nineteenth century, Harvard College presidents were clergymen. But now the clergymen were out, and merchants and lawyers were in. Tuition was raised, making it difficult for people of an inferior social class to attend. The composition of the faculty changed. The purpose in elevating breeding and taste to an important educational role at Harvard College was to help reach an agreement as to how lives were to be governed. Someone wrote then of Harvard that each man who attended became one of a great family, who have gone forth from her instruction, and borne manfully the honorable burdens of life. He is bound to them and to her by a thousand ties, which nothing in after-years can break. He and they may be rivals in business, struggling hand in hand in the competition for wealth; but, when they meet . . . they are indeed on common ground, with common tastes, feelings and hopes.

2. Family, marriage, and kinship.

The Bostonians, in order to exercise control and to resist the ravages of change, also utilized the most secure of all institutions, the family, to transmit social rules and perpetuate their power. By an "elaborate web" of kinship ties, Boston's elites sought allegiance, continuity, and stability. Family ties influenced the selection of supercargos, apprentices, ship captains, commission merchants, factors, agents, partners, and lawyers. Marriages were made that have been described as "capital . . . intensive." Uniting families served to aggregate the scarce capital needed to run businesses.

Marriage tended to be a conservative institution, permitting the preservation of resources within groups of families. For example, as Naomi Lamoreaux has recently pointed out, "[t]he operation of New England's banks was shaped primarily by kinship networks—alliances

171. Id. at 150-51.
172. Id. at 151 (emphasis in original).
173. See generally R. Story, supra note 7. For lawyers replacing clergy, see id. at 44-53; for social class and exclusionary practices, see id. at 89-108; for change in the faculty's composition, see id. at 74-88; for breeding and taste, see id. at 108-16.
174. Id. at 117.
175. Goodman, supra note 7, at 441.
178. W. Pease & J. Pease, supra note 141, at 129.
of individual enterprises and partnerships that were cemented by ties of marriage and consanguinity." And "[m]ajor kinship groups such as the Appletons, Lowells, and Lawrences in Boston . . . each controlled several banks in their . . . cit[y]." The banks' "main purpose was to serve as the financial arms of the extended kinship groups that dominated the economy. As such, banks provided kinship groups with a stable institutional base from which to raise the capital consumed by their diverse business enterprises."

But social relations were secured, not just within the mercantile elites, but between the merchants and other elites in the community, such as lawyers. The following are some examples of prominent family cohorts.

Family Cohort #1

Stephen White, wealthy Salem/Boston merchant (nephew of Joseph White, prominent Salem merchant/ship owner) married Harriet Story, Joseph Story's sister. Harriet Story White's children included Harriette Story (b. 1809), who married James William Paige (the half brother of Grace Fletcher Webster, Daniel Webster's first wife), and Caroline White (b. 1811), who married Daniel Fletcher Webster, Daniel Webster's son. Julia Webster, daughter of Daniel Webster, married Samuel Appleton Appleton (apparently one Appleton was not enough), who was the son of Eben Appleton. Young Samuel was a business partner (textile sales agency) of his famous uncle, Nathan Appleton, and James W. Paige. So the Storys, the Websters, and the Appletons were all related by marriage.

Family Cohort #2

To return to the Appletons, Nathan Appleton's first wife was Maria Theresa Gold of Pittsfield. The Agricultural Bank of Pittsfield was organized in 1818, when ninety percent of the shares were bought by four men; two of them were the brothers Nathan and William Appleton. The first president of the Bank was Thomas Gold, Maria's father. Maria's paternal grandmother was Sarah Sedgwick. Sarah Sedgwick's only brother was Theodore Sedgwick, at one time a judge of the Massachusetts Supreme Judicial Court. Theodore's grandson, Theodore Sedgwick (a cousin of Maria) wrote the influential nineteenth century

180. Id. at 652.
181. Id. at 659.
182. The genealogical information is drawn from 2 THE PAPERS OF DANIEL WEBSTER: CORRESPONDENCE 217-18 n.1 (C. Wiltse ed. 1976); 4 id. at 34 n.2, 345 (C. Wiltse & H. Moser eds. 1980); F. GREGORY, supra note 6, at 312.
treatise on damages.\textsuperscript{183}

\textit{Family Cohort \#3}

Thomas Handasyd Perkins (1764-1854), “the merchant prince of Boston,” railroad president, proprietor of the Massachusetts Locks and Canals (which controlled the water power that ran the Lowell mills), had eleven children. Among them were a daughter, Elizabeth, who married Samuel Cabot, a relative of George Cabot, former U.S. Senator; a daughter, Caroline, who married prominent attorney William H. Gardiner, president of the Suffolk Bar in the 1820s, who often represented his father-in-law; a daughter, Mary Ann, who married Thomas G. Cary, industrialist and railroad official, who was treasurer of the Hamilton Manufacturing Company, the second largest textile company in Lowell.

Perkins’ sister Elizabeth married Russell Sturgis; their son William was a merchant, banker, and textile manufacturer. His sister Margaret married Ralph Bennett Forbes. Among their seven children were Robert Bennett and John Murray Forbes, the China merchants.\textsuperscript{184}

\textit{Family Cohort \#4}

Francis Cabot Lowell (founder of Lowell and the mills) was related directly to the Cabots through his mother, to the Higginsons through his father, and to the Jacksons and Tracys through his wife. His wife’s sister married Henry Lee, and his brothers-in-law Patrick Tracy Jackson, Charles Jackson, and James Jackson (some of them cofounders and investors in Lowell) cemented the Jackson-Cabot alliance by marrying Lydia Cabot, Fanny Cabot, and first Elizabeth, then Sarah Cabot respectively. Fanny Cabot was Charles Jackson’s second wife (his first wife had been a Lee, Amelia). Charles Jackson was a judge of the Massachusetts Supreme Judicial Court, and a legal treatise writer. He was also the grandfather of Justice Oliver Wendell Holmes, Jr.\textsuperscript{185} (Incidentally, when Patrick Tracy Jackson, Jr. married Susan Loring, “[a]mong their 300 wedding guests, no fewer than 120 were first cousins or closer relatives of either one or both of them.”)\textsuperscript{186}

Lest there be any doubts about the concentrated power of these family cohorts, we should be reminded that

\[\text{by 1850, fifteen Boston families—the ‘Associates’—controlled 20 percent of the nation’s cotton spindleage, 30 percent of Massachusetts railroad mileage, 39 percent of Massachusetts insurance capital, 40}\]
percent of Boston banking resources. Their first big industrial enterprise had been the Boston Manufacturing Company, founded in 1813. In 1818 they organized the Massachusetts Hospital Life Insurance Company, their first venture in that field. After that they added steadily to their power in business and politics until in mid-century they were among the greatest of the new type of American businessman. Tightly knit, their organization had power far beyond what the simple figures show. They controlled water power on the Connecticut and Merrimack rivers and levied water rates on their textile manufacturing competitors who depended upon those waters. They held patents on many important machines, and for their use they collected royalties. Builders of canals and key railroads, they owned important transportation facilities in their state and section. They financed their enterprises through their own credit institutions, which also numbered among their debtors many other businessmen and business corporations. They insured their factories and other holdings through their own companies and sold life and fire policies to businessmen throughout the nation. They influenced state and local politics and sent Daniel Webster to the United States Senate. Lawrences, Lowells, Appletons, Cabots, Dwights, Eliots, Lymans, Searses, Jacksons—in a sense they were Massachusetts, dominating its conservative press and pulpit, its schools and platforms, charities and philanthropies, supporting the Boston Brahmins and their cultural renaissance.187

And so there were group rules setting standards of conduct, influencing every aspect of the cultural life of the community. The community's elite, "rooted in a homogeneous culture and a capitalist economy whose joint motive power and social cohesion went back to a Puritan ethic of hard work and self-denial, defined the limits of acceptable behavior . . . and shaped the institutions to enforce them . . . ."188 The group norms were also enforced through expectations of individual responsibility, for like Thomas Perkins,189 "the privileged and the propertied were expected to exert self-control, to support public safety, public order, and defense of private property by their own actions as well as by controlling the actions of others."190 In theory, whatever potential problems of social dislocation that arose had a solution. Temperance, abolitionism, evangelicalism, poverty, immigration, trade unionism, all could be met by private/public attitudes and private/public social control devices ranging from public schools to church and family. Whenever there was a question—whether it was how that church ought to look, or what this curriculum ought to include, or what rules should govern factory attendance, or prisoners' conduct, or what

188. Id. at 169.
189. See text accompanying note 147 supra; text accompanying note 184 supra.
190. W. PEASE & J. PEASE, supra note 141, at 169.
legal rules ought to be, or what was good or bad art, or good or bad literature—it was answered by a relatively small cohort of people who agreed on the basic principles by which to evaluate everyday conduct. Those who were part of it were consumed by it.

III. CONCLUSION: LAW, CULTURE, AND SOCIAL ORDER

This essay closes with another group portrait—an actual photograph taken in 1855 of a group called the Friday Evening Club that gathered “bimonthly for whist and discussions.” There are thirteen men in the picture. They are sitting on two benches that lead away from a table placed in the middle of the picture, almost like spokes from the center of a wheel. On the floor before them is a sumptuous oriental rug. Who are they? James K. Mills, textile sales agent and promoter; Francis C. Gray, lawyer and railroad investor; Charles H. Warren, president, Boston and Providence Railroad; Benjamin R. Curtis, Associate Justice, United States Supreme Court; Thomas Motley, textile manufacturer; George Hayward, physician; Nathan Hale, editor of the *Boston Daily Advertiser*; Nathan Appleton, textile industrialist; William Sturgis, textile manufacturer and banker; C.P. Curtis and Thomas B. Curtis, bankers; and Thomas W. Ward, the American representative of the

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British banking, credit, and investment firm of Baring Brothers. (William Appleton, Nathan's cousin, and Abbott Lawrence are missing from the photograph.) Seated behind the table, focusing the camera with his riveting gaze, is Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court and a Fellow of the Corporation of Harvard College for thirty years. Occupying center stage, Shaw symbolizes the drawing together of all those around him in common pursuits and interests.192

Here they were—industrialists, bankers, railroad presidents, lawyers (now judges)—all gathered together, having traveled a long way, in effect, from that tavern attic fifty years before in Boston. They now controlled various types of access to power. They did not gather in that room to conspire, to decide the fate of individuals or institutions. They came together to talk about certain things they agreed on or shared, about what was important, or what needed to be protected, or how the community should be organized, or who was living up to the general standards, or who was failing. That convergence seems to be far more important evidence of the alliance between the bar and commercial interests than one can possibly deduce from the history of legal doctrine. Theirs was a relationship reflecting common concerns, attitudes, and beliefs not just in law, but in almost all areas of social, economic, political, intellectual, and even family interaction. Without denying the importance of law, I think it is somewhat misleading to say that it was primarily as a result of legal doctrine or legal institutions that this alliance occurred.

There are better and worse ways of analyzing legal rhetoric and ideology. Elevating law to a central place in the cosmology of things may be questionable. A significant problem in recent American legal historiography seems to be the assumption that law, rather than being an element of a wider cultural debate, is, in fact, on center stage, and that important things follow from its dominating presence. Things legal, however, may be no more than implicated in a series of cultural events that can be similarly unpacked—art, literature, architecture, medicine.

The similarities between the portraits are more obvious than the differences. In each rendering, lawyers stand firmly embedded within the prevailing culture, whether with literary aspirants or later with entrepreneurs and industrialists. Although a cultural tug-of-war took place between 1805 and 1855, lawyers managed to maintain their cultural presence on each stage, in part because of their particular insight into the meaning of social order at any given time. Their adaptability to the situation was impressive, and this adaptability might make it appear that they were in control of, rather than in service of, a cultural ideal.

But lawyers are in some ways located very differently in the two por-

192. The photograph is reproduced in id. at illustrations after 170. Information on the members of the club is drawn from id. at 194-95.
traits. Although Shaw, the judge, was perhaps placed in the middle of the 1855 picture out of deference, in the imaginary portrait of 1805 there is a sense that lawyers are present, but lurking somewhat darkly in the shadows of the attic’s corners. If anyone would have been given center stage in 1805, it would likely have been one of the clergy, perhaps Buckminster, and not one of the lawyers. Thus, the sense of social order in 1805 is organized differently than in 1855. At the turn of the century, the dominant concern of social order is political order—revolutions and rebellions are fresh in everyone’s mind. Political fears predominate; democracy threatens to replace republicanism, and leveling is in the air. The clergy, while still important, are in decline and perhaps incapable of asserting themselves in the post-Revolutionary political climate. They are somewhat tentative and groping for a new language that meets the emerging possibilities of freedom without stifling that liberty with restraint. And the merchants are nowhere to be found in the tavern attic.

It would be foolish, however, to contend that in 1805 merchants were not important members of this society. They had been significant community figures for some time, as the work of Bernard Bailyn and others demonstrated many years ago.193 And yet their absence in 1805 stands in striking contrast to their strong presence in 1855. It is not easy to explain how lawyers could be present and merchants absent without asserting the primacy of law. But I think that such an assertion would miss the point about merchants.

Merchants in 1805 were still occupied, I believe, in the private world of the counting house, struggling with a world poised on the edge of change. They were doing what they thought they were chosen to do, preferring mostly not to meddle with public affairs, focusing generally on the internal, time-consuming mechanisms of mercantile life. In part, they are still trapped by what the Peases identify as their Puritan roots. John Cotton’s The Way of Life, published in 1641, is the classic demand that men devote themselves to making profits without succumbing to the temptations of profit, that a believer be drawn by his belief into some warrantable calling. . . . The Puritan’s thought was so far from any suggestion of individualism that his exhortation to money makers was, in his mind, not incompatible with enforcing the just price.194

Remembering God’s gifts meant, according to Perry Miller, that “a saint in his counting house would patiently suffer loss as a trial of faith, but would also take good fortune ‘with moderation’ and never be corrupted by success.”195 The result of this “mixture of business and piety,” Miller demonstrated, was “far from a keeping of the left hand in

195. Id. at 41-42.
ignorance of the right; the jeremiads came from something deeper than pious fraud, more profound than cant: They were the voice of a community bespeaking its apprehensions about itself."^^196

By 1800, merchants for the most part, I suspect, had moved beyond such spiritual ambivalence, although their preoccupation with private endeavors suggests that they had not left their consciences entirely behind them and that they were not quite ready to seize the public moment. But within one more generation, and with a mere handful of exceptions, all “apprehensions” seemed to have disappeared. When, in 1828, the young Unitarian minister Ezra Stiles Gannett, perhaps reflecting on the remnants of Puritanism, questioned the inherent Christianity of the business ethic, he met with a sharp rebuke from merchant-Congressman Nathan Appleton. Appleton wrote to Gannett “[t]hat every individual shall be entitled to the benefit of his own acquisitions[;] the fruit of his own labour is the fundamental principle of civilization and of course of morals. [T]ake this away & you reduce man to the savage state. . . . [N]o purer morality” existed than that of “the counting room.”^^197 The defense of business conduct is now based on individualistic, acquisitive needs. But in 1800, it was not exactly clear which way the organization of Boston society was headed. Cautious as always, the merchants watched and waited in their substantial homes. They did not often venture out to that Boston tavern. By 1855, however, the merchants were fully involved. Along with the lawyers, they stood for a primarily rational, individualistic economic and political order.

There is, however, a central irony associated with the photograph of 1855—every bit an intrusion of modernity as the photographic innovation itself. For the world was crumbling around the calm and carefully posed group. The breakdown of the configuration of law and letters was well under way,^^198 and Joseph Story had long ago lamented that he was “the last of the old race of Judges.”^^199 The political consensus within Massachusetts was disintegrating as slavery and union appeared increasingly incompatible;^^200 and Benjamin R. Curtis, one of those photographed, was soon to resign as a Justice of the United States Supreme Court in the aftermath of his dissent in the Dred Scott decision. The Civil War would soon break upon them, and its resolution for some would signify “preferring a coercive order to a chaotic liberty.”^^201 The Union would be saved, and out of the ashes of the great

196. Id. at 47.
198. See R. Ferguson, supra note 3, at 199.
199. K. Newmyer, supra note 1, at 197.
conflagration would “rise” the new generation of lawyers to serve the republic. But that must remain for now a different story.