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## The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction

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# THE DISCOURSE OF LAW IN TIME OF WAR: POLITICS AND PROFESSIONALISM DURING THE CIVIL WAR AND RECONSTRUCTION

NORMAN W. SPAULDING\*

## ABSTRACT

*This Article assesses the role of law and lawyering in time of war by examining how lawyers responded to and were affected by the Civil War and Reconstruction. Although the modern legal profession has its roots in the same time period (legal formalism, education in law schools rather than apprenticeships, Socratic instruction, bar associations, large firm practice, and a distinct brand of constitutional conservatism all emerge in the 1870s), historians of the legal profession have largely ignored the relationship between professional organization and lawyers' experience of the Civil War and Reconstruction.*

*Before the war period, many elite lawyers were committed to an ideal of professionalism that demanded direct engagement with matters of public concern. Lawyers who embraced the ideal were, as Joseph Story put it, "public sentinels," obliged not just to represent clients, but to defend the Constitution and the nation from lawlessness by helping to shape public opinion. Lawyers fulfilled this obligation not just by lauding the Constitution and rule of law values in public oratory, though this was a common practice, but by*

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*creating and disseminating a discourse that placed the authority of law at the center of pressing social questions.*

*During the Civil War and Reconstruction this professional ideal came to grief as legal discourse degenerated into a war of ideas over the constitutional contradictions opened by secession, unprecedented assertions of executive branch war powers, and often violent southern resistance to Reconstruction after Appomattox. Story's "public sentinels" set upon each other, threatening professional authority by exposing deep rifts in the profession about the legal status of events on the ground. Chastened and exhausted by this intraprofessional strife, elite lawyers gradually converged on a conservative view of the Reconstruction Amendments stressing constitutional continuity with respect to federalism principles and the irrelevance of federal law to the condition of blacks in the South. Central to this convergence was the development of organizational structures that provided collective, less directly political, venues in which to vindicate professional ideals and secure professional authority.*

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## I. INTER ARMA SILENT LEGES ("IN WAR, THE LAW IS SILENT")

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.<sup>1</sup>

This is Justice Davis writing for the majority in *Ex parte Milligan* just after the Civil War. Embedded in the paragraph are carefully placed assertions about the conditions necessary for reaching correct legal conclusions, and certain assumptions about what legal reasoning is and what it is not. Legal analysis, he tells us, is the exercise of reason unmoved by passion, ideology, fear; it is calm, cautious, deliberate, disinterested—at a remove from, even as it assesses, the legitimacy of power. Law is not power, on this register, but its keeper. Law is above power, both regulating it and deriving authority from independent sources.

But the paragraph also reveals a trace of relief that Milligan's habeas petition was not presented "[d]uring the late wicked Rebellion."<sup>2</sup> Relief because "[t]hen, considerations of safety were mingled with the exercise of power"—"feelings and interests prevailed" which might have inhibited "a correct conclusion of a purely judicial question."<sup>3</sup> The capacity "to form a legal judgment" might have been hobbled, or at least distorted, by "the temper of the times"—by the unbridled play of power in which the nation was consumed.<sup>4</sup> Power, Justice Davis concedes, consumes law. Only the end of hostilities, when public safety is assured, offers a proper opportunity for law to reassert its dominion.

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1. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866).

2. *Id.*

3. *Id.*

4. *Id.*

The affirmation and concession are, to say the least, difficult to reconcile. Law is displaced by power and, at the same time, or only afterwards, above power. The concession of the subordination of law to power is all the more remarkable given what the majority goes on to hold in the case. In inspired prose, Justice Davis does not hesitate to extend the governing hand of law over the events of the Civil War—reaching back into the play of power and boldly affirming the authority of civil judicial process over military commissions and martial law. His now famous phrases are confident, ethereal, and, above all, reassuringly dismissive of the claims of naked power:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.<sup>5</sup>

The “laws and usages of war,” he adds,

can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed ... no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life .... Congress could grant no such power .... Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.<sup>6</sup>

The opinion thus not only rescues Milligan from execution after summary trial by a military commission, it rescues law from power even as it concedes that, during the war itself, such an effort might not have been successful or even possible.

The concession of impotence is telling, a confession really, and a rare one coming from the Supreme Court in troubled times. Indeed,

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5. *Id.* at 120-21.

6. *Id.* at 121-22, 124-25. The majority was so anxious to affirm these principles that it brushed aside readily available and much narrower statutory grounds for disposing of the case. *See id.* at 133-36 (Chase, C.J., dissenting).

it is perhaps more accurate to say that the Court rescues law precisely because law was so violently displaced by the war—so perishable and helpless against the immediate demands of power the war presented.<sup>7</sup> If we accept the confession with the same conviction that we celebrate the holding, law is not above power so much as chasing after it. Yet this takes away the very reassurance offered by the holding and makes of the opinion a rather strange gift to civil liberty.

But it *was* a strange gift. It is no accident that, at the time, Justice Davis's ringing endorsement of civil liberty cheered southern sympathizers and opponents of Reconstruction more than the party and people who had won the war and were now trying to bring security for freedmen and order to the South. The law of civil liberties, in the temper of the time, took as much as it gave.<sup>8</sup>

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7. My point is not that the Court was completely incapacitated by the war, *see, e.g.*, *Prize Cases*, 67 U.S. (2 Black) 635 (1862) (upholding the validity of a blockade of rebel ports declared by President Lincoln), but rather that Justice Davis's opinion reveals a genuine sentiment about the precarious authority of law. The Court was, after all, rather quiescent on war and Reconstruction issues until after Appomattox. As Harold Hyman and William Wiecek write, the Court had been "virtually immobilized during the Civil War, both by a supposed fear of the Republican majority in Congress and by the justices' views of the limits of their authority." HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 366 (1982). Indeed, Congress created a tenth seat on the Court in 1863 "in part because the narrow margin in the *Prize* cases (5-4) dismayed legislators, and another safe justice was wanted" to overcome Democratic votes. *Id.* at 363; *see also* HAROLD M. HYMAN, *TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY* 261 (1959) (describing threats to abolish the Supreme Court after *Milligan* and the *Test Oath Cases* were decided).

8. *Milligan* was a Copperhead arrested and tried by military commission in Indiana for disloyal activities. Commentators have rightly pointed out that Justice Davis is careful to distinguish conditions in Indiana from conditions below the Mason-Dixon line and in active theatres of war, and that contemporary claims that the opinion undermined the constitutionality of Reconstruction were somewhat exaggerated:

The fact is that *Milligan* did not deal at all with the South. In 1867 Justice Davis, dismayed by both the Democrats' exaggerations about the outreach of the decision and Republicans' emotional denunciations of the position taken by the Court majority, noted that there was "not a word said in the opinion about reconstruction and the power is conceded in insurrectionary States."

HYMAN & WIECEK, *supra* note 7, at 383; *see also* 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88*, pt. 1, at 232 (1971) (reprinting Justice Davis's comment as quoted by Hyman and Wiecek). This is surely correct as a reading of the opinion. *See Milligan*, 71 U.S. (4 Wall.) at 125 (confirming constitutional sanction for suspending the privilege of the writ of habeas corpus in emergencies). In the words of the Court, "[i]t will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil

There is a similarly strange gift in the *Test Oath Cases*, decided the same term and involving equally important questions about the legal tools available to wrest order and security from war.<sup>9</sup> Justice Field, writing for the majority in *Cummings v. Missouri*, goes out of his way to acknowledge that the severity of the test oath before him is a product of Missouri's attempt to rewrite its constitution, to remake its fundamental law, in the heat of fratricidal strife.<sup>10</sup> In the guise of setting mere qualifications for office, he writes:

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authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection." *Id.* at 126. But the heart of white southerners' claim against military government was that they had followed President Johnson's plan of Reconstruction, that they were, as Johnson had formally declared, at peace, and that the courts were indeed open in the South. Taking the claim at face value, Justice Davis's strict definition of the conditions under which martial law is permissible supports the southern view that congressional Reconstruction, which in March 1867 broke up President Johnson's provisional governments and divided the region into military districts, was constitutionally doubtful. *See id.* at 127 (emphasizing that "[m]artial law cannot arise from a *threatened* invasion," and that it is appropriate only where the "necessity [is] actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration"); *see also* HYMAN & WIECEK, *supra* note 7, at 383 (arguing that "[c]ombined with the President's orders on peace, pardon, and amnesty, *Milligan* made Grant's General Orders 3 and 44 suspect, raised serious doubts about the Freedmen's Bureau and Civil Rights laws, and obscured the meaningfulness of the Thirteenth Amendment's enforcement clause"; quoting Attorney General Stanton's confusion about the status of trials by military commission in the South post-*Milligan*).

9. There are two cases. Both overturned legislative efforts to use oaths to ensure that, as the country moved toward peace, power in the form of public office and professional licenses would be distributed on the principle of loyalty. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 277-82, 316 (1866) (striking down as an unconstitutional *ex post facto* law and bill of attainder a test oath in the newly ratified Missouri Constitution including "more than thirty distinct affirmations and tests" designed to prohibit Confederate soldiers and sympathizers from holding public office or practicing professions such as law, teaching, preaching, and corporate management; Cummings was convicted of preaching without having taken the oath, fined \$500, and imprisoned until he agreed to pay the fine); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 333-34 (1866) (striking down as an unconstitutional *ex post facto* law and bill of attainder a test oath passed by Congress designed to prohibit Confederate soldiers, government officers, and sympathizers from practicing law in federal court and holding that the oath violated separation of powers by limiting the effect of Garland's presidential pardon; Garland represented the state of Arkansas in the Confederate Congress). Presidential pardons were a central device in the attempt to conciliate the South. Test oaths were equally important, both during the war and Reconstruction, for excluding Confederates from regaining control over the southern states and the national government. As Harold Hyman has written, *Ex parte Milligan* together with the *Test Oath Cases* "involved every aspect of the critical political struggle then gathering momentum between [President] Johnson and ... Congress" over the direction of Reconstruction. HYMAN, *supra* note 7, at 261.

10. *Cummings*, 71 U.S. (4 Wall.) at 277.



The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective.... In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship.<sup>11</sup>

Still, Justice Field reminds us, the severity and patent unconstitutionality of Missouri's oath, the vengeance embedded in it, are understandable once one recalls

the struggle for ascendancy in that State during the recent Rebellion between the friends and the enemies of the Union, and ... the fierce passions which that struggle aroused. It was in the midst of the struggle that the present constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.<sup>12</sup>

Thus, the Court, again at a relatively safe remove from the struggle and bloodshed, confidently asserts the dominion of law and civil liberties (here in constitutional prohibitions against bills of attainder and ex post facto laws) to rescue Cummings and the state from the too-fierce provisions of its own charter. Reassuringly invoking Chief Justice Marshall's reasoning in *Fletcher v. Peck*,<sup>13</sup> Field writes that "[i]t was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard."<sup>14</sup> Law mixed with passion, law made in the throes of violence and rebellion, law victimized by power, is understandably flawed. The Court will purify, Field insists; it will isolate and excise from Missouri's law all traces of vengeance and ungoverned passion.<sup>15</sup>

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11. *Id.* at 318.

12. *Id.* at 322.

13. 10 U.S. (6 Cranch.) 87 (1810).

14. *Cummings*, 71 U.S. (4 Wall.) at 322 (citing and quoting *Fletcher*).

15. Striking down a state constitutional provision, let alone a parallel federal statute, was,

But the immediate effect of the holding, as the dissent laments, was to open positions of power at a most precarious moment for the nation to infamous traitors who had a demonstrated “disposition ... to overturn the government.”<sup>16</sup> And in the case of Augustus Garland, who sought readmission to practice before the Supreme Court after dedicated service as a CSA General and four years in the Confederate Congress, the dissent could not avoid pointing out the irony and folly of denying to Congress the right to ensure that lawyers practicing in federal court are not traitors:

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument .... [F]or ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and [the] enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source.<sup>17</sup>

The dissent goes on to venture that if southern lawyers had been loyal in 1860 and 1861, they might have prevented secession, and the country “should have been spared the horrors of that Rebellion.”<sup>18</sup>

Law poisoned at its source. Law displaced by power, displaced by lawyers. Law as power. These are the insults the Civil War and Reconstruction hurled at the American legal profession and at law itself. In what follows I argue that, for elite lawyers of the period,<sup>19</sup>

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at the time, “a virtually unprecedented enlargement of federal judicial review.” HYMAN & WIECEK, *supra* note 7, at 373. On only one prior occasion “had the Court even accepted jurisdiction of a case involving allegations of a state Constitution’s violating the federal Constitution.” *Id.*

16. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 385 (1866).

17. *Id.* at 385-86 (Miller, J., dissenting). Garland went on to become Attorney General of the United States after Reconstruction.

18. *Id.* at 386.

19. I refer to elite lawyers because they led the profession and, more importantly for

the insults cut deep, producing both unparalleled anxieties about the failure of law, its woeful submission to power, and unparalleled opportunities to rescue law from power and rescue lawyers as a profession from the margins of the conflict.

The impact of the Civil War and Reconstruction on American lawyers, the history of these anxieties and opportunities, has been ignored for too long. I begin by exploring the reasons for this. Although lawyers were central to the war effort, to constitutional and legal reform during Reconstruction, and to the nation's eventual retreat from Reconstruction in the 1870s, accounts of the rise of the modern legal profession (which occurred in the midst of these events), have had surprisingly little to say about the relationship between the professionalization movement and legal failure in the period. This is partly due to our lingering ambivalence as a nation about the constitutional, racial, and political legacy of Reconstruction, and the century of racial apartheid that followed—our profound desire either to forget or to put a reassuring face on a period in which the nation radically reformed and then abandoned its constitutional commitments. But the betrayals of collective memory are only part of the problem. Scholarly histories of the legal profession leapfrog the war and Reconstruction period in an effort to prove either that the defining features of the modern legal profession are inextricably linked with the rise of industrial capitalism in the Gilded Age, and little else, or to show that lawyers were not, properly speaking, an “organized” profession at all until law schools and bar associations developed in the 1870s. Both accounts, I argue, capture realities of the legal profession, but they also miss important aspects of antebellum professional identity and the sense in which modern professionalization can be read as a response to the strain on pre-war professional ideals produced by the experience of legal failure in the war and Reconstruction.

The Article then moves to identify these antebellum professional ideals, in particular Joseph Story's vision of the lawyer as “public sentinel.” Story's concept reflects the anxiety, opportunity, and obligation that antebellum elites felt to affirm the authority of law,

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present purposes, because they left a record of responses to the constitutional issues posed by the Civil War and Reconstruction. For the most part, these lawyers were leaders in their communities and the bar. In addition, they had the leisure time, education, and means to speak and write on legal-political topics.

not just in practice, but through a self-consciously deployed discourse linking legal science to matters of public concern. I argue that this ideal, and the professional authority it was believed to secure, comes to grief when confronted with the fundamental legal contradictions ("constitutional antinomies" is the term I will use) of the war and reconstruction period.

Here my analysis takes as its focal point the discourse legal elites of the period produced to try to address these constitutional antinomies and to affirm their discursive authority by denying the failure of law. This involves rhetorical analysis, and, in some sense, trying to reveal traces of the very failure elite lawyers were writing to suppress. Thus, it is well to remember the place of rhetoric, both written and oral, in nineteenth century culture. As Daniel Walker Howe observes:

Intimately connected with [nineteenth century] oratory was rhetoric. To us, the term "rhetorical" connotes something ornamental. To antebellum Americans, however, rhetoric was a *practical* art: the study of persuasion.... [P]ersuasive rhetoric provided men of affairs with an indispensable tool for applying wisdom to everyday life. *Rhetoric thus mediated between thought and action*. Our loss of this meaning for rhetoric results from our bifurcation of thought from action, *a split that would have been incomprehensible to earlier generations*.... Rhetorical ability, everyone agreed, was crucial in a republic, for free men who could not be coerced had to be persuaded.<sup>20</sup>

Reviewing the legal discourse of the period suggests that modern professional organization is bound up with the nation's retreat from Reconstruction, particularly, the desire among elite lawyers to relocate professional authority on terrain that would not require engagement with the antinomies opened by the war. Lawyers—with the nation—tired of fratricidal strife, and this fatigue contributed to events like the formation of the American Bar Association in 1878 on the heels of the Compromise of 1877.

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20. DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 27 (1979) (emphasis added).

## II. ELIDING THE WAR AND RECONSTRUCTION EXPERIENCE

Law and lawyers were, in fact, never at the margins of the sectional conflict. To begin with, many lawyers left law practice to take up arms when the war broke out. Although the northern draft law permitted both substitution (paying another to take your place) and commutation (paying \$300 to waive service), both options open to lawyers of means, lawyers and other professionals generally chose to serve.<sup>21</sup> Professionals of all stripes in the North served in numbers roughly proportionate to their share of the adult male population. In the South, by contrast, professionals were overrepresented in the Confederate army.<sup>22</sup> At the leadership level,

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21. See Section 13 of the Enrollment Act of 1863, CONG. GLOBE, 37th Cong., 3d Sess., App. 210; EUGENE C. MURDOCK, *ONE MILLION MEN: THE CIVIL WAR DRAFT IN THE NORTH* 178 (1971) (quoting Section 13 of the Enrollment Act of 1863 that "permitted draftees to furnish substitutes in their stead, or to pay \$300 commutation money and thus escape military service altogether"). Records show that substitution and commutation were well known and widely used means of avoiding service, and that the commutation fee was specifically set to permit less wealthy draftees to buy out their service even if they could not afford the market-sensitive price of a substitute. See Peter Levine, *Draft Evasion in the North During the Civil War, 1863-1865*, 67 J. AM. HIST. 816, 827 (1981) (finding that "[c]ontemporary descriptions of the proceedings of local draft boards indicate that people were well aware of the legal avenues open to them" and that "[r]eports of large numbers of draftees rushing to their boards to pay commutation fees, provide a substitute, or obtain an exemption appear repeatedly in official correspondence"); *id.* at 819 (showing that from the inception of the draft until its end in December 1864, more than 160,000 men either paid the commutation fee or offered substitutes, a figure approximately three times the number of men actually held to personal service); see also Hugh G. Earnhart, *Commutation: Democratic or Undemocratic?*, 12 CIV. WAR HIST. 132, 133 (1966) (describing the egalitarian purpose behind commutation); cf. Russell L. Johnson, *"Volunteer While You May": Manpower Mobilization in Dubuque, Iowa, in UNION SOLDIERS AND THE NORTHERN HOME FRONT: WARTIME EXPERIENCES, POSTWAR ADJUSTMENTS* 30, 32 (Paul A. Cimbala & Randall M. Miller eds., 2002) (noting that 90 percent of northern soldiers were volunteers and that "fewer than 10 percent of Union Army soldiers were conscripts; adding draft substitutes, the number rises to just 10.2 percent"). It is important to note, however, that not all lawyers chose to serve. Michael T. Meier, *Civil War Draft Records: Exemptions and Enrollments* 26, in PROLOGUE: Q. NAT'L ARCHIVES 282, 282 (1994) (describing New York lawyer George Templeton Strong's decision to pay "a 'big Dutch boy of about twenty' \$1,100 to be his 'alter ego' in 1864"). In contrast to the northern draft laws, substitution, but not commutation, was available in the South. See MURDOCK, *supra*, at 24.

22. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 359 (1982) (reporting that professionals composed either 3.2% or 2.9% of the Union Army and 3.5% of the population of males in the 1860 census, and finding that professionals composed 5.2% of the Confederate army, though only 5.0% of males in the 1860 census). McPherson rightly points out that most people in the nineteenth century came into professional careers later in life and that the median age of soldiers was 23.5. Accordingly, the comparison to the 1860 occupational profile, which "represents men of *all* ages," may not accurately reflect the

lawyers figured prominently in both armies. Excluding professional soldiers, generals in the Union Army were more likely to have worked as lawyers or judges before the war than in any other job category. Twenty-two percent of the generals fielded by the North were lawyers or judges.<sup>23</sup> In the Confederate Army, fully thirty percent of the generals were lawyers or jurists, outnumbering even professional soldiers.<sup>24</sup> On both sides, these gentlemen soldiers did not simply enlist for the distinction of title and safe administrative or legal work. Often at substantial personal and pecuniary cost, not

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true extent of service by professionals. *Id.* at 357; see also Thomas R. Kemp, *Community and War: The Civil War Experience of Two New Hampshire Towns*, in TOWARD A SOCIAL HISTORY OF THE AMERICAN CIVIL WAR 31, 64-66 (Maris A. Vinovskis ed., 1990) (presenting detailed enlistment data showing "high participation rate[s] by both towns' 'prime' groups" in terms of wealth); John Robertson, *Re-Enlistment Patterns of Civil War Soldiers*, 32 J. INTERDISC. HIST. 15, 22-23 (2001) ("Studies of enlistment indicate that ... the Union Army of 1861 was the most socially representative army in United States history. Skilled and white-collar workers enlisted in numbers greater than their proportions in the general population," and "[i]f any occupation was underrepresented, it was laborers."); *id.* at 28, 30 (noting the opposite trend in re-enlistment using data from western Pennsylvania companies). Add to this the ready availability of substitution and commutation, see *supra* note 21, and the data McPherson cites reflects robust participation in the war effort by lawyers and other professionals.

Unfortunately, records from the two major studies cited by McPherson and relied on in the major studies of Civil War soldier demographics do not break down the "professional" occupational category, so we cannot know whether lawyers as a group served in proportion to their share of the general population without a direct examination of the regional enrollment records of the Provost Marshal at the National Archives, and even these records do not always list exact occupations. See Maris A. Vinovskis, *Have Social Historians Lost the Civil War? Some Preliminary Demographic Speculations*, in TOWARD A SOCIAL HISTORY OF THE AMERICAN CIVIL WAR, *supra*, at 13 (determining that the complete absence of "detailed national statistics on the characteristics of those who fought and died in the Civil War" forces analysis to the local and regional level); see also JAMES W. GEARY, *WE NEED MEN: THE UNION DRAFT AND THE CIVIL WAR* 87, 175 (1991); Meier, *supra* note 21, at 282 (describing Records of the Provost Marshal General's Bureau in Record Group 110 of the National Archives as the "principal records that relate to the 1863 draft").

23. EZRA J. WARNER, *GENERALS IN BLUE: LIVES OF THE UNION COMMANDERS* xix (1964) (reporting that lawyer/jurists made up 126 of the 583 Union generals). Lawyers were also strongly represented among Union colonels. See generally ROGER D. HUNT, *COLONELS IN BLUE: UNION ARMY COLONELS OF THE CIVIL WAR* (2001) (reporting short biographical sketches from New England states showing that 7 of 36 colonels from Connecticut were lawyers; 10 of 33 from Maine; 11 of 76 from Massachusetts; 10 of 26 from New Hampshire; 5 of 15 from Rhode Island; and 11 of 31 from Vermont).

24. EZRA J. WARNER, *GENERALS IN GRAY: LIVES OF THE CONFEDERATE COMMANDERS* xxi-xxii (1959) (reporting that lawyer/jurists made up 129 of the 425 Confederate generals). If politicians, many of whom Warner notes were also lawyers, are added to the category of lawyer/jurists, the latter substantially outnumber any other category. Even more striking in the Confederate army is that there were more than three times the number of lawyer/jurist generals than farmers, and more than twice the number of businessmen. *Id.*

to mention great bodily peril, they recruited, trained and led troops, and served with distinction in battle.<sup>25</sup>

Of course, the choice to take up arms cannot be interpreted as a repudiation of law by these lawyers, for the war itself was too widely seen as a campaign to vindicate law and save the Constitution.<sup>26</sup> But unless we reason backwards from results on the battlefield to determine the legal status of events, it is difficult to avoid the conclusion that, to the extent law mattered, *both sides* fought to vindicate law, and for reasons that reveal deep fissures in the legal community regarding the Constitution. One could believe in fighting to vindicate Lincoln's view that "in legal contemplation, the Union is perpetual ... [that] no State upon its own mere motion can lawfully get out of the Union."<sup>27</sup> One also could justify fighting for the constitutional sanctity of states' rights doctrine or the constitutional sanctity of slavery. As shown by the Abolitionist and Radical Republican push for emancipation during the war, these were not the only possibilities. One could justify fighting to redeem the Constitution by rescuing it from slavery. Thus, before Justice Davis's attempt to rescue law from the exigencies of war, we are confronted with the fact of a war fought not just for law, but over law. And during Reconstruction, of course, rather than end the war, law itself became the battlefield.

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25. See, e.g., David A. Murdoch, *Profiles in Leadership: Allegheny County's Lawyer-Generals in the Civil War*, 81 PITT. HIST. 172 (1999) (noting that "[t]hirty-five Pennsylvania lawyers achieved the rank of general during the Civil War," and detailing military careers, commendations for valor, promotions, and injuries suffered in battle by ten lawyers from Allegheny County); see also, e.g., GEORGE M. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISES OF THE UNION* 72-73 (1965); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 49-86 (1993) (describing Justice Holmes's thoughts on the Civil War in light of his personal service).

26. See Phillip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 AM. HIST. REV. 1013, 1015 (1972) (describing northern "law and order" response to the firing on Fort Sumter). For a survey of research into the complex motivation of soldiers, see Marvin R. Cain, *A "Face of Battle" Needed: An Assessment of Motives and Men in Civil War Historiography*, 28 CIV. WAR HIST. 5 (1982); cf. Vinovskis, *supra* note 22, at 1-2 (emphasizing that "[s]urprisingly little has been written about the personal experiences of ordinary soldiers or civilians during [the Civil War]," and that "social historians of the nineteenth century appear to have ignored the Civil War altogether").

27. Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), in *THE LIFE AND WRITINGS OF ABRAHAM LINCOLN* 650 (Philip Van Doren Stern ed., 1940) [hereinafter *LIFE AND WRITINGS*].

The vexed status of law can be seen with equal force in the work of lawyers who remained in practice but were nonetheless engaged in the war effort. In litigation,<sup>28</sup> public office,<sup>29</sup> and, most importantly for present purposes, in a steady stream of legal commentary, elite lawyers labored to reconcile the demands of law with the demands of war and Reconstruction, to answer the question how one serves law in time of war.<sup>30</sup> They generated very rich—if conflicted—answers about which we remember far less than we should.

Though arguably as significant in terms of their impact on constitutional law, history has not been as kind to the lawyers of this period as it has been to the many lawyer-statesmen who helped win the Revolutionary War and then convened in Philadelphia to write the Constitution. The Framers have attained a mythical status, and their time is often recalled as a “golden age” in the profession notwithstanding the rather bitter disputes between them and fairly sharp popular criticism of lawyers as a group.<sup>31</sup> Indeed,

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28. See, e.g., Daun van Ee, *David Dudley Field and the Reconstruction of the Law* 162-212, in *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS* (Harold Hyman & Stuart Bruchey eds., 1986) [hereinafter *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY*] (describing Field's role in arguing major reconstruction cases such as *Ex parte Milligan*, *Test Oath Cases*, *Ex parte McCordle*, and *Cruikshank*).

29. As Harold Hyman has observed:

[B]eginning in 1861, lawyers as a professional class moved in relatively large numbers up to the political echelons where power existed and decision-making was a daily weight. With respect to the national government only, a cadre of fine lawyers, including Lincoln, Chase, Edwin M. Stanton, Joseph Holt, Francis Lieber, Peter Watson, and William Whiting, took control at the White House, Treasury, and War Department .... In Congress, law-trained men also increased in prominence.

Harold M. Hyman, *Law and the Impact of the Civil War*, 14 *CIV. WAR HIST.* 51, 55 (1968); see also PHILLIP S. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 47 (1975) (“By the war era, the primacy of the legal profession in Congress was obvious. In the Thirty-ninth Congress, which assembled in December, 1865, 54 percent of the House and 85 percent of the Senate were lawyers. The Fortieth Congress had over 160 lawyers in it.”).

30. See generally *infra* Parts III, IV.

31. For the claim that the Revolutionary period was “the golden age of the lawyer,” see ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE REVOLUTIONARY AND THE POST-REVOLUTION ERA* 285 (1965) (“[T]he public leadership of the American legal profession attained unprecedented height. It was a time when lawyers spoke and acted with that conscious authority which is characteristic of truly creative founders and promoters of public institutions and policies.”). On the struggles between Federalists and Anti-Federalists, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 321-79 (enlarged ed. 1992); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON*



even as their disagreements are recapitulated in our own disputes over what they meant to accomplish in the Constitution, the depth of the Framers' differences and failings fade in the face of patriotic admiration for the genius of the document they produced and gratitude for delivering us from the disorder of confederation.

Lawyers of the Civil War and Reconstruction period tend, by contrast, either to be ignored or condemned for a lack of statesmanship that exacerbated an already embarrassing political and professional moment.<sup>32</sup> The omission is certainly not accidental. As

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8-29 (1945) (describing the political legacy of the Hamiltonian-Jeffersonian conflict of constitutional values). On the suppression of popular discontent with the profession by legal historians, see CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 212 (1911) ("Nothing in legal history is more curious than the sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class. For a time, it seemed as if their great services had been forgotten and as if their presence was to be deemed an injury to the nation."); cf. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 32-58 (1976) (canvassing early anti-lawyer sentiment and noting that it has "puzzled" legal historians intent on painting lawyers of the Revolutionary era as national heroes); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 108, 113 (2d ed. 1985) (describing anti-lawyer sentiment).

32. Justice Davis's jab at the role of southern lawyers in causing the war is but the tip of the iceberg. On negative estimations of the Chase Court, see HYMAN & WIECEK, *supra* note 7, at 359-60; cf. STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS*, at vii (1968) (concluding that the period comprising the Civil War and Reconstruction "represented continuity, not a lapse in judicial development"). Radical Republicans who strongly supported Lincoln and pushed hardest for constitutional amendments to liberate and protect blacks have only recently been recovered from the condemnation of the Dunning School characterization of Reconstruction as a catastrophe of corruption orchestrated by vindictive radicals. See generally MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869* (1974) (offering revisionist history of Reconstruction); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at xix-xxiv (1988) (summarizing the Dunning School interpretation and subsequent scholarly revisionism); EDWARD L. GAMBILL, *CONSERVATIVE ORDEAL: NORTHERN DEMOCRATS AND RECONSTRUCTION, 1865-1868* (1981) (offering revisionist history of northern Democrats).

There is, to be sure, a growing collection of very good biographies of leading lights, and the legal events have been thoroughly canvassed, though mostly through the lens of the Supreme Court's decisions and the work of the Congresses that battled President Johnson, presided over Reconstruction, and drafted the Reconstruction Amendments. See generally DAVID DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* (1960); DAVID DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* (1970); DAVID HERBERT DONALD, *LINCOLN* (1995); HOWE, *supra* note 20, at 238-98; JOHN ANTHONY MORETTA, *WILLIAM PITT BALLINGER: TEXAS LAWYER, SOUTHERN STATESMAN, 1825-1888* (2000); PALUDAN, *supra* note 29, at 109-249 (writing on Cooley, Sidney George Fisher, John Norton Pomeroy, Francis Lieber, and Joel Parker); HANS L. TREFOUSSE, *THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN* (1997); Alan Robert Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas*, in *AMERICAN LEGAL AND CONSTITUTIONAL HISTORY*, *supra* note 28; Charles W. McCurdy, *Stephen J. Field and the American Judicial Tradition*, in *THE FIELDS*

one commentator on the constitutional history of the period concludes:

Legally, the Civil War stands out as an eccentric period, a time when constitutional restraints did not fully operate and when the "rule of law" largely broke down. It was a period when opposite and conflicting situations coexisted, when specious arguments and legal fictions were put forth to excuse extraordinary measures.<sup>33</sup>

What is to be gained from studying the conduct and discourse of lawyers who presided over such a conspicuous failure of law? There is, on this view, certainly no comparison to the Framers.<sup>34</sup>

It is worth recalling though, that the lawyer statesmen of the 1780s operated at a distinct advantage so far as history making is concerned. They obviously had the good fortune of presiding over a successful founding rather than fratricidal strife and deeply contested constitutional reform. But the "Tory exodus" during the

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AND THE LAW 5 (Joseph Franaszek et al. eds., 1986); van Ee, *supra* note 28. Principal legal and constitutional surveys include FAIRMAN, *supra* note 8; 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, pt. 2 (1987); DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (Sentry ed. 1975); HYMAN & WIECEK, *supra* note 7; KUTLER, *supra*; J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1963). Contemporaneous legal commentary is often cited and examined in these works, but there has been no sustained effort to assess how the legal contradictions presented by the war and Reconstruction impacted the profession more generally. Philip Paludan, Harold Hyman, and William Wiecek track some developments in the legal profession, but they too are more interested in the way lawyers affected law and the times than vice versa. They also share a normative slant against advocates of the southern perspective and a tendency to suppress the depth of constitutional failure, especially in the war period. See HYMAN & WIECEK, *supra* note 7, *passim*; PALUDAN, *supra* note 29 *passim*; Paludan, *supra* note 26, at 1020. Their ultimate purpose, in any event, is to show how legal concerns helped close the door on Reconstruction, but they only gesture at the relationship between this narrative and the professionalization movement that coincides with Reconstruction and sectional reconciliation. In addition, there is little effort to connect this important relationship to the defining features of the antebellum legal profession.

33. RANDALL, *supra* note 32, at 521; see also HYMAN, *supra* note 7, at 259 (stating that "[c]ourts, constitutions, and bills of rights, whether federal or state, Northern or Southern, had utterly failed to protect American civil liberties during the war years").

34. Hyman offers another explanation for the failure to study lawyers in the war period. While legal scholars have tended to see continuity in the nineteenth century, historians "estimate the Civil War as turbulent watershed, not placid canal." Hyman, *supra* note 29, at 58.

Revolutionary War (helped along by loyalty oaths and so-called "Banishing Acts") also "included roughly one-fourth of all pre-revolutionary" lawyers in America—many of them leaders at the bar.<sup>35</sup> Whatever their principled differences, by the time prominent American lawyers sat down to work out a constitutional plan in Philadelphia, they at least were not forced to deliberate with or justify their work to peers turned apostates and traitors.

And perhaps we have continued to give the Framers more than their due. Their constitutional compromises (especially on slavery) and the structural issues they left to doubt (especially with respect to federalism), set the framework for constitutional failure and disunion seventy years later.<sup>36</sup> Law, in short, may have been failing from the start. And if this is so, lawyers of the Civil War and Reconstruction were faced with exceedingly controversial unfinished business—a refounding as Bruce Ackerman has insisted—without the luxury of banishing their faithless brethren.<sup>37</sup> Worse yet, in the "temper of the times," it was even hard to agree on what keeping faith should mean.<sup>38</sup>

Still, neglect of the impact of this period on the profession persists not just because the very concept of legal statesmanship was hopelessly vexed (would statesmanship have required adhering to the Framers' constitutional compromises or breaking from them?), and not just because it is difficult to locate and build reassuring narratives around legal actors when the action of law was so hotly contested. Neglect also persists because the dominant schools of thought in the history of the legal profession begin

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35. BLOOMFIELD, *supra* note 31, at 1-31, 42; *see also* FRIEDMAN, *supra* note 31, at 303. Warren contends that the bar lost some of its best talent to England and that "[t]his left the practice of the law very largely in the hands of lawyers of a lower grade and inferior ability." WARREN, *supra* note 31, at 212-14.

36. *See* HYMAN & WIECEK, *supra* note 7, *passim*; MCPHERSON, *supra* note 22, at 1-2 (noting significance of slavery and federalism to the rise of sectional conflict); Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327, 329 (1964) (finding that "the very form that the conflict finally took was determined by the pre-existing form of the constitutional system"); *see also* Bestor, *supra*, at 339-40, 351-52. This is not to deny the significance of other issues such as territorial expansion, the rise of organized abolition movements, and the economics of southern slavery and northern industrialism. *See* MCPHERSON, *supra* note 22, at 5-126; Bestor, *supra*, at 330-33.

37. *See* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99-207 (1998).

38. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 109 (1866).

from premises that render the war and Reconstruction experience largely irrelevant.

### A. Whiggish Accounts

On the one hand, early treatments of the nineteenth century legal profession tended to see, from the beginning of the Jacksonian democratic movement in the 1830s, a profession in disarray—increasingly composed of lawyers who lacked not only the civic republican virtues of the Revolutionary period lawyer-statesmen, but who were untrained, unregulated, ethically unscrupulous, professionally disorganized, and hostile to common law reception. The quality of judges is also said to have diminished as Jacksonian legislatures not only lowered or eliminated standards for admission to practice, but provided for the popular election of judges.<sup>39</sup> Roscoe Pound's *The Lawyer from Antiquity to Modern Times* is emblematic.<sup>40</sup> Eager to affirm the importance of organizational structures (especially the law school and bar associations) which did not begin to emerge in earnest until the 1870s, Pound brands the period between 1836 and 1870 as an “era of decadence”<sup>41</sup> responsible for the “thorough deprofessionalizing of the Bar.”<sup>42</sup> He writes that “[t]here had come to be, not a Bar, but so many hundred or so many thousand lawyers, each a law unto himself, accountable only to God and his conscience—if any.”<sup>43</sup> Dean Wigmore, Pound adds, “put it even more vigorously: ‘the profession was a complacent, self-satisfied, genial fellowship of individual lawyers—unalive to the shortcomings of justice, unthinking of the urgent demands of the impending future, unconscious of their potential opportunities, unaware of their collective duty and destiny.’”<sup>44</sup> Anton-Herman

39. On the transition to popular election, see JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 129-31, 140 (1950) [hereinafter HURST, *GROWTH OF LAW*].

40. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953).

41. *Id.* at 248.

42. *Id.*

43. *Id.*

44. *Id.*; see also *id.* at 232-34, 241, 249; John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75, 76-79 (Gerald W. Gawalt ed., 1984) (discussing the motives for organizing bar associations) [hereinafter *NEW HIGH PRIESTS*]; cf. JOHN R. DOS PASSOS, *THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE* 12, 25, 34 (Fred B. Rothman & Co. 1986) (1907) (dating the rise of “decadence” and the fall from a “profession to a business” at the

Chroust finds the same demoralizing trend in the antebellum bar, and he links lawyers' "highly self-conscious individualis[m]"<sup>45</sup> and rapacity to the leveling, antinomian values underlying Jacksonian democracy:

Due to the constant influx of a large number of people unfit by character, culture, or training to become members of a learned profession, the deterioration of the American bar as a whole assumed new and unprecedented proportions on the eve of the Civil War. The general contempt and disgust in which the contemporary legal profession was held by the public at large around the middle of the nineteenth century was often well deserved .... [Lawyers'] individualism, as well as the almost complete absence of any professional organization or internal discipline after 1830, was deeply rooted in the social, economic, and political thinking of the time; individualism and lack of professional cohesion were predominant in a society where each person primarily was bent on personal self-advancement and gain in the hectic exploitation of a new continent and its vast resources.<sup>46</sup>

Both Pound's and Chroust's narratives have the effect of reducing professional history to a struggle to establish and maintain the "modern" organizational structures that supposedly distinguish the profession of law from trades and occupations animated by the quest for personal gain. For Chroust, the gradual displacement of apprenticeship by rigorous academic preparation in law schools is of central importance to professional redemption.<sup>47</sup> For Pound, it is the development of formal bar associations:

Revival of professional organization for promoting the practice of a learned art in the spirit of a public service and advancing the administration of justice according to law got its impetus as a country wide movement from the organization of the American Bar Association in 1878. But the movement definitely began

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outset of the Civil War).

45. CHROUST, *supra* note 31, at 286-87.

46. *Id.* at 286-87; see also Philip J. Wickser, *Bar Associations*, 15 CORNELL L.Q. 390 (1930).

47. See CHROUST, *supra* note 31, at 287-88.

with the organization of the Bar Association of the City of New York in 1870.<sup>48</sup>

Formation of the New York association thus “mark[ed] a decisive change in the character and objects of organizations of lawyers.”<sup>49</sup>

Pound is right, of course, that the Association of the Bar of the City of New York (ABCNY) was instrumental not only in inspiring the formation of other bar associations, but also in helping to restore the honor and integrity of the bar by taking a stand against judicial corruption,<sup>50</sup> establishing a Committee on Grievances to review professional misconduct,<sup>51</sup> opposing codification of the common law,<sup>52</sup> and pursuing the improvement of standards for legal education and admission to the bar.<sup>53</sup> And he is right that the formation of the ABA in 1878 led to the first national code of ethics in 1908, as well as mandatory, integrated state bar associations with prescribed rules of admission, authority to disbar, and authority to speak with one voice for the profession on matters touching the administration of justice in each state.<sup>54</sup> It is true too that law schools finally began to capture the market in 1870 (after a century of exceedingly weak competition with the apprentice system) when Christopher Columbus Langdell took the deanship at Harvard and replaced the lecture format with the case method.<sup>55</sup>

But there is an unmistakably whiggish pull to the narrative Pound and Chroust offer.<sup>56</sup> Professionalism and progress are tightly

48. POUND, *supra* note 40, at 249; see also Matzko, *supra* note 44, at 78 (discussing the renewed interest in bar associations following the Civil War).

49. POUND, *supra* note 40, at 255.

50. The ABCNY “played an important part” in bringing down the Tweed ring, as “[t]he impeachment of two judges, and resignation of a third, as a result of an investigation [the ABCNY] had recommended, established it in public confidence ....” *Id.* at 260.

51. *Id.*

52. *Id.* Pound writes that the ABCNY “did a real service to the law” because “[t]he time was not then ripe for codification of the common law.” *Id.*

53. *Id.*

54. See *id.* at 271-78; Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471 n.2 (1998) (describing how the Alabama Code influenced the structure of the first national code of ethics in 1908).

55. See HURST, *supra* note 39, at 256, 260-64; ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW* 343-45 (1921); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1406 (2003).

56. I refer here to the historiographic school, not to be confused with the American

linked to the emergence of organizational structures we now take for granted. Pound describes “the rise of Bar Associations in the last three decades of the nineteenth century, and the growth of Bar organization in the present century as a progress in undoing the mischief wrought in the deprofessionalizing of the practice of law in America before and after the Civil War.”<sup>57</sup> More than simply “undoing” past mischief, he sees the creation of organizational structures to superintend legal education, entry into practice, the conduct of practicing of lawyers, and the administration of justice as “restoring the practice of law *as a profession*.”<sup>58</sup> Professional identity (in the most basic sense of self-conscious membership in a shared enterprise) and professionalism (in the sense of enforceable adherence to shared standards of conduct and a commitment to law as a form of public service) are thus equated with the presence of specific institutions controlled by and authorized to regulate lawyers.

The claim that these institutions are historically significant is unassailable. But with such a narrow focus on the presence or absence of specific institutional structures and such a dim view of antebellum lawyers, it would be difficult even to see other evidence or other forms of professional identity, organization, and self-regulation if they existed before 1870.<sup>59</sup> Moreover, the whiggish

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political party. Whiggish themes are also implicit in Charles Warren’s work and in other histories of the legal profession. See WARREN, *supra* note 31; see, e.g., GERALD CARSON, A GOOD DAY AT SARATOGA (1978); DOS PASSOS, *supra* note 44, at 12-14, 25, 184-85; ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); REED, *supra* note 55; M. LOUISE RUTHERFORD, THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION (1937); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK (1953); G.W. Adams, *The Self-Governing Bar*, 26 AM. POL. SCI. REV. 470, 473 (1932); W. Raymond Blackard, *The Demoralization of the Legal Profession in Nineteenth Century America*, 16 TENN. L. REV. 314 (1940); Norbert Brockman, *The National Bar Association, 1888-1893: The Failure of Early Bar Federation*, 10 AM. J. LEGAL HIST. 122 (1966).

57. POUND, *supra* note 40, at 353.

58. *Id.* (emphasis added).

59. It is not even clear that the whiggish theory of professionalization is persuasive with respect to the twentieth century bar. As Deborah Rhode and others have shown, the intrusiveness and irrationality of moral character reviews contrast sharply with the bar’s notorious laxity in imposing discipline on deviant lawyers already in the profession. See DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 152-53 (2000). The bar has also failed to mandate pro bono service. Accordingly, most lawyers do little if any public service work of any kind, and law reform, as a bar agenda, is relatively uninspired. *Id.* at 37, 203-04, 208. In short, notwithstanding the emergence of formal organizational structures, the profession remains weakly regulated and ill-fitted to Pound’s

account is almost completely silent on the impact of the Civil War and Reconstruction even though the institutional structures central to its thesis arose in the midst of the sectional conflict. With the exception of Chroust's veiled hint that the war may have had something to do with the deteriorated condition of the profession on the "eve" of the outbreak of sectional violence, the war surfaces only as a metonymic expression for the period marking the divide between antebellum lawyers and the rise of the modern profession.<sup>60</sup> Not a word is said about Reconstruction.<sup>61</sup>

### *B. Neo-Marxist Accounts*

The other principal account of the development of the modern legal profession, which for present purposes we can call neo-Marxist,<sup>62</sup> is offered by legal ethicists and post-functionalist sociologists who link the emergence of modern institutional structures for professional education and regulation to the rise of industrial capitalism, a professional ideology of amoral, client-centered practice, and specialized, large-firm corporate law practice.<sup>63</sup> "At the center of these changes," on this account, "were

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conception of a "learned art in the spirit of a public service." POUND, *supra* note 40, at 5. See generally RHODE, *supra*, chs. 6-7 (exploring regulation of the legal profession and discussing the need for reform starting at the law school level).

60. See CHROUST, *supra* note 31, at 286.

61. This is more understandable in the case of Chroust, whose focus is the early American bar, see *id.*, than in Pound's history, which runs the narrative of professional organization forward into the twentieth century. See POUND, *supra* note 40, at 270-349. Allison Marston's article is an important exception. See Marston, *supra* note 54. Her laudatory description of Thomas Goode Jones's role in the drafting of Alabama's State Code of Ethics in 1887 points directly, though cursorily, to the "social upheaval" of the Civil War and Reconstruction as motivating elite lawyers in the state to devise a formal code. See *id.* at 486-87, 490. Nonetheless, working within a whiggish framework to celebrate the code as an important step toward professionalization, see *id.* at 190-91, leads her to discount the important relationship between post-war reformism, political and moral conservatism, professional organization, and pervasive racism. See *id.* at 480 (defending Jones's service to professional organization on the ground that "[d]espite [his] conservative, racist vision, [he] was a reformer throughout his career").

62. "Neo-Marxist" captures the loose economic determinism underlying the critique of professionalization offered by this group of scholars, but this is not the only feature of the school. Moral condemnation, nostalgia, and civic republican idealism runs just as strong, if not stronger, than the economic critique.

63. See Spaulding, *supra* note 55, at 1400-07 (describing the neo-Marxists' view of the legal profession's fall from civic republicanism to amoral, client-centered advocacy and citing



the needs of emerging corporate capitalists to frame their economic interests and transactions in the legitimating language of the law, and, concomitantly, the needs of elite lawyers performing this task to organize and frame their efforts in a legitimating professional ideology."<sup>64</sup> Eighteen seventy is still taken to be the watershed date, but rather than marking the beginning of real progress in the project of professionalization, for the neo-Marxists it marks the capitulation of antebellum statesmanship and civic republican values to commercialization, laissez-faire principles, and pure self-interest.<sup>65</sup>

The neo-Marxist account thus takes for granted the whiggish claim that the rise of formal institutional structures is critical to understanding the modern legal profession. Indeed, it stresses the parallel growth and significance of another institution: the large corporate law firm.<sup>66</sup> But it also reverses the valence of the whiggish thesis, revealing a perverse underside to the purpose and effect of those very structures. Far from laying the foundations for professional progress, the work of law schools and bar associations (primarily routinized, narrowly doctrinal legal training, formalist legal theory, standardized admission tests, moral character reviews, ethical codes, and attorney discipline) is viewed as providing the profession with the essential tools for protecting its monopoly rents by excluding competitors, restricting entry, and forestalling public regulation—all under the cover of an ethical theory that conve-

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sources); see also PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION 1-4 (1999) (citing and canvassing his earlier work on the "professional morality" of antebellum university law teachers, and discussing the "opposition between the commitments of lawyers" who embraced this tradition and the narrower commitments of "many contemporary lawyers").

64. *Id.* at 1402-03.

65. See *id.* at 1405-06, 1458-59; see also HURST, GROWTH OF LAW, *supra* note 39, at 441-42 (analyzing the market economy's impact on American legal and social order).

66. See, e.g., Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920* [hereinafter Gordon, *Legal Thought*], in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 72-75 (Gerald L. Geison ed., 1983) [hereinafter PROFESSIONS AND PROFESSIONAL IDEOLOGIES] (describing the relationship between Harvard-style university law training and the work of corporate law firms); Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in NEW HIGH PRIESTS, *supra* note 44, at 5-7 (reporting statistics on the growth of large law firms); see also MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 16 (1988) (noting the impact of the emergence of large law firms on the New York bar).

niently rationalizes indifference to the moral and social costs of zealous client-centered service.<sup>67</sup> Modern professionalization, in short, is equated with elitism, rent-seeking, and, most damningly, moral failure.

The neo-Marxists are surely right to emphasize the effect of industrial capitalism on late nineteenth century lawyers. It was palpable, and it remains an overwhelmingly significant force shaping the practice of law.<sup>68</sup> But in their intense focus on the relationship between industrial capitalism, institutional structures, and professional ideology, antebellum lawyering receives a decidedly nostalgic, arcadian gloss,<sup>69</sup> vibrant and diverse nineteenth

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67. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 3-7, 12-13, 62-66, 276-81 (1976); POWELL, *supra* note 66, at 9-16, 23-26; Spaulding, *supra* note 55, at 1400-09 (citing and discussing neo-Marxist authors). There is a point at which the neo-Marxist and whiggish theories converge in deploring the effects of commercialization. Compare Spaulding, *supra* note 55, at 1405 (noting that for neo-Marxists "[t]he [legal] profession was thus compromised ... by service to corporate capital"), with POUND, *supra* note 40, at 359-60 (anticipating that commercialization may cause practitioners to focus on the "trade spirit of emphasis on wages rather than the professional one of emphasis on pursuit of a calling in the spirit of public service"). The difference between the two is that for neo-Marxists, professional organization is, or at least becomes, a part of the problem, not a solution.

68. See Richard L. Abel, *United States: The Contradictions of Professionalism*, in *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* 186-238 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

69. Commercial pressures, greed, and self-interest were well established in antebellum practice. As many historians have shown, the commercial class and the corporate form were significant forces in antebellum law, and the challenges they presented to the civic republican ideal of law practice were already being felt. See, e.g., FRIEDMAN, *supra* note 31, at 114-15, 177-78, 191, 308 (describing the effects of economic change on American law during the late eighteenth and early nineteenth centuries); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at xvi (1977); HURST, *GROWTH OF LAW*, *supra* note 39, at 253 (noting the effects of the growth of commerce as far back as the eighteenth century); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 15-17, 105 (1956) [hereinafter HURST, *LAW AND CONDITIONS*] (describing the relationship between law and the release of entrepreneurial energy); SCHLESINGER, *supra* note 31, at 334 (discussing the corporation in the Jacksonian era); Gerard W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900*, in *NEW HIGH PRIESTS*, *supra* note 44, at 97 ("Rather than opposing the rise of this new dominant group in society, the legal profession joined the business community in many forms and .... shared in its socioeconomic advances at the expense of professional and individual autonomy .... In Massachusetts, this shift was well underway by 1840, and the change was virtually accomplished by 1870."); Harry N. Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 *LAW & SOC'Y REV.* 57, 117-18 (1975) (examining the effects of federalism on legal-economic development). Philadelphia lawyer Sidney George Fisher, though never particularly comfortable with law practice, would lament in his diary as early as 1837 that

century perspectives on professional ethics are suppressed,<sup>70</sup> and, as in the whiggish account, there is deafening silence on the impact of the Civil War and Reconstruction except insofar as they helped accelerate the growth of American industrial capitalism.<sup>71</sup>

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"[t]he professions have become mere money-making pursuits." Sidney George Fisher, Diary Entry (Apr. 12, 1837), in *A PHILADELPHIA PERSPECTIVE: THE DIARY OF SIDNEY GEORGE FISHER COVERING THE YEARS 1834-1871*, at 29-30 (Nicholas B. Wainwright ed., 1967) [hereinafter *PHILADELPHIA PERSPECTIVE*]. Fisher continued:

I know of nothing more narrowing to the mind, more debasing to the soul than this same struggle for business at the bar to which so many of our young men are obliged to devote themselves; and nothing has ever disgusted me so much with human nature as to witness the moral qualities which it produces or develops & cherishes ... sordidness, & cringing crawling sycophancy to older members of the bar or to businessmen who have practice to give ....

Fisher, Diary Entry (Feb. 9, 1837), in *PHILADELPHIA PERSPECTIVE*, *supra*, at 21; *see also* Fisher, Diary Entry (Dec. 17, 1839) in *PHILADELPHIA PERSPECTIVE*, *supra*, at 92 (discussing "rage for money-making" breaking down "all principle & honesty"); Fisher, Diary Entry (Feb. 25, 1849), in *PHILADELPHIA PERSPECTIVE*, *supra*, at 219 (discussing worries about representing a fraudulently financed local railroad); Fisher, Diary Entry (Jan. 13, 1850), in *PHILADELPHIA PERSPECTIVE*, *supra*, at 232; Fisher, Diary entry (Jan. 19, 1857), in *PHILADELPHIA PERSPECTIVE*, *supra*, at 246.

70. There is evidence that antebellum lawyers were at least as comfortable as postbellum lawyers defending an amoral, client-centered ethic of practice. *See* Spaulding, *supra* note 55, at 1424-58. It is not even clear that amoral, client-centered ethics dominated post-war practice. *See* Gordon, *Legal Thought*, *supra* note 66, at 97 (describing "three distinctive versions of the ideology of legal science" and the different styles of practice and "public service activity" each implied); Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, in *NEW HIGH PRIESTS*, *supra* note 44, at 65-66 (discussing the absence of a unifying ideology of practice coming out of the Gilded Age).

71. Even the more scrupulous histories of the legal profession, which do not suffer from whiggish or neo-Marxist biases, give only passing attention to the war and reconstruction. *See, e.g.*, BLOOMFIELD, *supra* note 31; FRIEDMAN, *supra* note 31; HORWITZ, *supra* note 69; HURSI, *GROWTH OF LAW*, *supra* note 39; Gordon, *Legal Thought*, *supra* note 66; Gordon, *supra* note 70; Hyman, *supra* note 29, at 58 (supporting Perry Miller's simplistic account of the Civil War as a "violent curtain," separating sharply Americans' aspirations and priorities. Before Sumter, codification was a crusade among a talented elite of young legalists; after Appomattox it was a prissy concern of the elitist patricians of the legal profession."). Charles Warren's chapter on the war period in *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* is dated and limited to the careers of Emory Washburn and Joel Parker at Harvard Law School. 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 307-11, 313-18 (1908). Robert Gordon, who offers a sophisticated critique and extension of the neo-Marxist account by focusing on the relationship between professional ideology and the law practice of Gilded Age elites, is nonetheless skeptical about the relevance of the war and Reconstruction:

Some accounts seek the origins of ... legal Liberalism in strictly American phenomena, such as antislavery natural-law jurisprudence or the revulsion against the active state because of its supposed abuses during Reconstruction. *Such explanations seem unduly parochial*, since legal thought went through

We need a fresh start. No account of the development of the modern American legal profession can afford simply to leapfrog the war and Reconstruction. As Mark Twain wrote in *The Gilded Age*, the Civil War “uprooted institutions that were centuries old, changed the politics of a people, transformed the social life of half the country, and wrought so profoundly upon the entire national character that the influence cannot be measured short of two or three generations.”<sup>72</sup> To see the impact of these tumultuous events on lawyers, to see the continuities between antebellum and postbellum professional consciousness, and to see the forms of professional action, ideology, and authority operating at the time, we have to move beyond the reductivism inherent in the whiggish

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comparable phases in England and Germany, neither of which suffered a Civil War.

Gordon, *Legal Thought*, *supra* note 66, at 91 (emphasis added); *see also* Gordon, *supra* note 70, at 54 (noting in passing that either railroads or Reconstruction, or both, may have been responsible for the feeling among elite lawyers in the 1870s that legal science was in shambles). Finally, Paul Carrington’s biographical work covers several lawyers who played prominent roles in the Civil War and Reconstruction. He is chiefly concerned, however, with tracking the continuity of a vision of professionalism I argue is profoundly transformed by the war and Reconstruction experience. *See, e.g.*, Paul D. Carrington, *A Tale of Two Lawyers*, 91 NW. U. L. REV. 615 (1997) [hereinafter Carrington, *A Tale of Two Lawyers*]; Paul D. Carrington, *Law as “The Common Thoughts of Men”: The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495 (1997); Paul D. Carrington, *Lawyers Amid the Redemption of the South*, 5 ROGER WILLIAMS U. L. REV. 41 (1999) [hereinafter Carrington, *Lawyers Amid Redemption*]; Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339 (1992) [hereinafter Carrington, *Theme of Law Teaching*].

72. 1 MARK TWAIN & CHARLES DUDLEY WARNER, *THE GILDED AGE: A TALE OF TO-DAY* 200-01 (New York, Harper & Brothers, 1873). Scholarly commentators agree. As Eric Foner has written:

From the standpoint of physical destruction, loss of life, structural changes in the economy, the introduction of new ideas, and the diffusion of enduring sectional passions, the Civil War shaped and altered the lives and consciousness of several historical generations .... [A] *satisfactory portrait of the American experience cannot emerge from an attempt to read the Civil War out of American history.*

ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 11 (1980) (emphasis added); *see also* FREDRICKSON, *supra* note 25, at 1 (quoting Henry James’s assertion that “[t]he Civil War marks an era in the history of the American mind”); MCPHERSON, *supra* note 22, at vii (describing the Civil War as “the central event in the American historical consciousness”); Bestor, *supra* note 36, at 327 (“When the nation finally emerged from three decades of corrosive strife, no observer could miss the profound alterations that its institutions had undergone. Into the prodigious vortex of crisis and war every current of American life had ultimately been drawn.”).

obsession with institutional organization and the neo-Marxist obsession with capitalist corruption. Relying on economic determinism and reifying institutional form diminishes professional history to a play of structural forces at once too diffuse and too inflexible to bring professional action, ideology, and authority during the Civil War period into relief.

An examination of the profession's response to the failure of law in the war period shows not just that the experience of war and Reconstruction is relevant to modern professionalization, but more importantly that the authority of the legal profession is located in a source antecedent to (though not independent of) the institutional structures and ideologies that emerge after 1870. As Emory Washburn lectured his law students at Harvard in July 1864, the fourth summer of war, "the governing power in the nation is in the play and exercise of thought, however it is originated."<sup>73</sup> Properly understood, the lawyer is

[a] man of intellectual power, [who] with the press, the post-office, and the telegraph all within his reach, stands, as it were, at the very centre of a moral universe, from which he can, at his pleasure, touch every part of the circle around him, with a wand of power.<sup>74</sup>

Before professional ideology, then, before modern professional organization, and before professional expertise finds expression in judicial opinion, there is discursive authority—the power to shape the personal, social, moral, political, and economic issues that divide parties to suit, interest groups, classes, and regions as *legal* questions, and even more ambitiously, as the quote from Washburn implies, the power to shape the public mind through legal discourse.<sup>75</sup> It is precisely the discursive authority of law that was

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73. The lecture was later published as an article in a well-known law magazine. See Emory Washburn, *Reconstruction: The Duty of the Profession to the Times*, 26 MONTHLY L. REP. 477, 481 (1864). Before law schools began producing law reviews, magazines were one of the principal means of professional and scholarly communication. See BLOOMFIELD, *supra* note 31, at 143 (finding that law magazines were "[d]esigned to serve the 'workingmen of the profession'").

74. Washburn, *supra* note 73, at 481.

75. See *id.*

thrown into jeopardy by the outbreak of violence in 1861 and the legal contradictions that it brought to the surface.

### III. PROFESSIONALISM IN THE AGE OF JACKSONIAN DEMOCRACY

At least as early as the Jacksonian period, elite lawyers were concerned about their ability to control and guide public sentiment through law. Behind this concern was a deeper fear about public animosity toward the profession and the disintegration of law as they knew it. The rational elaboration of common law to meet the exigencies of American economic and territorial growth was, in their view, threatened by codification at the hands of Jacksonian legislators who lacked legal training and were elected by ignorant, newly enfranchised voters.<sup>76</sup> The Burkean commitment of legal elites to constitutional stability was threatened by widespread state-level constitutional revision.<sup>77</sup> The integrity of law practice was jeopardized by an influx of new clients and new lawyers as a result of increased immigration and legislative removal of standards for entering practice. And their high priests, the judiciary, were threatened by legislative endorsement of the popular election of judges. In short, politics—Jacksonian democratic politics in particular—was thought to be corrupting law.<sup>78</sup>

Robert Gordon synthesizes what he calls the “Jeffersonian-Jacksonian” side of this conflict in the following terms:

Jeffersonian-Jacksonian law reformers and antilawyers took the position that the knowledge of rights was accessible to ordinary reason, which meant that (1) democratic legislatures, subject to the supra-democratic executive veto, were capable of defining them in such a form that the citizenry would be capable of understanding and acting upon them, or that (2) ordinary intuition could derive them from customary morality without the

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76. See SCHLESINGER, *supra* note 31, at 329-31.

77. See *id.* at 332.

78. Schlesinger rightly notes that, on a political level, law had become a strategically useful tool for resisting Jacksonian political power. Conservative Federalism, he writes, had already “entrenched itself in the courts of law and sought to make them unshakable bulwarks against change.” *Id.* at 322; cf. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 1-2 (abridged ed., Oxford University Press 1991) (1988) (explaining the place of Federalist politics in the Marshall Court).

mediation of official definition. Unfortunately the common law, then the chief source of reference for definitions of private rights, was a mass of unintelligible feudal barbarities, most of which should be thrown away and the rest reduced to a clear and definite statutory code .... [And as to law practice], anyone with natural genius who hustled could succeed at the bar, an entrepreneurial ideology that seemed to be confirmed by experience.<sup>79</sup>

The response of conservative elite lawyers was not only to defend the common law—and to resist codification and constitutional change—but also to use public speeches, essays, treatises, lectures to lawyers, and law magazine articles to defend, or rather render self-evident, the authority of lawyers (and, by necessary implication, the authority of the courts) to say what the law is. Professional identity and professional responsibility were, for these lawyers, intimately linked with both a deep anxiety about public acceptance of these pronouncements, and an almost brazen confidence that their oracular conception of the lawyers' role would work—confidence that in and through legal discourse and client representation lawyers could ensure order and social stability.<sup>80</sup>

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79. Gordon, *Legal Thought*, *supra* note 66, at 83, 86. As Schlesinger puts it:

A leading source of the power of judges and lawyers, the Jacksonians felt, lay in the ambiguities of the law. The existing chaos of statutes and common law was held to hand over great discretionary power to the courts as well as to make a mystery out of justice which rendered the bar indispensable, thereby creating a legal and judicial aristocracy. Radical Democrats accordingly began to initiate movements toward legal reform—toward simplifying the laws and procedure, toward making courts more accessible to public opinion, and toward codification, especially of the common law.

SCHLESINGER, *supra* note 31, at 329-30. On law and Jacksonian politics, see CHARLES W. MCCURDY, *THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839-1865* (2001). For contemporaneous expressions of democratic lawyers, see BLOOMFIELD, *supra* note 31, at 59-90 (discussing William Sampson and the codification movement); see also P.W. Grayson, *Vice Unmasked, An Essay: Being a Consideration of the Influence of Law upon the Moral Essence of Man, with Other Reflections*, in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 192-200* (Perry Miller ed., 1962) [hereinafter *THE LEGAL MIND IN AMERICA*] (summarizing the arguments against the common law). See generally Robert Rantoul, Jr., *Oration at Scituate, Delivered on the Fourth of July, 1836*, in *THE LEGAL MIND IN AMERICA*, *supra*, at 222-27; William Sampson, *An Anniversary Discourse, Delivered Before the Historical Society of New York, on Saturday, December 6, 1823: Showing the Origin, Progress, Antiquities, Curiosities, and the Nature of the Common Law*, in *THE LEGAL MIND IN AMERICA*, *supra*, at 124.

80. White states:

The confluence of those trends was to foster the emergence of a new class of

Gordon describes the *mélange* of ideas and aspirations held by these “Whig-Federalist” lawyers as a “*thèse nobiliaire*” in which “rights definition” was seen as

a process of almost unbearable complexity since it was inherent in the concept of rights that they be certain, yet society was constantly changing. A code of laws would be too rigid to accommodate change; an unlimited power of legislative revision would subject rights to the fluctuating opinions of temporary majorities. Fortunately there was available to the extremely learned a science capable of developing a progressively more precise mode of rights definition. The primary but not exclusive data of this science were the common law and equity reports, a vast storehouse of collective experience wiser than any single man could be ....

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lawyers—elite commentators—who defined their role as educating the profession and the public in the “science” of law .... They self-consciously set out not only to respond to the increased demand for legal sources, specifically in the systematization and publication of legal rules and doctrines, but also to establish themselves as professional guardians of republican principles, persons whose special knowledge of “legal science” enabled them to recast law in conformity with the assumptions of republican government.

WHITE, *supra* note 78, at 79. On the role of legal periodicals, Bloomfield argues:

Whatever the measurable effect of populist legislation enacted after 1830, conservative legal spokesmen did not remain passive in the face of what *they* at least considered a serious threat to their professional status. Instead, they set in motion an impressive public relations campaign .... Legal periodicals played a vital role in this image-making process.

BLOOMFIELD, *supra* note 31, at 142. On the role of antebellum legal oratory, oral traditions in general, and print commentary, see *id.* at 160; FREDRICKSON, *supra* note 25; HOWE, *supra* note 20, at 25-27; JEAN V. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 43 (1980) (“[T]he public oration was both ritual action and public entertainment, and the audience both participants in the rite and critics of the performance. Public speaking was an art form that generated schools of criticism and huge audiences. Twenty thousand people assembled to hear Webster’s Bunker Hill oration in 1825 ....”); *id.* at 49 (“Whigs left their imprint on the national consciousness through the generally Whiggish orientation of important means of communication, from the North American Review through the school text book, to the printed collections of famous orations. The speeches of Webster, Clay, Everett, even Choate, made their way into respectable parlours and, more importantly, into schoolhouses across the nation.”); THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 8-9 (Michael H. Hoeflich ed., 1988); Donald M. Scott, *The Profession that Vanished: Public Lecturing in Mid-Nineteenth-Century America*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES, *supra* note 66, at 12-28. On the attempt to foster this professional ideal through university law training, see Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990); Carrington, *Theme of Law Teaching*, *supra* note 71.



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 ... In the rhetoric of this scheme, the term "trustee" was habitually used to describe the lawyer's role in society, a metaphor that put the lawyer in charge because of his superior learning but subordinated him to the service of his settlers and beneficiaries, the People.... [T]he legal elite was to help the People guard their collective customary wisdom and realize their historical destiny as Americans .... The science that made lawyers worthy of this trust, if they invested the pains to master it, did so because its study and practice inculcated not only learning but also virtue ....<sup>81</sup>

Gordon's emphasis is on the private, common law aspect of the *thèse nobiliaire* and the Whig-Federalist's concept of legal science. But there was an equally significant public law dimension: a conviction that lawyers are obliged both to disseminate knowledge of the Constitution (the other primary legal source of the people's customary wisdom) and to protect the fundamental rights and rule of law values it canonized. Dissemination should occur, on this view, not merely by celebrating the Constitution in order to bolster sentimental attachment, and not merely by working to enhance public awareness of constitutional strictures, though both were common Whig-Federalist endeavors. Whig-Federalist professionalism further required the production and distribution of learned expositions on pressing legal-political questions. This meant engagement in matters of public concern and defending the rule of law itself—a conception of professional responsibility that not only included, but also extended well beyond, the sphere of client representation.<sup>82</sup> A deeply paternalistic impulse, thinly veiled

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81. Gordon, *Legal Thought*, *supra* note 66, at 83, 84-85; see also SCHLESINGER, *supra* note 31, at 350-53 (describing Whig-Federalist views on the law and the legal profession).

82. On celebrating the Constitution and conservative rule of law values, see Rufus Choate, *The Position and Functions of the American Bar, as an Element of Conservatism in the State: An Address Delivered Before the Law School in Cambridge (July 3, 1845)*, in *THE LEGAL MIND IN AMERICA*, *supra* note 79, at 267. Choate stressed the importance of continuity:

[W]e have made our constitutions, founded our policy, written the great body of our law, set our whole government going. It worked well. It works to a charm. I do not know that any man displays wisdom or common sense, by all the while haranguing and stimulating the people to change it.... I appreciate the uses and the glory of a great and timely reform. Thrice happy and honored who leaves the Constitution better than he found it. But to find it good, and keep it so, this, too, is virtue and praise.

behind the rhetoric of professional duty, underlies the entire enterprise.<sup>83</sup>

Joseph Story's peroration on his appointment as Dane Professor of Law at Harvard in 1829 perfectly captures the blend of paternalism and professionalism in the aspirations of Whig-Federalists.<sup>84</sup>

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*Id.* at 267, 272; *see also* HOWE, *supra* note 20, at 210-25, 225-37 (discussing Webster's conservative oratory and Choate's views); MATTHEWS, *supra* note 80, at 147-92 (discussing Choate's legal conservatism). On the importance of disseminating "scientific" expositions of constitutional law and defending the rule of law, *see* Timothy Walker, Introductory Lecture on the Dignity of the Law as a Profession, Delivered at the Cincinnati College (Nov. 4, 1837), in *THE LEGAL MIND IN AMERICA*, *supra* note 79, at 238. Walker opined:

He can but poorly appreciate the freedom he enjoys, who does not understand the great charter which secures it.... [W]hen I consider how many of our citizens have no opportunity of studying our constitutions, for want of suitable provision in our seminaries of learning, I forbear. At the same time, I rejoice that arrangements have been made for instruction in this branch, in the academical department of this college.... [S]hall the many here, whose high prerogative it is to rule the few, leave the study of the constitution only to the few? Lawyers must study it, as the foundation of all other law; and shall not others study it, as the foundation of their liberty?

*Id.* at 246-47; *see also* WALTER THEODORE HITCHCOCK, *TIMOTHY WALKER: ANTEBELLUM LAWYER* 220-23 (1990) (discussing Walker's view of the lawyer's role as a guardian of the law); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 718-19 (Boston, Little, Brown & Co. 1858) (extolling rising generations to improve and guard the Constitution); TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 659 (Da Capo Press 1972) (1837) (stating "[l]et it never be forgotten, that the sole tenure by which we hold our rights, is, the absolute and unquestioned supremacy of the law"); WHITE, *supra* note 78 *passim*; Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), in *1 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 108, 112 (Roy P. Basler et al. eds., 1953) ("Let reverence for the laws ... become the *political religion* of the nation ....").

Bloomfield's assertion that antebellum lawyers increasingly turned away from politics is too strong. *See* BLOOMFIELD, *supra* note 31, at 136-90. The law magazines he relies on reflected an increasingly technical, politically neutral concept of the lawyer, purporting to enhance knowledge of the law "as it is," but this can be seen as part of a larger project of establishing the authority of lawyers above politics, precisely in order to superintend and control public opinion on matters of public concern. The neutral, technocratic image of the lawyer fostered by the law magazines was not separate from politics, but a condition of lawyers' authority in political-legal arenas.

83. Gordon, *Legal Thought*, *supra* note 66, at 88 ("[T]he Whig-Federalist lawyers had claimed that their science gave them an authority of virtue and learning that entitled them to declare *how people should behave toward one another* in a wide range of social situations in which neither they themselves nor the legislature had prescribed ...."). *See generally* HOWE, *supra* note 20, at 27 (stating that "for the Whigs, the orator performed a double service: he must not only defend the people's true interests but show the people themselves where those interests lay" and describing the Whig view that oratory was "a means of social control"); *id.* ("Jacksonians were less concerned that statesmen should play a didactic role and tell people what was good for them; Democrats saw the orator as the people's spokesman.").

84. Although delivered before law students, the speech was later published for public

Immediately after insisting that the profession "has far higher aims and nobler purposes" than "[the] sharp and cunning pettifogger; a retailer of lawsuits; a canter about forms, and a caviller upon words,"<sup>85</sup> Story argues that the defense of common law and constitutional rights (the two are artfully merged together in the passage) is the height of professional dedication and self-sacrifice:

Upon the actual administration of justice in all governments, and especially in free governments, must depend the welfare of the whole community....

....

One of the glorious, and not unfrequently perilous duties of the Bar is the protection of property; and not of property only, but of personal rights, and personal character; of domestic peace, and parental authority. The lawyer is placed, as it were, upon the outpost of defence, as a public sentinel, to watch the approach of danger, and to sound the alarm, when oppression is at hand.... The attack is rarely commenced in open daylight; but it makes its approaches by dark and insidious degrees. Some captivating delusion, some crafty pretext, some popular scheme, generally masks the real design. Public opinion has been already won in its favor, or drugged into a stupid indifference to its results, by the arts of intrigue. Nothing, perhaps, remains between the enterprise and victory, but the solitary citadel of public justice. It is then the time for the highest efforts of the genius, and learning, and eloquence, and moral courage of the Bar.... It is then, that ... the advocate stands alone, to maintain the supremacy of the law against power, and numbers, and public applause, and private wealth. If he shrinks from his duty, he is branded as the betrayer of his trust.... If he succeeds, he may, indeed, achieve a glorious triumph for truth, and justice and the law. But that very triumph may be fatal to his future hopes, and bar up for ever the road to political honors. Yet what can be more interesting than ambition thus nobly directed? that sinks itself, but saves the state?<sup>86</sup>

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consumption. See Joseph Story, Discourse Pronounced upon the Inauguration of the Author as Dane Professor of Law in Harvard University (Aug. 25, 1829), in *THE LEGAL MIND IN AMERICA*, *supra* note 79, at 176.

85. *Id.* at 180 (quoting Cicero).

86. *Id.* at 180-82. Miller refers to the speech as "the supreme, the final, the victorious statement within the profession of ... the 'orthodox' conception of its function" quoted and imitated "[i]n thousands of similar utterances." Perry Miller, *Introduction to Joseph Story*,

Story is not simply contending that the banal work of client advocacy can be an inspiring, if personally costly, act of statesmanship. It may become that, depending on the case, but the passage suggests something at once more subtle and more poignant. Story uses the metaphor of advocacy to show that the lawyer's true client, or rather the client of the true lawyer, *is the state*. Indeed, all the constitutive features of Whig-Federalist professionalism are present in his vision of the lawyer as public sentinel: anxiety that public susceptibility to "captivating delusions" can lead to lawlessness, the subversion of rights, and, ultimately, the corruption of republican government;<sup>87</sup> conviction that lawyers can and must tame public opinion through law; a conservative account of common law and constitutional values linking the sanctity of property rights to personal, familial, and political stability; insistence that dedication to law supersedes politics and political ambition (professional martyrdom, Story tells us, may close "the road to political honors");<sup>88</sup> and, finally, an elitist affirmation that mastery of legal science (work that attracts "genius" and produces "learning," "eloquence," and "moral courage")<sup>89</sup> is a prerequisite to "save[] the state" in its hour of need by maintaining "the supremacy of the law against power."<sup>90</sup>

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Address Delivered Before the Members of the Suffolk Bar, 1821, in *THE LEGAL MIND IN AMERICA*, *supra* note 79, at 176. He also emphasizes that it was delivered just "six months after Andrew Jackson had been inaugurated President." *Id.* at 176-77; *see also* Carrington, *A Tale of Two Lawyers*, *supra* note 71, at 618-21 (discussing Timothy Walker's use of the sentinel concept and the "professional ethic of public service" it implied). Gordon's claim that Story's pedagogy offered "a vulgarized version of Whig legal science, shorn of its pretension to elegance, public statesmanship, and Ciceronian virtue and squeezed into the Jacksonian mold of standardized practical expertise," Gordon, *Legal Thought*, *supra* note 66, at 87, is surely right, especially when Story's approach is compared to David Hoffman's course of legal study. *See id.* at 86-87 (discussing Story's efforts and Hoffman's failure). Story had high praise for Hoffman's book, however, and the epigraph above shows that he had not abandoned his civic republican aspirations for the profession. *See id.* at 87.

87. STORY, *supra* note 82, at 181.

88. *Id.*

89. *Id.* Much of the rest of the speech is dedicated to the common Whig-Federalist claim that "mastery" of the law is only possible through proper training—a "laborious undertaking." *Id.* at 183; *see also id.* at 182-83 (stating that law "is a jealous mistress, and requires a long and constant courtship").

90. *Id.* at 181-82. Horace Binney's role in quelling the Philadelphia nativist riots of 1844, and aiding the city's transition from self-help and the traditional village constable-watch system to a professional police force empowered to use deadly force, is a vivid example of Story's vision of professionalism in action. *See* BLOOMFIELD, *supra* note 31, at 191-234. After

Story's vision of professionalism was repeated widely, and affirmed by other Whig-Federalist lawyers, but it also left ample room for Jeffersonian-Jacksonian law reformers to claim the mantle of "public sentinel." Some conservatives united with Jeffersonian-Jacksonian law reformers like David Dudley Field in support of codification on the theory that lawyers who had mastered legal science could guide legislatures and ensure that codification was simply a reduction and clarification rather than a rejection or subversion of common law principles.<sup>91</sup> These lawyers were as dedicated to legal science as Whig-Federalists (though more sanguine about the feasibility of extra-judicial rights definition); they were as anxious to use law to channel popular opinion (though somewhat less intimidated by universal suffrage and the egalitarianism it implied); and they were as committed to the view that lawyers are obliged to serve and protect the rule of law, not just

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several days of deadly street riots, Binney, a "living legend in his hometown," was summoned "to advise the municipal authorities about riot control." *Id.* at 211-12. Binney offered a set of resolutions recommending organization of a police force and asserting

"the legal right, for the protection of property and life, to resist and defeat the mob by the use of any degree of force that was necessary for this purpose." An estimated audience of ten thousand persons cheered Binney's resolutions at the mid-morning meeting, and volunteers hastened to enroll in the new companies of Peace Police being organized by the aldermen of each ward.... The Peace Police patrolled the streets of their respective wards nightly for almost a week, until all threats of further mob attacks had subsided.

*Id.* at 212-13 (emphasis added). When riots erupted again later in the summer, Binney intervened for the "friends of order and law," writing a lengthy address published in the local press that reemphasized the sanctity of property and person and defending the right of police to use all means necessary to put down the street violence. *Id.* at 227. As Bloomfield recounts:

In such circumstances the first duty of every citizen was to uphold the established authority. "Obedience," Binney declaimed—"implicit, unhesitating, and unquestioning obedience"—was due to the law and its administrators.... "Every person standing in the ranks of the mob, adds to its apparent force, and to its actual violence.... [Injuries and deaths to rioters resulting from police enforcement measures] are in law and in conscience ... wounds and deaths caused by the rioters and insurgents, and by them only. Theirs is the whole guilt ...."

*Id.* Binney also helped draft the state's first riot act, passed the following year. *Id.* at 229-31; see also Fisher, Diary Entry (May 12, 1844), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 165-66 (discussing the riots); Fisher, Diary Entry (July 24, 1844), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 172-75 (praising Binney's address).

91. See David Dudley Field, Reform in the Legal Profession and the Laws, Address to the Graduating Class of the Albany Law School (Mar. 23, 1855), in THE LEGAL MIND IN AMERICA, *supra* note 79, at 287-95.

individual clients.<sup>92</sup> The lawyer as public sentinel thus functioned as a rich ideological frame, shaping professional action and ideals even for lawyers who did not share Story's conservatism.

And for all their differences, both Whig-Federalists and Jeffersonian-Jacksonian lawyers shared a profound desire to vernacularize law. The desire is easy to locate in the Jeffersonian-Jacksonians who, in the crusade for codification, argued incessantly that law ought to be made more simple, more accessible, and more affordable. For Whig-Federalists, the picture is more complex. Although codification specifically, and popular law reform in general, struck Whig-Federalists as but a vulgarization of law, their response was not a solipsistic retreat from the field. Legal science "belonged" to lawyers, in their view, but the concept of the lawyer as public sentinel implied a further obligation to disseminate the discoveries of that science to ensure that the public would imagine and articulate its interests and ambitions in the language of law. Whig-Federalists certainly were much more concerned than

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92. Timothy Walker, a disciple of Story who moved west to Ohio, founded the Cincinnati Law School as well as the *Western Law Journal*, and wrote a treatise on American law which went through thirteen editions, is an excellent example. He defended the supremacy of law and the authority of lawyers but supported codification and other progressive reforms such as the legal recognition of married women, the abolition of capital punishment, and the abolition of criminal punishment through pecuniary fines. See HITCHCOCK, *supra* note 82, at 159-88, 199, 203, 230; see also Perry Miller, *Introduction to Timothy Walker, Introductory Lecture, 1837, in THE LEGAL MIND IN AMERICA, supra* note 79, at 238 (discussing Walker's efforts in Cincinnati). On the Jeffersonian-Jacksonian side were lawyers like Theodore Sedgwick—a Democrat who embraced both common law and statutory law, and who could sound like a Whig-Federalist in his commitment to law as a form of social control. See Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law, in THE LEGAL MIND IN AMERICA, supra* note 79, at 296. Sedgwick stated that

the law of nature, the moral law, the municipal law, and the law of nations, form a system of restraints before which the most consummate genius, the most vehement will, the angriest passions, and the fiercest desires, are compelled to bend, and the pressure of which the individual is forced to acknowledge his incapacity to resist.

*Id.* at 297; see also Carrington, *A Tale of Two Lawyers, supra* note 71, at 621 (arguing that "[e]ven the Jacksonians" believed in the goal of using legal education to "train prudent, virtuous, Jacksonian leadership for the republic").

To be sure, both sides had extremes. There were Whigs so disgusted with the degeneration of law that they talked constantly about abandoning it for gentlemanly leisure and pure intellectual inquiry, and there were Jacksonian anti-lawyers who talked about eliminating the profession altogether, see Grayson, *supra* note 79, at 192-200. There was, however, an important convergence at the center around the idea of the lawyer as a public guardian.

Jeffersonian-Jacksonians about controlling the specific content of popular legal consciousness—indeed, they hoped that disseminating the conclusions of legal science would generate respect not just for law but for *their* definition of rights. But in many ways this only accentuated their anxiety about and desire for what I have called the discursive authority of law—the power to superimpose legal discussion and analysis onto social questions, to shape and direct public opinion with the language of law.

A similar dynamic can be seen at the intersection of substantive law and economic growth in the period. Whig-Federalist lawyers and judges responded to rapid commercial growth and popular law reform not by categorically resisting change, but rather by adapting common law doctrine to support (and at the same time direct) what James Willard Hurst has so aptly termed “the release of energy” in antebellum society.<sup>93</sup> Whig-Federalist conservatism, in short, was not static.<sup>94</sup> But neither was it purely ideological (verbally affirming the value of stasis while functionally embracing change). Instead, their professional ideals led them, at one and the same time, not merely to resist but to extend and channel the vernacularization of law so as to ensure their discursive authority.<sup>95</sup>

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93. HURST, *LAW AND CONDITIONS*, *supra* note 69, at 3.

94. On legal “instrumentalism” as a response to antebellum commercialization, see FRIEDMAN, *supra* note 31, at 664, 688 (discussing legal instrumentalism); HORWITZ, *supra* note 69, at 16-30 (documenting the emergence of an instrumental conception of law in the nineteenth century); HURST, *LAW AND CONDITIONS*, *supra* note 69, at 18, 66 (arguing that the common law was used “to promote the release of creative individual energy”); Scheiber, *supra* note 69, at 65 (“It is now well accepted that the ‘style’ of judicial law-making, at least before 1860, was predominantly *instrumental*, reflecting pragmatic concern to advance productivity and material growth.”). Schlesinger’s model, in which the courts are presented as “bulwarks against change,” SCHLESINGER, *supra* note 31, at 322, is, in this respect, too simple. On the relationship between Whig values and commercial/industrial growth, see HOWE, *supra* note 20, at 96-122:

Whigs thought of economic progress as providing the basis for all other kinds of progress.... [They overcame] the idea that “commerce” was opposed to “virtue” and constituted a threat to it ... by arguing that commerce could nourish virtue.... [And they] justified not only the new technology but the system of industrial capitalism on the grounds of moral benefit to society ... improving the quality of life and giving wider scope for the employment of talents and savings.... Industrial capitalism was the high point of civilization from the Whig point of view.

*Id.* at 101-02.

95. If this is correct, elite lawyers held a decidedly ambivalent position with respect to one of the primary conditions of their own authority. The ambivalence is perhaps understandable

Although aspects of the modern professionalization movement are clearly visible in the Jacksonian period,<sup>96</sup> it is difficult to sustain Pound's conclusion that the profession was in disarray. Anxious about sustaining professional authority? Yes. Wrestling with the impact of political, demographic, and economic forces on law practice? To be sure. But disorganized? The question admits of no ready answer without comparisons that defy analysis.<sup>97</sup> Moreover, what may have seemed like a degeneration of law to Whig-Federalists (or "decadence" and "deprofessionalization" to later historians),<sup>98</sup> often looked like progress to Jeffersonian-Jacksonians.<sup>99</sup> The deprofessionalization thesis, in sum, depends for its persuasiveness on internalizing rather than interrogating Whig-Federalist sentiment. More important than trying to place the antebellum profession on a natural evolutionary path toward the institutional forms we now take for granted is the task of revealing the interests and forces that shaped professional identity and organization as it existed.<sup>100</sup>

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because an antinomian impulse which could, if fully realized, render lawyers obsolete, operated at the limit of the Jeffersonian-Jacksonian position.

96. Examples include the elitist reaction to lax admission standards, see Matzko, *supra* note 44, at 76-78, increased immigration and rapid commercial growth, see SCHLESINGER, *supra* note 31, at 507, and the didactic impulse to formalize and rationalize both legal science and legal education through law publishing and nascent law schools. See Gawalt, *supra* note 69, at 109; Gordon, *Legal Thought*, *supra* note 66, at 73.

97. Given the laxity of discipline and the wide diversity in approaches to practice today, can we confidently say that the profession is more organized now? According to Deborah Rhode,

Bar disciplinary agencies generally dismiss about 90 percent of complaints ....

....

... Less than 2 percent of complaints result in public sanctions such as reprimands, suspensions, or disbarment ... [a]nd [t]he vast majority of disciplinary agencies are underfunded and understaffed ....

....

... Half of [disbarred lawyers who apply for reinstatement] are readmitted, even though about 40 percent of these readmitted attorneys have a history of stealing client funds.

RHODE, *supra* note 59, at 158-65.

98. POUND, *supra* note 40, at 223, 183.

99. See SCHLESINGER, *supra* note 31, at 377 (reporting that Democrats like James Fenimore Cooper were mortified by the "tyranny of opinion" by elites); see also Gordon, *Legal Thought*, *supra* note 66, at 83-87.

100. Of course, limitations in the historical record make it impossible to speak with certainty. Many of the antebellum forms of collective action, communication, and professional regulation were oral, informal, and local. Thus, we know far less about the organizing effects of the primary mechanisms, such as apprenticeship, circuit riding, bar admission, informal



## IV. THE FAILURE OF LAW

A. *Constitutional Stalemate*

Story and his contemporaries worried about the degeneration of law in their time, but they never seriously contemplated the failure of legal science—the possibility that dispassionate, reasoned analysis might generate radically irreconcilable principles governing the same legal question, or, worse still, the possibility that legal argument would exacerbate rather than resolve social and political conflict. But the burgeoning controversy over slavery (beginning with the Wilmot Proviso in 1846 and running forward through the Compromise of 1850, the Kansas-Nebraska Act, *Dred Scott*, John Brown's raid, Lincoln's election, and South Carolina's secession in the winter of 1860) raised the specter of constitutional failure.

As sectional interests hardened, constitutional law increasingly played what Arthur Bestor has called a "configurative role," channeling national attention toward the question of congressional power over slavery in the territories, without, at the same time, providing one unequivocal answer.<sup>101</sup> All sides reverted to first

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bar gatherings, and courthouse conversations, by which the profession operated collectively. And we know far less about the "journeymen of the bar" and their engagement with elite views on professionalism and legal science. But this does not mean that we should judge professional organization using modern criteria. At least among elites, overlapping ideological commitments to the vision of the lawyer as a public sentinel suggest a higher degree of professional organization than the deprofessionalization thesis allows.

Even if Story's specific vision of professionalism implied, at the level of courtroom ethics, that representation should be controlled by "the severest injunctions never to do injustice," STORY, *supra* note 82, at 179, it is also worth noting that antebellum professionalism left ample room for elite lawyers to defend taking cases of doubtful justice (even knowingly representing guilty clients) as serving rule of law values. See Spaulding, *supra* note 55, *passim*. Thus we can draw no unilateral inferences from archetypes of professional ideology in the period to normative stances on the ethics of practice. Indeed, Story's view of courtroom ethics may be more flexible than it seems at first. Immediately following the "injunction[] never to do injustice," is the injunction "never to violate confidence." STORY, *supra* note 82, at 179. The relationship between ideology and the ethics of representation was as complex then as it is now. Revealing that complexity is beyond my purpose here, but I raise it to dispel the temptation seen in the neo-Marxist account to romanticize elites of the period as sharing a single view of what constituted morally upright practice.

101. Bestor, *supra* note 36, at 329, 351-52; cf. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 464-65 (1978) (discussing the debate over the Lecompton constitution in Kansas in 1857-58).

principles in the hope that the binding force of law might solve what politics could not.<sup>102</sup> But here reversion to first principles deepened the problem by producing “[f]our irreconcilable constitutional doctrines.”<sup>103</sup> Ex-Whig conservatives, following the tradition of Henry Clay, held that Congress had power to prohibit slavery in the territories, but that past practice (“balanc[ing] the prohibition of slavery in one area by the erection elsewhere of a territory wherein slaveholding would be permitted”)<sup>104</sup> was “more than a precedent; it was a constitutional principle.”<sup>105</sup> Republicans accepted the conservatives’ first proposition but emphatically rejected the second. Although “territories in the past had been apportioned between freedom and slavery, the Republicans refused to consider this policy as anything more than a policy, capable of being altered at any time.”<sup>106</sup> Pro-slavery Democrats, on the other hand, conceded that the Constitution gave Congress the power to regulate the territories, but insisted that Congress could not impinge the property rights of citizens entering a territory from any state. More than that, they claimed, Congress was obliged to protect property rights, including the right of property in slaves.<sup>107</sup> This position implied the unconstitutionality of the Missouri Compromise and the Ordinance of 1787,<sup>108</sup> but it rested on the doctrine of states’ rights and, after the Kansas-Nebraska Act and *Dred Scott*, it could be uttered without hesitation, let alone embarrassment. Douglas Democrats articulated an unconventional compromise by simply “eras[ing] the constitutional distinction between a territory and a state”<sup>109</sup> and arguing that, just as the people of a state determine its domestic institutions, popular sovereignty rather than congressional prerogative should decide the fate of slavery in each territory.<sup>110</sup>

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102. People “argued about the Constitution because they accepted its obligations (whatever they considered them to be) as binding.” Bestor, *supra* note 36, at 332.

103. *Id.* at 351.

104. *Id.* at 346.

105. *Id.*

106. *Id.*

107. *Id.* at 351.

108. *See id.* at 345, 348.

109. *Id.* at 348.

110. *Id.* at 347; cf. JOEL PARKER, THE TRUE ISSUE AND THE DUTY OF WHIGS: AN ADDRESS BEFORE THE CITIZENS OF CAMBRIDGE 62-63, 86 (Cambridge, James Munroe & Co. 1856) (arguing that the Constitution did not contemplate new territory, and that even if acquisition is permitted and slavery extended, the Three-Fifths Clause should not apply) [hereinafter

All but Douglas Democrats could plausibly claim constitutional authority for their position, and even for Douglas Democrats, there was the authority of higher law—"the indefeasible right of every community to decide for itself the social institutions it would accept and establish."<sup>111</sup> By 1860, sectional, economic, and political factions—bolstered by the sense of righteousness and entitlement only constitutional authority can confer—reached a stalemate. As Bestor concludes, "[s]lavery at last became, in the most direct and immediate sense, a constitutional question, and thus a question capable of disrupting the Union."<sup>112</sup> Lincoln's election and South Carolina's secession broke the stalemate, but only by breaking the perceived rules of engagement—deepening the rift over what was "sayable in the language of the Constitution."<sup>113</sup>

### *B. Rupture*

What followed has often been called a constitutional crisis,<sup>114</sup> but the term can distort interpretation of the events it purports to describe. In its primary signification, a crisis is a sudden event, especially a turning point for the better, as with a fever that breaks just after it peaks. Constitutionally speaking, and for the legal profession, the Civil War was not a crisis in this sense. A protracted paroxysm, a trauma, a rupture—perhaps even a demise<sup>115</sup>—but not a crisis. Terms matter here. For to imagine the Civil War and Reconstruction as a crisis of law is at once to imply resolution, a return to normalcy, and to diminish the extent to which the authority of law was threatened by events.<sup>116</sup>

Genuine legal resolution was, to say the least, frustratingly elusive. In the prosecution of the war and in the attempt to secure

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PARKER, DUTY OF WHIGS].

111. PARKER, *supra* note 110, at 62-63, 86.

112. Bestor, *supra* note 36, at 338.

113. The phrase is Sanford Levinson's. See SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

114. See, e.g., Bestor, *supra* note 36, at 338.

115. See Thurgood Marshall, Speech (May 6, 1987), in LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 10 n.2 (2d ed. 1988) ("While the Union survived the civil war [sic], the Constitution did not.").

116. See, e.g., Paludan, *supra* note 26, at 1017-18; Lorraine A. Williams, *Northern Intellectual Reaction to Military Rule During the Civil War*, 27 THE HISTORIAN 334, 349 (1965).

peace during Reconstruction, the nation was thrown violently from one legal morass to the next, tossed about by the inability to resolve constitutional antinomies and bring the order of law to events on the ground. Constitutional law, in this sense, did not play a merely “configurative role,” it helped prolong and exacerbate the conflict by emboldening military and political adversaries.<sup>117</sup> As Thomas M. Cooley observed in a speech delivered on the dedication of a lecture hall for the law school at the University of Michigan:

[T]he very reverence men felt for the law carried them off into rebellion ....

....

The battle our brothers are waging in Virginia, and Tennessee, and Arkansas, is one of constitutional law. The question at issue is one proper for the determination of courts, but it has been forcibly wrested from their control, and made the age of bloody contest. Lawyers engaged in this strife are merely settling a point of national law.<sup>118</sup>

Solutions came, if they came at all, more by force and happenstance than by steadfast adherence to legal principles.

Nothing could have been more traumatic for elite lawyers of the period than to see these antinomies revealed, to confront the failure of the Constitution, and to witness the subordination of law to power. Their response was immediate, self-conscious, deliberate, and, notwithstanding the absence of “modern” institutional structures, *organized*. Throughout the period, elite lawyers used pamphlets, books, newspaper articles, public speeches, and treatises to affirm their discursive authority—to enact Story’s vision of the lawyer as public sentinel, rescue law from power, and save the state in the process. That law itself had failed was, simply put, an unthinkable thought, and legal elites recoiled from it in denial.<sup>119</sup>

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117. See HOWE, *supra* note 20, at 23 (noting that the antebellum “tendency to debate the constitutionality of issues rather than their expediency did little to temper the discussion; if anything, it exacerbated differences”).

118. Thomas M. Cooley, Address on the Dedication of the Law Lecture Hall of Michigan University 15 (Ann Arbor, The Law Class of the University of Michigan 1863) [hereinafter Cooley, 1863 Address].

119. As William Whiting wrote early in the war effort:

[Some] have supposed [the Constitution] incapable of adaptation to our changing conditions, as if it were a form of clay, which the slightest jar would shatter; or

an iron chain, girdling a living tree, which could have no further growth unless by bursting its rigid ligature.... This great nation, like a distant planet in the solar system, may sweep round a wide and splendid orbit, but it will not pass beyond the reach of its central light. The sunshine of constitutional law will illumine its pathway in all its changing revolutions. We have not yet approached the "dead point" where the mould must be shattered, the chain broken, the tree girdled, or the sun shed darkness instead of light.

WILLIAM WHITING, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* 9 (2d ed., Boston, Lee & Shepard 1871). Few elite lawyers would have agreed with E.L. Godkin's 1864 assertion that excessive reverence for the Constitution was part of what brought the nation to war. Godkin argued that lawyers' "general contempt and ridicule" for abolitionists and their appeals to higher law was grounded in "Constitution-worship"—the "hallucination" that the Constitution was perfect and operated as "a final rule of right." Edwin Lawrence Godkin, *The Constitution and Its Defects*, 99 N. AM. REV. 117, 120 (1864). "The spell," he wrote, "has been broken by the war":

[C]riticism has been let loose even upon the Constitution of the United States. The secession of the South has satisfied even the most sceptical [sic] that a thing may be unconstitutional and still possible, and that the Constitution, admirable as it is, has not fully served its purpose. Its object was to hold the States of this Union together—whether as a nation or a confederation it matters not; and it has not succeeded in accomplishing it.... To anybody who undertakes to show us that the Constitution ought to have held the Free and Slave States together, we reply, that the experiment has been fully tried, and that it did not succeed.

*Id.* at 123-24. Among lawyers, rare concessions of constitutional failure tended to be bound up with theories of construction that would redeem the Constitution or reversions to political partisanship. Sidney George Fisher would write in his diary in late March 1861 that "respect for law and love of country, and confidence in the government, and loyalty are so weakened, that we can scarcely be said to have a government at all and seem to be approaching the rule of no rule. There is no King in Israel." Fisher, *Diary Entry* (Mar. 25, 1861), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 383. By 1863, he would publicly blame the Constitution, especially the difficulty of ratifying amendments under Article V, but this time on the way to spurning strict construction and offering a reading of the instrument that would permit whatever the exigencies of the war effort demanded. *See, e.g.*, SIDNEY GEORGE FISHER, *THE TRIAL OF THE CONSTITUTION*, 17-28, 39 (1862) [hereinafter *FISHER, THE TRIAL*]. Fisher argued that

[t]he Amendment Article in our Constitution has not preserved us from civil war, though the war turned on construction as to the power of Congress over the Territories. The safety-valve did not work, and the boiler has burst....

....  
... [The war has released] strong forces .... How are these to be met, regulated, and controlled? By the Constitution? It has already failed to perform a less difficult task.... The Constitution has failed to protect us from the calamity of a bloody and destructive civil war; but it does not follow that free government is to fail.... The great principles of the Constitution are true. The machinery by which they were meant to be carried out is for the most part well contrived for the purpose. But its defects must be corrected....

....  
... If the Government is to be saved, it must be by the truth that is in the Constitution, not by its errors or by the erroneous interpretations put on it. It

Politics, passion, abolitionist preachers, sensationalist journalism, and lust for power (whether southern or northern)—in sum, an apotheosis of popular democracy—may have corrupted the country and constitutional reasoning, but elites repeatedly insisted that dispassionate analysis by legal experts would light the way to safety, if not national salvation. Their discursive work was two-pronged. First, in law magazines and treatises they redoubled their antebellum efforts to report on developments in positive and decisional law and to apply the tools of legal science to standard legal questions having little or nothing to do with slavery, secession, the war, and Reconstruction.<sup>120</sup> Positivistic legal discourse, it was

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has truth enough to save it, if the truth be allowed legitimate sway.

*Id.* at 27-60; *see also id.* at 60-61 (arguing that the Constitution must be construed to confer “power sufficient to protect the public safety” and that extra-legal action is made constitutional by “the consent and approbation of the people, when it [is] impossible or imprudent to await or to attempt the uncertain and tedious [amendment] process appointed in the Fifth Article”). Although he would become a rather partisan Confederate propagandist, *see infra* note 148, Galveston lawyer William Pitt Ballinger at least privately echoed Godkin’s critique of American Constitution-worship in an 1863 letter to a friend:

The doctrine of the perfection of the American Constitution is almost a superstition—& certainly an Absurdity. It was a mere experiment ... [sic] And yet every one North & South, cries out, “the Constitution is perfect—Only give us the Constitution.” Such blind adherence to outmoded forms made disunion inevitable, Ballinger thought ....

BLOOMFIELD, *supra* note 31, at 285.

120. Thirty-four new law magazines were launched between 1850 and 1870, and nearly half of these opened after 1860. In 1870, seventeen law magazines were in print, more than three times the number in print when Andrew Jackson took office. *See* BLOOMFIELD, *supra* note 31, at 142; *see also* FRIEDMAN, *supra* note 31, at 329, 630-31; WARREN, *supra* note 31, at 338-40, 547-48. Their objective was “rigorously utilitarian,” and directed at improving the “lay image of the American lawyer.” BLOOMFIELD, *supra* note 31, at 142-43. As Boston lawyer and editor of the long-running *Monthly Law Reporter*, Peleg W. Chandler put it in a letter to Joseph Story:

A great deal is said ... about what the law ought to be, ... but precious little of *what it is*. Now it would seem that a good way to check this thing ... is to hold up before the profession and the public the decisions fresh from the court—to place before them the law as it comes from the dispensers of it.... In conducting the [Law Reporter], I have been actuated by these feelings ....

*Id.* at 143. A survey of the law magazines and treatises published over the war and Reconstruction period ratifies, with some important exceptions, Harold Hyman’s claim that “the legal periodicals, case reports, and miscellaneous professional literature, are crammed full of other subjects.” Hyman, *supra* note 29, at 53; *cf.* HYMAN & WIECEK, *supra* note 7, at 350 (describing the growth of technical legal publications on local government and state law and the link to wartime violence in northern cities); JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW, at xiii (New York, D. Appleton & Co., 2d ed. 1883). Even the *Monthly Law Reporter*, which was steadfastly dedicated to reporting cases and publishing essays and book

hoped, would help reinforce a public conception of law as above politics and of the lawyer as a “benevolently neutral technocrat.”<sup>121</sup> At the same time, however, elites directly engaged the legal issues opened by the war and Reconstruction, constantly reminding their audience that their opinions deserved special weight precisely because they were uncorrupted by the passion, self-interest, and political ambition of other commentators.

As William Whiting, Lincoln’s Solicitor in the War Department, admonished in a pamphlet published in the spring of 1862:

We are not to take our opinions as to the extent or limit of the powers contained in the constitution from partisans, or political parties, nor even from the dicta of political judges. When the interpretation depends upon technical law, then the contemporary law writers must be consulted. The question as to the meaning of the constitution depends upon what the people, the plain people who adopted it, intended and meant at the time of its adoption....

....

... We must therefore go back to that original source of our supreme law, and regard as of no considerable authority the platforms of political parties who have attempted to import into the constitution powers not authorized by fair interpretation of

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reviews on non-political topics, entered the fray on occasion:

The policy of stripping the rebels of their property and liberating their slaves has been urged upon the country with much eloquence, and with an adroit appeal to the passions naturally excited by the condition of public affairs.... [S]o grave a question of constitutional law cannot escape the attention of the profession, and its discussion falls strictly within the scope of a legal periodical.

*The Rightful Power of Congress to Confiscate and Emancipate*, 24 MONTHLY L. REP. 469, 469 (1862) (arguing that war powers do not permit emancipation). The article provoked a sharp reply contending that the doctrine of necessity was implied constitutional law and that emancipation, if it advanced the war effort, was constitutional. *See, e.g., The Right to Confiscate and Emancipate*, 24 MONTHLY L. REP. 645 (1862); *see also Slave Property in the Territories*, 23 MONTHLY L. REP. 321 (1860) (examining the constitutionally protected rights of slave holders in U.S. states and territories).

121. BLOOMFIELD, *supra* note 31, at 143 (describing this “impressive public relations campaign”); *id.* at 148 (noting “publicists” intent to “divorce ... law from politics”); *id.* at 155 (“The approach of the civil war did little to change the introspective bias of law magazines.”). I am less convinced than Bloomfield that the campaign had largely “succeeded by the time of the Civil War,” though this may be due to the fact that the principal sources he relies on are in the antebellum period, whereas my focus is later. BLOOMFIELD, *supra* note 31, at 142.

its meaning, or to deny the existence of those powers which are essential to the perpetuity of the government.<sup>122</sup>

Whiting's confidence in the rightful authority of lawyers to interpret fundamental law for the public and to shape public opinion on the constitutionality of the war effort parallels the faith other elite lawyers held in the unique capacity of the legal profession to help resolve the sectional conflict by, as Emory Washburn lectured in 1861, "aiding to control the current of public thought."<sup>123</sup> For

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122. WHITING, *supra* note 119, at 138-39. On his appointment to the War Department, see HYMAN & WIECEK, *supra* note 7, at 257.

123. EMORY WASHBURN, A LECTURE BEFORE THE MEMBERS OF THE HARVARD LAW SCHOOL, AT THE CLOSE OF THE TERM 18 (Boston, Harvard Law School 1861) [hereinafter WASHBURN, LECTURE 1861]; *see also* Cooley, 1863 Address, *supra* note 118, at 7-8 ("[T]he influence of the legal profession is perhaps greater than with any other"; "[e]ven when the judges cannot be convinced, the lawyer may sometimes instruct the public judgment."); *id.* at 14 ("If the American be a true lawyer, devoted to morality, to good order, to social programs and to freedom, he will be devoted also to national unity."); WHITING, *supra* note 119, at 13-14. For other expressions of the conviction that law and lawyers can and should control public opinion, see HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION OF THE UNITED STATES, in CAMPBELL'S PAMPHLETS 3 (Phila., 1862) [hereinafter BINNEY, THE PRIVILEGE] (answering the question of whether Congress or the President has power to suspend the writ of habeas corpus in wartime in the affirmative, noting that such suspension "will relieve the public mind of an embarrassment, and at the same time constitute the performance of a duty, due to the public intelligence, suspended in doubt of the meaning of the Constitution"); HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS, in CAMPBELL'S PAMPHLETS 1 (Phila., 2d pt. 1862) [hereinafter BINNEY, THE PRIVILEGE (2d pt.)] (writing to answer "some popular suggestions, which have no legal value in the interpretation of [the Suspension Clause], but which from their more frequent repetition seem to be thought the most effectual"); ROBERT L. BRECK, THE HABEAS CORPUS, AND MARTIAL LAW 6 (Cincinnati, Richard H. Collins Printer 1862) ("I had supposed the object of the [journal] was to form and lead public sentiment, and not to follow it."); DAVID BOYER BROWN, REPLY TO HORACE BINNEY ON THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (Phila., 1862); J.C. BULLITT, A REVIEW OF MR. BINNEY'S PAMPHLET ON "THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION," in CAMPBELL'S PAMPHLETS 26 (Phila., James Challen & Son 1862) (arguing that the "opinions of eminent lawyers" ought to control constitutional interpretation "because they are the concurrence of the minds of impartial commentators, looking at the question with no other motive than to search for truth"); BENJAMIN R. CURTIS, EXECUTIVE POWER 13 (Boston, Little, Brown & Co. 1862) (writing against Lincoln's emancipation proclamation and incursions on northern civil liberties because "it may be possible, from my studies and reflections, to say something to my countrymen which may aid them to form right conclusions in these dark and dangerous times"); FISHER, THE TRIAL, *supra* note 119, at vi ("I offer my views to the public with unfeigned diffidence. I consider it a duty to offer them, because, if true, they are important; and I believe them to be true. I do not advocate, I state them. Reason looks for truth only, not expediency ...."); POMEROY, *supra* note 120, at 3-5; Joel Parker, *The Three Dangers of the Republic* [hereinafter Parker, *Three Dangers*], in LECTURES DELIVERED IN THE LAW SCHOOL



Washburn, this was one of the most "solemn duties and responsibilities" of the profession.<sup>124</sup> "[S]omebody has to do the thinking,"<sup>125</sup> he admonished, "so susceptible has the public sense been to any thing new and startling."<sup>126</sup> The important thinking on matters of law and good government could not be done by the clergy (who "look at every thing in the light of conscience" and often confuse their own will with the dictate of conscience),<sup>127</sup> nor by the press (which "too often is compelled to follow in the lead of an excited popular opinion"),<sup>128</sup> nor by politicians (who "make traffic of [their] own convictions of right"),<sup>129</sup> and certainly not by other people engrossed with money-getting or numbed by physical labor.<sup>130</sup> "The truth is," Washburn

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OF HARVARD COLLEGE, AND IN DARTMOUTH COLLEGE, 1867-68, and '69, at 1 (New York, Hurd & Houghton 1869) [hereinafter LECTURES] (lecturing to law students about the constitutionality of Reconstruction and arguing that lawyers "necessarily exercise a great influence upon the destinies of the country"); *The Legal Status of the Rebel States Before and After Their Conquest*, 26 MONTHLY L. REP. 537 (1864) (offering to study the status of southern states and the constitutionality of emancipation "as questions of constitutional law, independent of every other consideration" because the "public mind" is faced with new questions and because there is a "divergency of views among [the Union party's] leading members"). Wartime writers and public speakers like Washburn and others tracked a well-recognized rhetorical style with respect to opining on the legal aspects of the sectional conflict and the conviction that public sentiment could be shaped by expert legal opinion. For examples of this discourse from pre-war elites, see ALFRED CONKLING, *LEGAL REFORM: AN ADDRESS TO THE GRADUATING CLASS OF THE LAW SCHOOL OF THE UNIVERSITY OF ALBANY* 24 (Albany, W.C. Little & Co. 1856); ALFRED O.P. NICHOLSON, *ADDRESS ON THE MORAL POWER OF THE LAWYER BEFORE THE LAW SCHOOL OF CUMBERLAND UNIVERSITY* 6, 14, 18, 24 (Lebanon, T.N., Herald Print 1857); BELLAMY STORER, *THE LEGAL PROFESSION, AN ADDRESS DELIVERED BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF LOUISVILLE* 16 (Cincinnati, C. Clark & Co. 1856).

124. Letter from Emory Washburn, to Michael W. Robinson, Edwin H. Abbot & Henry A. White (Jan. 14, 1861), in *PROFESSIONAL TRAINING AS AN ELEMENT OF SUCCESS AND CONSERVATIVE INFLUENCE: A LECTURE BEFORE THE MEMBERS OF THE HARVARD LAW SCHOOL* 3 (Boston, Harvard Law School 1861). See generally Robert M. Spector, *Emory Washburn: Conservator of the New England Legal Heritage*, 22 AM. J. LEGAL HIST. 118 (1978).

125. WASHBURN, LECTURE 1861, *supra* note 123, at 17.

126. *Id.*

127. *Id.* at 21.

128. *Id.*

129. *Id.*

130. *Id.* at 17. Other legal writers were equally disdainful of nonlegal sources of opinion and quick to disclaim any political or emotional motivation on their part. See BRECK, *supra* note 123, at 38 ("[T]he demagogue or partisan advocate may treat with a sneer ... the deliberate and official opinions of the ablest jurists of England and America," but "serious, thoughtful and patriotic men, who have no end but the welfare of their country to subserve," will respect these opinions); FISHER, *THE TRIAL*, *supra* note 119, at 325-33 (blaming sectional conflict on "political managers" who aroused extreme party passions); CHARLES INGERSOLL,

reasoned, "our profession is the only one which by training, by habit and by necessity, is able to carry on excited discussions without awakening personal passion to blind or mislead judgment"<sup>131</sup>—all the more so in a national emergency when "[e]very Thing seems to be unsettled and unhinged ... [and] [t]he public mind has lost its balance."<sup>132</sup> In such times:

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A LETTER TO A FRIEND IN A SLAVE STATE BY A CITIZEN OF PENNSYLVANIA, in CAMPBELL'S PAMPHLETS 28, 54-55 (Phila., 1862) (blaming the "fanaticism" of "the emancipation party" for prolonging the war and refusing to offer statesmanlike compromises to the south); TATLOW JACKSON, MARTIAL LAW: WHAT IS IT? AND WHO CAN DECLARE IT?, in CAMPBELL'S PAMPHLETS 16 (Phila., 1862) (prefacing transition from survey of political precedents on martial law to legal precedents by admonishing: "So much for extra-judicial opinions; they are, as must be all such where political feuds and alliances influence the speaker, contradictory and unsatisfactory. Now we come to the Bench, whence all passion should be banished."); JOHN T. MONTGOMERY, THE WRIT OF HABEAS CORPUS, AND MR. BINNEY, in CAMPBELL'S PAMPHLETS 15 (Phila., 2d ed. 1862) (stating that "[n]o political warp should be permitted to obtrude itself upon the question" of whether Lincoln's suspension of habeas corpus was unconstitutional); PARKER, *supra* note 110 (stating that the constitutionality of Reconstruction was often debated by "parties with a greater degree of zeal than of knowledge or discretion," but "rest assured that in whatever I may say I have no party to serve, nor any party purpose to subserve nor any personal interest to promote"); *id. passim* (describing the political distortion of the Constitution); Joel Parker, *The Character of the Rebellion, and the Conduct of the War*, 95 N. AM. REV. 500, 525 (1862) (stating that "it is the inordinate political ambition of the southern politicians which is the cause of the rebellion"); *see also* CURTIS, *supra* note 123, at 12-13 ("I am a member of no political party.... I have nothing but my country for which to act, in any public affair."). Charles Sumner similarly stated:

I have no theory to maintain, but only the truth ... I simply follow teachings which I cannot control.... Not as a partisan, not as an advocate, do I make this appeal; but simply as a citizen, who seeks ... to offer his contribution to the establishment of a policy by which Union and Peace may be restored.

Charles Sumner, *Our Domestic Relations, or, How to Treat the Rebel States*, 12 ATLANTIC MONTHLY 507, 524 (1863); *id.* (going on to argue that Congress has exclusive jurisdiction over conquered southern states, as it would any other territory held by the federal government).

131. WASHBURN, LECTURE 1861, *supra* note 123, at 21.

132. *Id.* at 18-19. Writing when some form of compromise still seemed possible, Washburn was moved by the ability of his northern and southern students to get along: "[T]hey were so situated here that they could not fail to perceive that there were two sides to the question in controversy, and were able to apply other tests to its merits than that of mere feeling." *Id.* at 3. More generally, Washburn noted what he called "the spirit of courtesy in advocacy," or lawyers' "appreciation for rights and opinions of those who stand opposed to each other." *Id.* at 2. Washburn was not alone in thinking that lawyers possessed uniquely valuable analytic abilities. As Fisher wrote:

[V]ery few, either by training or talents are capable of following out a chain of logical deduction and then surveying all parts of a subject as a whole. If sectional, sectarian, partizan [sic], or personal motives or passions are connected with one of the series of truths which constitute a system or an argument, that truth or doctrine immediately absorbs the attention of its own advocates, who

Notions, the wildest and most extravagant, are constantly struggling to gain a lodgment in the public mind, and so long as they are dealt with only by men who have but a single line of thought, and have never been trained to scrutinize questions as having two sides to them, they often assume for the time being, a weight and importance which sink into insignificance the moment such a test is applied.<sup>133</sup>

Lawyers, he concluded, "have a common country to care for,"<sup>134</sup> a duty to "bring back the people to sober reason."<sup>135</sup> The echoes of Story's injunction to the profession (though in a decidedly more anxious tone) are unmistakable.

The paradox is that elite lawyers shared Washburn's conviction about the authority of legal reasoning—its elevation above politics, passion, and power, and its capacity to shape "the public mind"—even as they used the tools of legal science to open relentless (and in many cases, sharply partisan) attacks on all sides of the legal issues presented by the war and Reconstruction, and even as the turn of events forced many of them into hopeless contradictions. Although by training they could see both sides of the controversy, failed attempts to revise and reenact the Founders' constitutional compromise early in 1861, and the ensuing bloodshed,<sup>136</sup> marked a

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cannot see it in its relation to the whole, but magnify it into the whole.

Fisher, Diary Entry (May 10, 1860), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 352. Fisher goes on to praise his own legal analysis regarding slavery in the territories. *Id.* at 353.

133. WASHBURN, LECTURE 1861, *supra* note 123, at 17.

134. *Id.* at 22-23.

135. *See id.* at 23; *see also* Cooley, 1863 Address, *supra* note 118, at 15 (blaming secession on the corruption of southern thought by "thirty years persistent instruction" in state's rights doctrine: "When bad men planned to destroy the American Union, they set deliberately at work to educate the people in erroneous principles of national law."); Sidney George Fisher, *The Right Men in the Right Places*, *PHILA. N. AM.*, June 24, 1861 [hereinafter Fisher, *Right Men*].

136. *See* HYMAN & WIECEK, *supra* note 7, at 218-23 (describing Lincoln's support in early 1861 for a proposed Thirteenth Amendment "prohibiting federal interference with slavery in the states, stating that this was 'now ... implied constitutional law'"); *id.* at 220 (finding that all efforts on the question of slavery in the territories were "foredoomed because ... [c]ompromise on either side required capitulation, and neither side was prepared to capitulate"). The earlier generations of statesmen who were open to constitutional compromise and committed to "progress ... through peaceful accommodation" no longer held the reigns. *See* HOWE, *supra* note 20, at 144-49, 224 (describing the role of Daniel Webster and Henry Clay in supporting the Compromise of 1850); *see also* FISHER, *THE TRIAL*, *supra* note 119, at 326 (lamenting the nation's turn away from the "safe path" of constitutional

decided shift in the terms of statesmanship. Elite lawyers increasingly mobilized legal arguments to support “single lines of thought” in an effort to align constitutional law as well as public opinion with their side.

Whiting’s pamphlet is a striking example. Although framed as a dispassionate exposition of legal science, it remains one of the most vigorous, unapologetic defenses of executive branch war powers ever written—an obvious, if not entirely partisan, attempt to defend the Lincoln administration from (primarily Democratic) criticism that its prosecution of the war was extraconstitutional. The following passage regarding the administration’s suppression of civil liberties is remarkable, not only for its stridence, but for the contempt it exudes for the very view the Supreme Court would later endorse in *Ex parte Milligan*:

[An individual’s] rights enjoyed under the constitution, in time of peace are different from those to which he is entitled in time of war....

....

... If the commander in chief orders [the army] ... to send traitors to forts and prisons; to stop the press from aiding and comforting the enemy by betraying our military plans; to arrest within our lines, or wherever they can be seized, persons against whom there is reasonable evidence of their having aided or abetted the rebels, or of intending so to do, the pretension that he thereby violates the constitution is not only erroneous, but it is a plea in behalf of treason. To set up the rules of civil administration as overriding and controlling the laws of war, is to aid and abet the enemy. It falsifies the clear meaning of the constitution ....<sup>137</sup>

Those who raise the Constitution against the suppression of free speech, arbitrary arrest, indeterminate executive detention, and military displacement of civil process not only defy plain constitutional law, but plead “in behalf of treason.”<sup>138</sup> The latter phrase is a

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compromise lit “by judicious men” of the past); Fisher, Diary Entry (Feb. 2, 1861), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 378; Fisher, Diary Entry (Mar. 4, 1850), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 233.

137. WHITING, *supra* note 119, at 51-53.

138. *Id.* at 53. There are striking parallels and differences with John Ashcroft’s statements

play on the then familiar refrain among lawyers shocked by Lincoln's incursions on civil liberties that necessity is "the tyrant's plea."<sup>139</sup> Both apothegms indicate the depth of partisan acrimony the period brought out in elite commentators.

Indeed, for Whiting, as for many other elite lawyers, there were "[t]wo wars ... waged between the citizens of the United States—a war of Arms and a war of Ideas," and both were to be waged with equal vigor.<sup>140</sup> In the early years of the Civil War and Reconstruction, lawyers were actively engaged on all sides of the war of ideas, straining antebellum professional ideals to the breaking point.<sup>141</sup> The sentinels set upon each other, and their open, protracted divisions exposed the failure of law in the very discourse deployed

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regarding civil liberties advocates post-9/11. The principal difference, of course, is that the nation is not now engaged in a civil war. See *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (2001) (testimony of Attorney General John Ashcroft).

139. Lawyers were borrowing from Milton. See MONTGOMERY, *supra* note 130, at 28 ("Milton puts the word *necessity* into an apt mouth when he says: 'So spake the fiend, and with necessity. The tyrant's plea, excused his devilish deeds' and it is still the shibboleth of the descendants of the Prince of Darkness.").

140. WHITING, *supra* note 119, at 229; see also SIDNEY CROMWELL, *POLITICAL OPINIONS IN 1776 AND 1863: A LETTER TO A VICTIM OF ARBITRARY ARRESTS AND "AMERICAN BASTILLES"* 16 (New York, Anson D.F. Randolph 1863) ("Words are weapons in civil war."); Paludan, *supra* note 26, at 1086-95 (discussing Francis Lieber's pro-Union pamphleteering and other discursive efforts in the war of ideas). In addition to his work for the War Department, Lieber served as President of the Loyal Publication Society. See, e.g., *LOYAL PUBLICATION SOCIETY OF NEW YORK, PAMPHLETS ISSUED BY THE LOYAL PUBLICATION SOCIETY (1864-1865)*.

141. Whiting's stridence was matched by commentary from lawyers like S.S. Nicholas, a Unionist judge from Kentucky, who published a pamphlet in 1862 arguing that citizens had the right *forcibly* to resist arbitrary executive arrests: "*Silent leges inter arma* is not—never was a legal maxim.... It is not—never was—never can be a recognized principle in the code of any government pretending to have civil liberty for its basis." S.S. NICHOLAS, *MARTIAL LAW*, in *CAMPBELL'S PAMPHLETS* 25 (Phila., 1862). Unfortunately, he argued, the "public press" was contributing to the

gross ignorance prevalent in the nation upon this important subject, causing the utterance of the wildest vagaries as to the powers of the President and his military subordinates, calculated to lead even well-intentioned, loyal officers into serious difficulties, perhaps into great criminal offences [sic] ....

....  
*... It is high time our officers should be informed, that so far from a President having power to make or authorize the arbitrary arrest of a free citizen, if he were to attempt to make or aid in making such an arrest, the citizen would have a right to kill the President in self-defence [sic], and would be acquitted as for justifiable homicide by any intelligent court and jury.*

*Id.* at 26-27 (emphasis added).

to affirm its legitimacy. As Reconstruction wore on, this intra-professional strife intensified, and with it a desire to find less controversial terrain on which to secure professional authority.

### C. *Constitutional Antinomies*

In approaching the legal discourse of the Civil War and Reconstruction period, there is an almost irresistible temptation to choose up sides—to assess the arguments and marshal proof to declare who wins the war of ideas. The thought of legal failure—the thought that law not only failed to prevent, but may have accelerated and deepened the nation's descent into violence—is nearly as unthinkable for us as it was for elite lawyers of the period who wrote to defend the citadel of the Constitution. But focusing on who gets it right often diminishes, if it does not suppress altogether, the serious claims raised by those who are cast as “opponents” of constitutional “truth.”<sup>142</sup> Lawyers on opposing sides were equally sincere and, more importantly, on the most pressing questions (secession, executive branch incursions on civil liberties, and emancipation), insuperable indeterminacies created room for plausible but radically irreconcilable doctrines. Thus, professional opinion splintered (and each side could believe that it alone was rescuing law and saving the state), not just because passion or conflicting political and social interests distorted interpretation, but because the war exposed genuine constitutional antinomies. These antinomies not only raised vexing questions about the legality of the war effort, they persisted—resurfacing during Reconstruction, often in ways that forced adherents of each side flatly to contradict their original positions.

Two antinomies central to the perceived legitimacy of the war and Reconstruction received especially close attention from elite legal commentators of the period: whether force can be used to protect

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142. See, e.g., HYMAN & WIECEK, *supra* note 7, at 232-38 (diminishing criticism of Lincoln's suspension of habeas corpus); *id.* at 337 (arguing that “during the war, lawyers harmonized what John Codman Hurd described as the ‘chaos of doctrines’ concerning the nature of the war and the status of the seceded states” and claiming that “such lawyers-in-Union-service as Joseph Holt, Francis Lieber, and William Whiting, among others, helped to restore the self-esteem of the profession”); PALUDAN, *supra* note 29, *passim*. But see Sanford Levinson, *Abraham Lincoln, Benjamin Curtis and the Importance of Constitutional Fidelity*, 4 GREEN BAG 419, 427-28 (2001) (resisting the legalistic temptation to resolve the constitutionality of emancipation).

law in the absence of consent, and whether order and civil rights can be maintained without destroying constitutionally guaranteed civil liberties. Elite lawyers steeped in constitutional history knew that consent, not just force, is essential to the rule of law and to the character of democratic self-government. But secession (southern repudiation of consensual union) set the two principles against each other not just during the war but in determining the status of the southern states after their surrender at Appomattox. The second antinomy also emerged as soon as the war began and resurfaced during Reconstruction. Lincoln faced immediate questions about the constitutionality of using military force and martial law to put down organized, often violent, pro-southern conspiracies and protests in the North. And as southern states were eventually occupied by northern armies, the President and Reconstruction Congresses faced equally vexing questions about the constitutionality of military government in the South.

In what follows, I review the contemporary discourse of legal elites on these antinomies. My purpose is twofold: first, to show how the concept of the lawyer as public sentinel operated to establish the discursive authority of lawyers engaged in the war of ideas; and second, to reveal the strain on this professional ideal produced by the attempt to resolve these antinomies. From the start of the conflict, traces of strain can be seen in the very discourse deployed to bind events in a reassuring affirmation of legal authority.

### *1. Force / Consent: Secession or Lawless Rebellion?*

Most Unionists, along with Lincoln, rejected secession out of hand as "legally void" and "the essence of anarchy."<sup>143</sup> This move proved necessary to contend in the next breath that the federal government could constitutionally use force to subdue South Carolina and the ten other states that joined it to form the Confederacy. Exit, on this account, was plainly unconstitutional ("insurrectionary or revolutionary, according to circumstances")<sup>144</sup>—in short, lawless. A union had been formed, not a mere compact, and no state could, at its

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143. LIFE AND WRITINGS, *supra* note 27, at 650, 653. On northern "law and order" sentiment against secession, see Paludan, *supra* note 26.

144. LIFE AND WRITINGS, *supra* note 27, at 650.

discretion, dissolve its bond with that union. As Lincoln reasoned in his First Inaugural:

[I]n contemplation of universal law and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination.<sup>145</sup>

The Union could only be terminated, therefore, by extralegal means—"by some action not provided for in the instrument itself."<sup>146</sup>

Secessionists, by contrast, held fast to a compact theory of the Constitution. The theory provided that because the consent of the states was a necessary condition for entering into and establishing the Union, formal revocation of consent was legally sufficient to exit.<sup>147</sup> On this view, breach of the "compact" by the North (primarily violations of the Fugitive Slave Clause and other acts in derogation of the right of property in slaves) fully justified secession.

Underlying the technical claims about breach was the bedrock political principle that democracy rests on the consent of the governed. Withdraw that consent and no allegiance would be due to the government thus renounced, and hence no power in that government to force a reunion. As Alexander Stephens, a lawyer, former Whig, and soon to be Vice President of the Confederacy,

145. *Id.* at 649.

146. *Id.*

147. Jefferson Davis's address to the Confederate Congress after the South fired on Fort Sumter tried to match Lincoln's invocation of constitutional authority. Davis emphasized the singular and marked caution with which the States [at the founding] endeavored, in every possible form, to exclude the idea that the separate and independent sovereignty of each State was merged into one common government and nation; and the earnest desire they evinced to impress on the Constitution its true character—that of a *compact* BETWEEN independent States.

....

... Strange indeed must it appear to the impartial observer ... that all these carefully worded clauses proved unavailing to prevent the rise and growth in the Northern States of a political school which has persistently claimed that the Government thus formed was not a compact between States, but was in effect a National Government, set up above and over the States.... [T]he creature has been exalted above its creators; the principals have been made subordinate to the agent appointed by themselves.

*The Southern Congress: Message of President Davis, NAT'L INTELLIGENCER, May 7, 1861.*



wrote to Lincoln in late 1860: "Force may perpetuate a Union. That depends upon the contingencies of war. But such a Union would not be the Union of the Constitution. It would be nothing short of a Consolidated Despotism."<sup>148</sup> Stephens later republished the letter in a two-volume defense of secession in which he argued that dispassionate legal analysis and the "truth of History" would prove not only that northern lawlessness and disrespect for southern rights justified secession, but that secession was a right well grounded in constitutional law:

The real object of those who resorted to Secession, as well as those who sustained it, was not to overthrow the Government of the United States; but to perpetuate the principles upon which it was founded. The object in quitting the Union was not to destroy, but to save the principles of the Constitution.<sup>149</sup>

Stephens cannot be dismissed as a fire-eating secessionist. Although he followed Georgia into the Confederacy and firmly believed that secession was legal, he spoke publicly against the wisdom of secession in late 1860 before the Georgia state legislature,<sup>150</sup> and responded cordially to Lincoln's request for a copy of the speech (he had sat with Lincoln as a fellow Whig in Congress in the

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148. 2 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 270 (Kraus Reprint Co. 1970) (1870). William Pitt Ballinger, a prominent Texas lawyer and Whig who opposed secession, agreed that the use of force to put down secession was contrary to law: "The Union can never be what it is. The silver cord is loosed—the golden bowl broken .... The national govt [sic] may be reestablished—The political union may be perpetuated—but if so, it will be by force and we will be practically a conquered vassal people." BLOOMFIELD, *supra* note 31, at 285. For all his reservations about the legality of secession, "the use of force to maintain the Union struck him as so repugnant to 'the spirit of our Govt.' [sic] that he branded it a worse folly than secession itself." *Id.* When war broke out, Ballinger "never wavered in his public support of Confederate policies ... accepting an appointment as receiver of alien enemy property in October 1861," *id.* at 287, and publishing strident editorials in "defense of Confederate policy at all levels." *Id.* at 293. On Lincoln's assassination, Ballinger wrote, "[n]ot a soldier, nor a woman, an old man nor a limping child with true heart to this Southern land but feels the thrill electric, divine, at this sudden fall in his own blood of the chief of our oppressors." *Id.* at 295.

149. 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES 31 (Phila., Nat'l Publ'g Co. 1868). The book was published in 1868, but it can be read as an extended elaboration of public arguments Stephens made in his official capacity during the secession winter.

150. *See id.* at 17. Other southern lawyers who joined the Confederacy once secession was a fact were more skeptical about its legality.

1840s),<sup>151</sup> and the book (representations of conversations Stephens said he had with "old friends," reduced to fictional exchanges between himself, a Radical Republican, a Conservative Republican, and a War Democrat)<sup>152</sup> offers a formidable exposition of the legal and historical record on secession.<sup>153</sup>

Still, legal science led Stephens in a radically different direction than it did northern lawyers like Joel Parker, Royall Professor of Law at Harvard, who wrote to defend the Union cause as an equally solemn exercise in law enforcement. For Parker, any "construction of the Constitution which should sanction the alleged right of secession" was "utter absurdity."<sup>154</sup> The compact theory, he insisted, simply cannot be squared with the Supremacy Clause: "It is a perversion of terms to call the 'supreme law of the land' a compact between the States, which any State may rescind at pleasure."<sup>155</sup> Parker's essay, published for public consumption in the influential *North American Review*, is a paradigmatic expression of Story's professional ideal, turning "naturally ... in the first instance to the Constitution itself" in order to determine whether secession is a legal right or a sophism propounded by lawless rebels.<sup>156</sup> For Parker, turning to the Constitution meant studying the document with the tools of legal science rigidly separated from politics, especially from political utterances like the Virginia and Kentucky Resolutions (regular precedents in the case for secession): "The resolutions and platforms of political parties, in times of party excitement, whether in or out of the halls of legislation, do not furnish any authentic expositions of the principles of constitutional law."<sup>157</sup> "Regarding the

151. On Stephens and other southern Whigs, see HOWE, *supra* note 20, at 238-62.

152. 1 STEPHENS, *supra* note 149, at 14-15. The format of adversarial exchange tracked Washburn's faith in the beneficial effects of a pedagogy built around recognizing rather than ignoring counterarguments—while offering Stephens the opportunity to make point-by-point refutations of the core arguments against the legality of secession. Skeptics could at least see their own positions and evidence invoked against Stephens's assertions.

153. The volumes run more than fourteen hundred pages and include extended quotes from Madison's notes of the Constitutional Convention, the Virginia and Kentucky Resolutions, floor debates from Congress, and the correspondence of federal officers.

154. Joel Parker, *The Right of Secession*, 93 N. AM. REV. 212, 226 (1861) [hereinafter Parker, *Right of Secession*].

155. *Id.* at 224. Other familiar constitutional arguments against secession are scrupulously canvassed. See *id.*

156. *Id.* at 222.

157. *Id.* at 237.

Constitution *as a law*," he scoffed, "probably no one can be found, at the present day, to contend for the right of secession."<sup>158</sup>

Parker's article closes with a formalistic dismissal, couched in a metaphor from property law, of popular ratification of secession in the South:

[T]he political axiom, that "all rightful government is founded upon the consent of the governed," cannot justify or excuse secession.... The consent has been given by the ratification of the Constitution. The compact has been made by the Fathers, who vindicated their title to the country, and their right to form the institutions under which it should be governed. The present generation comes in as their successors, and is thus "in privity." The covenant "runs with the land," and binds all persons who occupy it. If any one desires to relieve himself from the obligations which it imposes, he can secede, personally, by transferring his domicile to some other country.<sup>159</sup>

Dispassionate legal analysis, for Parker, proved conclusively that the constitutional mandate belonged to the North. Anyone who disagreed was simply not thinking like a lawyer, not interpreting the Constitution "as a law."<sup>160</sup>

But other northern lawyers were not so sure. Drawn out of a life of gentlemanly leisure by the sectional conflict, Philadelphia lawyer Sidney George Fisher penned a series of pamphlets, newspaper editorials, magazine articles, and eventually a book on the constitutional issues raised by slavery in the territories, secession, and the war effort. Fisher found law practice in the age of Jackson so demoralizing, and was so taken with the idea of managing his Maryland farm from a distance while living a life of the mind on his modest Philadelphia estate, that he allowed his inheritance gradually to dwindle rather than expand his practice. He was, in this sense, an archetypical conservative Whig: trained in law but too

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158. *Id.* at 228 (emphasis added). Mixing martial and legal metaphors, Parker described the Union's "resort to gunpowder, shot, and shells" as an exercise of "stringent legal and equitable powers" to force compliance with fundamental law. *Id.* at 238. Parker was not the only northern lawyer to mix martial and legal metaphors. See WHITING, *supra* note 119, at 49-50.

159. Parker, *Right of Secession*, *supra* note 154, at 244.

160. *Id.* at 228. As we will see, Parker was no blind Republican party advocate. See *infra* Part IV.C.4.

disgusted with the debasement of practice in his time to build a practice of his own; contemptuous of corruption in party politics and the effects of expanding suffrage, but impelled diligently to follow politics by an elitist sense of duty and a fervent hope that the "right men" would someday return to the helm.<sup>161</sup> Concern about the fate of law in the sectional conflict (and conviction that he possessed the knowledge and virtue to help shape public opinion on the issues) inspired the only sustained exercise of his legal talents in his entire career.<sup>162</sup> Fisher would be a public sentinel, or no lawyer at all.

By the publication of *The Trial of the Constitution* in 1863, he had become an ardent supporter of the Lincoln administration—seeing in the "rough school[ed]" western lawyer the very qualities of statesmanship and patriotism he found so lacking in the regular party machinery.<sup>163</sup> But in November 1860 he was so mortified by the demagoguery of mass politics (especially radical abolitionism in the Republican party) that he could not bring himself to cast a vote in the momentous presidential election.<sup>164</sup> A

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161. See Fisher, *Right Men*, *supra* note 135; Fisher, Diary Entry (June 17, 1861), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 394 (noting that a friend "asked me to write an article on the necessity at the present crisis of selecting men of education and ability for public stations").

162. See generally Fisher, Diary Entries, in PHILADELPHIA PERSPECTIVE, *supra* note 69, *passim*. On his discursive engagements with the sectional conflict, see PALUDAN, *supra* note 29, at 170-97.

163. See Fisher, *Right Men*, *supra* note 135. Lincoln's First Inaugural Address and his July 4, 1861, address to Congress apparently converted Fisher. See Fisher, Diary Entry (Dec. 5, 1861), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 410; Fisher, Diary Entry (July 6, 1861), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 396. On Fisher's pamphleteering and THE TRIAL OF THE CONSTITUTION, see William H. Riker, *Sidney George Fisher and the Separation of Powers During the Civil War*, 15 J. HIST. IDEAS 397 (1954).

164. The entry reads:

Today is election day. I did not vote. I do not entirely like the animus of the Republican Party. There is too much of hostility to the South in it. The anti-slavery party has become the party of the multitude.... I am glad to hear that it is to triumph, but I do not wish it to triumph by too great a majority. If the spirit by which it is animated were simply to restrain slavery within its present limits, but heartily to maintain it within those limits, I would vote for Lincoln. But it is leavened largely with a different feeling, a blind, reckless & enthusiastic hatred of slavery, without regard to the character of the Negro race, or to the consequences of abolition.... How can a people at once love liberty and love slavery. They must hate slavery, unless they are placed in circumstances, as the southern men are, to make slavery a necessary thing for their own safety. But to realize such circumstances, to appreciate the reasoning by which slavery is justified because of them, is a process requiring too much thought & logic for the

Unionist, he nevertheless wrote to defend "legalized" (by which he meant federally authorized) secession.<sup>165</sup> He denounced secession by state conventions as revolutionary in the same spirit as Parker, but, unlike Parker, he lived close enough to the Mason-Dixon line to worry seriously about the legitimacy of relying on sheer force to preserve the Union.<sup>166</sup> "It rarely happens," he conceded, "that any opinions long held by large numbers of men are without some foundation of truth."<sup>167</sup> Southerners may have confused the moral right of revolution with the legal right of secession, but a "compelled Union"<sup>168</sup> would betray rather than vindicate the Constitution:

[I]f the Government succeeded in reducing resisting States to submission, and imposing upon them the yoke of a hated authority, would a compelled Union, cemented by blood, be the Union of the Constitution, or a secure foundation for national glory and greatness? Could it be followed by a real peace, and how long would it endure? ... The American people desire no such Union. If they cannot have one founded on consent and mutual good will and common interests in a common destiny, they would rather give up their cherished hope of a great Republic, and accept the destiny of Europe.<sup>169</sup>

Fisher's diary entries during the secession winter reveal even deeper concern about whether the spirit of the Constitution would

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mind of the masses. They stop short at their hatred of slavery & act on that. But this is a very dangerous point for them to stop at. It involves the destruction of the Union & of the South. I wish to preserve both.

Fisher, Diary Entry (Nov. 6, 1860), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 367.

165. See Sidney George Fisher, *Legalized Secession*, *PHILA. N. AM.*, Dec. 31, 1860; see also Fisher, Diary Entry (Dec. 31, 1860), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 376 n.52 (describing Fisher's article). Others believed, with President Buchanan, that even if illegal, secession could not lawfully be opposed. See HYMAN & WIECEK, *supra* note 7, at 217 ("[T]he President declared that secession had no constitutional basis, but then went on to state that neither was there authority for presidential coercion of the seceding states."); see also WILLIAM DUSINBERRE, *CIVIL WAR ISSUES IN PHILADELPHIA 1856-1865*, at 83-94 (1965).

166. Although a steadfast Whig, he had also married an Ingersoll—a prominent Democratic family in Philadelphia with strong southern sympathies. See Fisher, Diary Entry (June 16, 1851), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 234. On the Ingersoll family, see Irwin F. Greenberg, *Charles Ingersoll: The Aristocrat as Copperhead*, 93 *PA. MAG. HIST. & BIOGRAPHY* 190 (1969).

167. FISHER, *THE TRIAL*, *supra* note 119, at 165.

168. *Id.* at 170.

169. *Id.* at 170-71.

be violated in a war waged to enforce it. "Legalized" secession, he hoped, would do what federal coercion and naked state defiance certainly could not—preserve *both* the sanctity of law and the freedom it guarantees:

Coercion ... is impossible.... It is plain that the government should determine either to put down & punish rebellion by force, or should make secession a legal act, for otherwise the law is defied & dishonored. Should the former course be resolved on, it would at once unite all the southern states, at least so everyone thinks. The civil war of a very dreadful character would follow, the consequences of which no man could foresee, for even if the government should succeed, *the whole character & value of this union, which should rest on consent, opinion & mutual benefit, not on force & terror, would be destroyed.*<sup>170</sup>

Fisher's concept of a constitutional right in the federal government to expel deviant states (especially upon request) went nowhere. The views of Parker and Lincoln carried the day in the North, and were eventually embraced by the Supreme Court.<sup>171</sup> But lawyers like Fisher could see that the antinomy between force and consent opened by secession threatened the Constitution itself. And the legal problem of relying on force to preserve relationships grounded in consent—the insult to law of an enforcement measure so bloody and so contrary to what Fisher called "the whole character & value of this union"<sup>172</sup>—persisted well into Reconstruction.

## 2. Order / Liberty: The Doctrine of Necessity

There is [a] class of persons who ... urge that we should first save the country, and then settle questions of Constitutional law. *We*

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170. Fisher, Diary Entry (Dec. 4, 1860), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 372 (emphasis added); *see also* Fisher, Diary Entry (June 30, 1862), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 429 ("How then can the Union be restored?... [T]he spirit of the North is roused and the people are determined ... to keep the country undivided if they hold the South in absolute subjection. What then will become of the Constitution and free government?").

171. *See Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868) (endorsing the doctrine of "indestructible Union").

172. Fisher, Diary Entry (Dec. 4, 1860), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 372.

*may ask, what is it they will save?... What is the worth of the Constitution if it be of force only in peaceful and tranquil times? It is precisely in times of great agitation and peril the citizen needs, and it was designed to give him, protection. It is from the storm and tempest he needs a shelter.*<sup>173</sup>

Forcing the South back into the union raised one constitutional antinomy. Equally significant in the war of ideas between elite lawyers was the antinomy between order and liberty. In a series of measures designed to maintain order in the North, quell dissent, and discourage draft evasion, Lincoln authorized military officers to make discretionary arrests, suspend habeas corpus, and use military commissions to try civilians.<sup>174</sup> Each step was predicated on rather broad assumptions about the constitutional power of the Executive in time of war. Both unionists and southern sympathizers immediately accused the President of dictatorship, of trampling constitutional guarantees of civil liberty, and of usurping congressional power.

During Reconstruction, the problem of securing order shifted to the South where freedmen, unionists, and loyal state governments required federal protection. But this time it was Congress imposing military rule in a time of relative peace, and the Executive, now in the hands of President Johnson, insisting upon constitutional limitations. Pro-southern writers suddenly championed the constitutional authority of the Executive branch while Reconstruction advocates turned to arguments of legislative supremacy. The Supreme Court was also involved, both in the war period through Chief Justice Taney's famous legal duel with Lincoln over the suspension of habeas corpus in *Ex parte Merryman*,<sup>175</sup> and during Reconstruction in *Ex parte Milligan* and the *Test Oath Cases*.<sup>176</sup> Taney wanted an even greater role for the Court, secretly preparing "opinions that declared unconstitutional the arbitrary arrests, conscription, and emancipation" before "the facts of a particular appeal were before him or the Court."<sup>177</sup> Well aware of the hostility,

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173. BRECK, *supra* note 123, at 38-39 (emphasis added).

174. See *infra* notes 182-207 and accompanying text.

175. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). The Court also addressed the legal status of the rebellion in the Prize Cases. See *supra* note 7.

176. See also *White*, 74 U.S. (7 Wall.) 700 (1868).

177. HYMAN & WIECEK, *supra* note 7, at 241.

"Lincoln tried to keep off the Court's docket" litigation involving the constitutionality of Civil War issues.<sup>178</sup>

The separation of powers issues were complex, to say the least, and forced many commentators into self-contradiction. But underneath these issues lay deeper and even more difficult questions about rule of law values akin to those raised by lawyers regarding secession—most prominently, whether constitutional rights can be suspended or violated in order to "save the state" and whether the state is truly "saved" if the Constitution is trampled in the process. Legal elites split sharply on these questions, each side laying claim to Story's vision and decrying the partisan corruption and constitutional infidelity of those who wrote in opposition.

The war of ideas on civil liberties is often framed as a contest between Lincoln and Taney, in which Taney figures as a cramped strict constructionist against Lincoln's pragmatic constitutionalism and fortitude.<sup>179</sup> In this narrative, lawyers such as Attorney General Edward Bates, William Whiting, Francis Lieber, and Judge Advocate General Joseph Holt rally around Lincoln, proving the "adequacy-of-the-Constitution" to meet the exigencies of the war.<sup>180</sup> But there was a much more dynamic exchange, a much sharper clash, in professional opinion.

The starting point in this debate was *Ex parte Merryman*.<sup>181</sup> When South Carolina fire-eaters finally pulled the trigger at Fort Sumter in mid-April 1861, Lincoln immediately mobilized the northern militias.<sup>182</sup> In order to reach Washington, D.C., troops had to travel through Maryland, a slave state in which secession sentiment ran strong.<sup>183</sup> Within a week of the fall of Fort Sumter, pro-secession mobs "blocked the passage of Massachusetts troops en route to guard the nation's capital ... [and] burned Baltimore's key railroad bridges."<sup>184</sup> To keep the Maryland route open, Lincoln

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178. *Id.*

179. Taney deserves the charge. My point is simply that Taney's objections, in this instance, were serious and supported by other law writers. See *supra* text accompanying notes 147-49; *infra* text accompanying notes 182-207.

180. HYMAN & WIECEK, *supra* note 7, at 234; see also *id.* at 257, 337.

181. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

182. See HYMAN & WIECEK, *supra* note 7, at 214-15.

183. *Id.* at 215.

184. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 4-5 (1991).



unilaterally suspended habeas corpus on the lines for conveying troops between Philadelphia and the capital.<sup>185</sup>

John Merryman was arrested by Union soldiers at two a.m. on the morning of May 25th.<sup>186</sup> The arrest order came from a general who had learned that Merryman was working to aid the South, specifically "drilling Marylanders in a scheme to take them south and join the Confederate army."<sup>187</sup> He was taken to Fort McHenry and allowed to see his lawyer, who rushed to Washington to meet in person with Chief Justice Taney.<sup>188</sup> The Chief Justice promptly issued a writ of habeas corpus which was refused on the ground of Lincoln's suspension order.<sup>189</sup> Taney then drafted an opinion declaring Lincoln's order unconstitutional on the theory that only Congress could suspend habeas corpus under the Suspension Clause.<sup>190</sup> Taney's reading of the opinion was "shrewdly staged before local and national journalists,"<sup>191</sup> with the result that it "was quickly published in newspapers and in pamphlet form in Baltimore and Philadelphia. It also received immediate dissemination in the Confederacy ...."<sup>192</sup>

In both the substance of the opinion and in its staging, Taney sought to portray himself as the quintessential public sentinel, sounding the alarm to warn the nation of a constitutional threat as dire, in his view, as secession. The Suspension Clause, he argued, is not located in Article II, which sets forth executive powers, but in Article I, among other limitations on legislative power.<sup>193</sup> And although the record from the constitutional convention is not crystalline, there is clear evidence of "the jealousy and apprehension of future danger which the framers ... felt in relation to [the executive] department ... and how carefully they withheld from it

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185. *Id.* at 8-9.

186. *Merryman*, 17 F. Cas. at 147.

187. NEELY, *supra* note 184, at 10.

188. HYMAN & WIECEK, *supra* note 7, at 239.

189. NEELY, *supra* note 184, at 10. At the time, a written reply to the writ was insufficient—the writ required the government to physically produce the body of the prisoner in addition to the reasons for his or her detention.

190. *Merryman*, 17 F. Cas. at 148. The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

191. HYMAN & WIECEK, *supra* note 7, at 239.

192. NEELY, *supra* note 184, at 10.

193. See *Merryman*, 17 F. Cas. at 148-49.

many of the powers," like suspending the writ, which had been so notoriously abused by the crown.<sup>194</sup> He added that no one before Lincoln had taken the position that the suspension power rested in any other branch than the Legislative.<sup>195</sup> On the contrary, Blackstone, Chief Justice Marshall, Justice Story, and Thomas Jefferson had all either explicitly averred or assumed that suspension is a legislative power.<sup>196</sup> Finally, he reasoned, the courts of Maryland were open and operating. In his words, "the district judge of Maryland ... the district attorney and the marshal, all reside[] in the city of Baltimore, a few miles only from the home of the prisoner."<sup>197</sup> Lincoln's actions were plainly extra-legal, Taney concluded, and the nation was at the mercy of executive discretion:

[I]f the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a Government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.<sup>198</sup>

Congress might have ended the controversy by intervening, but it was "not anxious to enter the politically dangerous military arrest morass" and waited nearly two years before endorsing Lincoln's suspension orders in the Habeas Corpus Act of March 1863.<sup>199</sup> In the meantime, Lincoln simply refused to comply with Taney's decision.<sup>200</sup> Indeed, Lincoln extended his initial suspension order to

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194. *Id.* at 149; see also *id.* at 151 (observing that the English Habeas Corpus Act was enacted "to cut off the abuses" by the crown "and the servile subtlety of the crown lawyers" and noting that "[i]f the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown ....").

195. *Id.* at 148.

196. *Id.* at 148, 150-52.

197. *Id.* at 152.

198. *Id.*

199. HYMAN & WIECEK, *supra* note 7, at 241.

200. *Id.*

cover military lines as far as Maine by October 1861,<sup>201</sup> arrested suspected secessionist Maryland state legislators over the summer,<sup>202</sup> declared martial law and allowed military trials of civilians in unstable border states like Missouri throughout the war,<sup>203</sup> and suspended habeas corpus throughout the nation to aid enforcement of a new conscription law and to permit indefinite detention of "all persons arrested for disloyal practices."<sup>204</sup>

Still, sensing the need to answer, if not to obey, Taney's opinion, Lincoln made his now famous plea of necessity, asking in his July 4, 1861, message to Congress: "[A]re all the laws, *but one*, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"<sup>205</sup> The following day, Attorney General Bates issued a formal opinion arguing that the President may suspend the writ to put down insurrection in an emergency, whether Congress has given authorization or not.<sup>206</sup> But the opinion was far from conclusive,

201. NEELY, *supra* note 184, at 14.

202. *Id.* at 14-18.

203. *See id.* at 32; *see also* DANIEL FARBER, *LINCOLN'S CONSTITUTION* 147 (2003); HYMAN & WIECEK, *supra* note 7, at 241.

204. NEELY, *supra* note 184, at 52-53. The official proclamation came in September 1862, but Stanton effectuated a nationwide suspension on August 8, 1862, in a series of orders from the War Department. *Id.* Although the writ was suspended throughout the North, arrests and detentions were most prevalent "in areas exposed to Confederate invaders or where large-scale resistance developed to emancipation, the employment of Negro troops, or conscription." HYMAN & WIECEK, *supra* note 7, at 241. As Dan Farber summarizes, the evidence suggests that Lincoln's incursions on civil liberties were in some instances unjustified but, viewed comparatively, not severe:

According to the best recent estimate, at least thirteen thousand civilians were held under military arrest during the course of the war. Most of these arrests involved suspected deserters or draft dodgers, citizens of the Confederacy, possible blockade runners, or individuals trading with the enemy. Some were arrested purely for disloyal speech....

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... [But] intrusions on civil liberties were no sign of impending dictatorship. FARBER, *supra* note 203, at 144, 146. "Indefinite" detention was also rare, as many prisoners were freed upon swearing an oath of loyalty and many others were freed upon petition to Lincoln and others in his administration. *See* HAROLD MELVIN HYMAN, *THE ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION* 33-47 (1954); NEELY, *supra* note 184, at 100-02, 117.

205. NEELY, *supra* note 184, at 12 (quoting Lincoln). Lincoln did not completely concede that he lacked legal authority to suspend habeas corpus without congressional approval. *See* Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *LIFE AND WRITINGS*, *supra* note 27, at 675-77.

206. Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861) (invoking the Presidential Oath Clause and two antebellum statutes authorizing the

conceding meekly that “[v]ery learned persons have differed widely about the meaning of this short sentence, and I am by no means confident that I fully understand it myself.”<sup>207</sup>

Bates had a difficult task. However politically motivated Taney’s opinion in *Merryman* was, it rested on rather solid constitutional footing. Thus, when Horace Binney, patriarch of the Pennsylvania bar, came to the defense of the administration in a lengthy pamphlet (which quickly went to a second edition), it touched off a firestorm.<sup>208</sup> It was one thing for Lincoln to plead necessity and concede that he might be breaking the law in order to enforce it, but quite another for a light of the bar to claim that the doctrine of necessity enjoys a clear constitutional mandate. Binney’s principal claim was that the Suspension Clause is self-executing (needing no legislation to authorize suspension in time of rebellion or invasion), and that the act of suspension is quintessentially executive in nature.<sup>209</sup> The location of the clause was not, therefore, dispositive, and analogies to English history and practice were misleading, both because England’s Habeas Corpus Act contained no limitation on the suspension power to times of rebellion or invasion, and because the United States’ executive branch is weak (and hence not to be feared).<sup>210</sup> Like Hamilton’s claim in *The Federalist No. 74* about the power to pardon, Binney added, suspension would be effective only in helping to avert rebellion or invasion if the Executive has power to act immediately:

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President to suppress rebellion and insurrection). The opinion was republished in law magazines. See, e.g., 24 MONTHLY L. REP. 129 (1861).

207. Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. at 87. During the immediate post-Sumter crisis in Maryland, “Lincoln asked ... Bates for an opinion on declaring martial law....” NEELY, *supra* note 184, at 4. The memorandum, produced by Assistant Attorney General Titian Coffey, was also equivocal. *Id.* (describing the memorandum as “not particularly encouraging to a chief executive seeking precedents”). For a contemporary critique of Bates’s opinion, see MONTGOMERY, *supra* note 130, at 24-27.

208. See BINNEY, THE PRIVILEGE, *supra* note 123. A less sophisticated and less controversial defense was offered by Reverdy Johnson. See Reverdy Johnson, *The Power of the President to Suspend the Writ of Habeas Corpus*, DAILY NAT’L INTELLIGENCER, June 22, 1861.

209. See HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION OF THE UNITED STATES 6-7 (PHILA., 2d ed. 1862) [hereinafter BINNEY, THE PRIVILEGE (2d ed.)].

210. See *id.* at 12-24.

[A] suspicious fragment and no more, without the present clue to detection, may appear—not enough for the scales of justice, but abundantly sufficient for the precautions of the guardian upon his watch .... To confront it at once, in the ordinary course of justice, is to insure its escape, and to add to the danger.<sup>211</sup>

The old English common law doctrine that there is no exception to the privilege of the writ in time of emergency, he lamented, is simply “*too perfect for human society*, at least for the condition which human society has usually assumed for several centuries.”<sup>212</sup>

Binney’s pamphlet sparked numerous responses in speeches, pamphlets, editorials, and other media, many coming from his peers at the bar in Philadelphia.<sup>213</sup> The second largest city in the country at the time, Philadelphia was considerably more moderate than the Northeast, and, as in many parts of the lower North, “[s]ympathy with abolitionism was weak” even among Whig-Republicans.<sup>214</sup> During the secession winter many Philadelphians had been inclined to permit peaceful disunion, and when they finally rallied to support the war in April, “many did so neither to destroy slavery nor even simply to preserve the Union, but to rebuke violence against the last vestige of the government’s authority.”<sup>215</sup> The bar in Philadelphia was also well established. Its bar association, founded in 1802, was “the oldest continuously existing organization of lawyers in the

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211. *Id.* at 47. Binney goes on to quote Hamilton’s argument that: there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels, may restore the tranquility of the Commonwealth .... The dilatory process of convening the Legislature or one of its branches, for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity.

*Id.* at 49 (quoting THE FEDERALIST NO. 74 (Alexander Hamilton)).

212. *Id.* at 13.

213. Sydney George Fisher, son of the Philadelphia lawyer, author, and diarist, lists over forty publications in *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 POL. SCI. Q. 454 (1888); see also CAMPBELL’S PAMPHLETS (Phila., 1862); DUSINBERRE, *supra* note 165, at 131; Fisher, Diary Entry (May 29, 1861), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 391 (commenting on the President’s authority to suspend the Writ). Binney would reply in a second pamphlet in April 1862, see BINNEY, THE PRIVILEGE (2d pt.), *supra* note 123, and in a third at the close of the war. See HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS, in CAMPBELL’S PAMPHLETS 1 (Phila., 3d pt. 1865) [hereinafter BINNEY, THE PRIVILEGE (3d pt.)].

214. DUSINBERRE, *supra* note 165, at 12.

215. *Id.* at 107; see also *id.* at 112; *id.* at 96, 123, 179.

United States.”<sup>216</sup> In 1861, Binney was by far its “most famous lawyer.”<sup>217</sup>

The discursive clash Binney’s pamphlet provoked was still early in the war effort, and was a bit less strident, more in the spirit of the “adversarial courtesy” Washburn spoke of in his 1861 lecture, than later debates.<sup>218</sup> But there is no mistaking the frustration directed at Binney for adding the weight of his name to (in the view of his opponents) a palpable subversion of law. As John T. Montgomery lamented in his attempt to “review some of [the] errors” in Binney’s pamphlet:

At a time like this, when the United States professes to be contending for the principles of Free Government under the Constitution, it is unfortunate that a gentleman of great attainments and reputation, and of an experience of rare maturity, should come from his honorable retirement to give the world his reasons for humbling from its hitherto proud position one of the dearest principles of liberty known to free institutions.<sup>219</sup>

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216. POUND, *supra* note 40, at 205. On the prominence and demographics of the Philadelphia bar, see Gary B. Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 COMP. STUD. SOC’Y & HIST. 203, 205, 214 (1965).

217. DUSINBERRE, *supra* note 165, at 130.

218. See BINNEY, *THE PRIVILEGE* (2d ed.), *supra* note 209, at 1. The pamphlet begins with Binney’s cover letter to Francis Lieber noting their earlier exchanges on the subject and stating that:

[n]o one should be dogmatical, or very confident, in such a matter; but perhaps one who has lived as long as I have under the Constitution, may be permitted to put some of his thoughts into the common mass, that the best opinion may be extracted from the whole. It is by the elimination of errors, on both sides of a question, that we come to the truth.

*Id.*; see also BULLITT, *supra* note 123, at 3-4; G.M. WHARTON, REMARKS ON MR. BINNEY’S TREATISE ON THE WRIT OF HABEAS CORPUS, in CAMPBELL’S PAMPHLETS 3 (Phila., 2d ed. 1862) (“Any contribution ... in the proper spirit, to the due consideration of such a question, before its final authoritative adjudication, should be welcomed, if not invited.”). The propositions of Binney’s pamphlet

were examined as questions of law ... independently of the influence of preconceived opinions. The result arrived at was a conviction on my mind that in many respects his premises were not well taken, and that his inferences or conclusions were erroneous ....

....

... I have sought to treat the subject simply and purely in its legal aspects. If the following remarks shall in any degree aid in eliminating the truth, that will be ample compensation for the time and labor bestowed upon them.

*Id.* at 3-4.

219. MONTGOMERY, *supra* note 130, at 3.

Similarly, Tatlow Jackson was embarrassed that "the honor of propping a weak argument with a name of legal and logical renown [had fallen] to our fellow-citizen, Horace Binney":

Knowing the high character and strict integrity of Mr. Binney ... I ... sincerely regret that Mr. Binney's logic has been employed in an endeavor to increase "the one man" power, by advocating a construction of the Constitution totally different from what it is patent was held by its creators and adopters.<sup>220</sup>

Some of the responses were positively vitriolic.<sup>221</sup>

Frustration with Binney was not purely partisan. Political views certainly played a role, but Unionists and War Democrats were just as outraged at Lincoln's action and Binney's apologia as were Copperheads.<sup>222</sup> More fundamental was the concern that his

220. TATLOW JACKSON, *AUTHORITIES CITED ANTAGONISTIC TO HORACE BINNEY'S CONCLUSIONS ON THE WRIT OF HABEAS CORPUS*, in *CAMPBELL'S PAMPHLETS* 2 (Phila., 1862); see also BROWN, *supra* note 123, at introduction ("Men of acknowledged wisdom, some of them statesmen in high authority, are using their eminent abilities in endeavoring to construct from the Constitution an interpretation opposed to the long established convictions of the people, and the teachings of the Fathers."); JAMES F. JOHNSTON, *THE SUSPENDING POWER AND THE WRIT OF HABEAS CORPUS*, in *CAMPBELL'S PAMPHLETS* 4 (Phila., 1862) ("A gentleman, of Philadelphia, of high legal reputation, has published an argument to prove that the Convention which prepared the Constitution ... meant to give to the *President*, and *not to Congress*, the power to suspend the *privilege* ... and it is in reply to [him] that the following remarks are submitted.").

221. See, e.g., NICHOLAS, *supra* note 141, at 12 (calling Lincoln's actions tantamount to treason). S.S. Nicholas also stated that:

It has been the proud boast of the profession ... that in every contest for liberty it has always led the van ... Will [the Philadelphia bar] not take jurisdiction over that delinquent son of Pennsylvania, her most prominent Representative, and administer justice upon him? It is he who shamed her as much as if she had given birth to an Arnold.

S.S. NICHOLAS, *HABEAS CORPUS: A RESPONSE TO MR. BINNEY* 17 (Louisville, Bradley & Gilbert 1862); cf. WHITING, *supra* note 119, at 171-72 (arguing that judges who obstruct military process are "public enemies" subject to arrest).

222. See, e.g., BRECK, *supra* note 123; BROWN, *supra* note 123; DUSINBERRE, *supra* note 165, at 130 (noting Whig-Republican lawyer William Meredith "fundamentally disagreed" with Binney, but urged friends "not to publish their disagreement with Binney" for fear of "embarrassing the administration"); CHARLES INGERSOLL, *AN UNDELIVERED SPEECH ON EXECUTIVE ARRESTS* (Phila., Svo. Rebellion Pamphlets 1862); JACKSON, *supra* note 220, at 1 ("I feel it to be a duty, notwithstanding the misconceptions that may be entertained as to the motive which prompts me, to make public the result of such investigations on the subject as my limited time has permitted me to make."); NICHOLAS, *supra* note 141; cf. Fisher, *Diary*

pamphlet would undermine the integrity and authority of the profession—the “dread and suspicion” that commentators felt at the attempt by “learned lawyers to make a precedent of the acts of the Executive relating to arrests and detainer, without the benefit of the Writ of Habeas Corpus, by trying to prove their correctness”<sup>223</sup>—and the concern that the administration’s position invited disrespect for law.<sup>224</sup>

Lawyer-pamphleteers on both sides responded by turning to their craft, insisting on their discursive authority even as that discourse became increasingly cacophonous. They scrupulously surveyed structural arguments based on the text of the Constitution, English and American precedents, evidence of debates at the constitutional

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Entries (Apr. 27, 1862; Apr. 30, 1862), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 424 (deploring Democratic motives of those who wrote against the administration).

223. ISAAC MYER, PRESIDENTIAL POWER OVER PERSONAL LIBERTY: A REVIEW OF HORACE BINNEY’S ESSAY ON THE WRIT OF HABEAS CORPUS 1-2 (1862); *see also* WHARTON, *supra* note 218. To Wharton,

[t]he importance of the great Constitutional question[] involved ... cannot be overestimated .... The decision of the point, either by the highest judicial authority of the Union, or, *what is sometimes more potent, by the prevalent sense of the community*, will mark an era in the history of the Country and its Constitution, which will give tone to the opinions and practice of after times, and mould by traditionary influence the minds of posterity.

*Id.* at 3 (emphasis added). Edward Ingersoll similarly stated:

If state necessity could be pleaded, as it cannot, what State necessity could be shown for the indignities and violences which have been put upon the law and which American lawyers are defending. *Alas that the legal hands which should minister at the altar of the Constitution, should subserve to desecrate that altar.*

EDWARD INGERSOLL, PERSONAL LIBERTY AND MARTIAL LAW: A REVIEW OF SOME PAMPHLETS OF THE DAY 37 (Phila., 1862). There was, of course, a parallel dread among administration advocates that a war explicitly predicated on enforcing the Constitution had, so soon after its inauguration, required the subordination of sacred constitutional principles. *See* FISHER, THE TRIAL, *supra* note 119, at 205 (expressing doubt about executive powers in light of conflicting opinions among “men whose opinions are entitled to respect”). Lincoln himself remained circumspect about the necessity and legality of military arrests and trials by military commission. *See* FARBER, *supra* note 203, at 146, 174.

224. According to one author:

One department of Government transcends its constitutional powers in what it deems a case of extreme necessity. The act evokes suspicion, distrust, and jealousy on the part of the other departments. It loosens the constraining force of the Constitution on all branches of the Government .... The people have always been watchful and jealous of the exercise by their rulers of powers not clearly granted. Each unauthorized act weakens the confidence of the people in their form of Government. As confidence is withdrawn, respect and affection fade.

BULLITT, *supra* note 123, at 54.



convention and state ratifying conventions, Andrew Jackson's declaration of martial law in New Orleans in the War of 1812, Thomas Jefferson's attempted suspension of habeas corpus during Aaron Burr's conspiracy, and any other sources they could find to bind the antinomy between order and liberty. Opponents of the administration protested that "law knows no State necessity,"<sup>225</sup> that necessity is the "tyrant's plea,"<sup>226</sup> and that the Constitution's guarantees of civil liberty were made for times of war and emergency, not just peace.<sup>227</sup> "[L]awyers-in-Union-service,"<sup>228</sup> on the other hand, contended that "martial law ... is, in time of war, constitutional law," and that those who opposed martial law were not patriots.<sup>229</sup>

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225. INGERSOLL, *supra* note 222, at 37; *see also* MONTGOMERY, *supra* note 130, at 19 ("[I]n the Book of Constitutional freedom there is no such word as necessity, unless *under* the law. A principle of freedom once surrendered, is practically useless afterwards. The precedent is ever ready in the mouth of power, and human nature and experience tell us it will be used.").

226. MONTGOMERY, *supra* note 130, at 28 (quoting Milton). As Joel Parker noted:

The safeguards of civil liberty provided by the wisdom of the fathers have certainly been sadly prostrated in the time of the children, and the end is not yet. At the very first strain upon them they gave way, partly on the plea of necessity,—the tyrant's plea,—which often means mere questionable expediency ....

PARKER, DUTY OF WHIGS, *supra* note 110, at 13; *see also* 2 STEPHENS, *supra* note 148, at 411 ("Necessity is always the usurper's, as well as the tyrant's plea.").

227. As one author reasoned:

[The Constitution] is written law, and was intended to prevent the exercise of arbitrary power in such emergencies as would tempt those in office to encroach upon the liberties of the people. The Constitution knows no "higher law" than its own plain precepts. That doctrine was born later down in the life of the nation. It is an excrescence thrown out in the heat of sectional and fanatical strife. It is neither Scriptural nor constitutional.

BULLITT, *supra* note 123 at 50. John Montgomery also asserted that:

It is no answer ... to say that the present is an anomalous and exceptional period, and that during such days the fundamental law may be strained to suit an emergency without peril. *It is for precisely such occasions that Constitutions and laws are made.* They are garbs of freedom to be perpetually worn.

MONTGOMERY, *supra* note 130, at 27 (emphasis added); WHARTON, *supra* note 218, at 7 ("Guards and limitations and checks upon power, in republican countries, are introduced into their Constitutions for extraordinary occasions.").

228. This term is from HYMAN & WIECEK, *supra* note 7, at 337.

229. WHITING, *supra* note 119, at 185 (emphasis added); *see also* BINNEY, THE PRIVILEGE, *supra* note 123; FISHER, THE TRIAL, *supra* note 119; Joel Parker, *Habeas Corpus and Martial Law, A Review of the Opinion of Chief Justice Taney, in the Case of John Merryman*, 93 N. AM. REV. 471, 498 (1861) (arguing that if Merryman was correctly decided "the judicial power may be made quite as effectual to overthrow the government in time of war as the suspension of the *habeas corpus*, by order of the President, in time of peace, could be to overthrow the

### 3. *Restoration or Reconstruction?*

Fissures in the profession opened by secession, the suspension of habeas corpus, and the imposition of martial law did not end when Congress passed legislation authorizing Lincoln's suspension orders in 1863. As the war came to a close, however, there was a sense of optimism among many northern lawyers.<sup>230</sup> Peace, it was hoped, would reestablish the authority of law and enhance opportunities for professional lucre. As early as the summer of 1864, Emory Washburn reassured his students and the profession that, with victory, the nation would turn from its generals and politicians back to lawyers for guidance.<sup>231</sup> "You have only to wait a brief time,"<sup>232</sup> he wrote, until

the business of reorganization must be resumed; and the people will look to the aid and counsel of others than the mad or selfish politicians, whose evil counsels or rash judgments first involved them in the disastrous consequences of alienated affections and civil discord.... In the general wreck and ruin ... the sanctity of personal security, as well as the accustomed and traditional respect for law, have been all but extinct. These are to be restored by the direct agency of the courts, and the influence and instrumentality of the officers of justice, including the practitioners at the bar.... I have no doubt an abundant harvest of professional gains will be open to men of competent skill and ability ....<sup>233</sup>

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liberties of the people"). In 1862 and 1863, the same arguments about the suspension of the writ and the war power of the Executive spilled over into debate on emancipation. *Cf.* CHARLES P. KIRKLAND, A LETTER TO THE HON. BENJAMIN R. CURTIS, LATE JUDGE OF THE SUPREME COURT OF THE UNITED STATES, IN REVIEW OF HIS RECENTLY PUBLISHED PAMPHLET ON THE "EMANCIPATION PROCLAMATION" OF THE PRESIDENT (New York, Latimer Bros. & Seymour 1862); GROSVENOR P. LOWREY, THE COMMANDER-IN-CHIEF: A DEFENCE UPON LEGAL GROUNDS OF THE PROCLAMATION OF EMANCIPATION, AND AN ANSWER TO EX-JUDGE CURTIS' PAMPHLET, ENTITLED "EXECUTIVE POWER" (New York, G.P. Putnam 1862); THE RIGHTFUL POWER OF CONGRESS TO CONFISCATE AND EMANCIPATE (Boston, Charles H. Crosby 1862). Compare WHITING, *supra* note 119, and DANIEL AGNEW, OUR NATIONAL CONSTITUTION: ITS ADAPTATION TO A STATE OF WAR OR INSURRECTION 29-31 (Phila., C. Sherman, Son & Co. 1863), with CURTIS, *supra* note 123.

230. See HYMAN & WIECEK, *supra* note 7, at 340.

231. See Washburn, *supra* note 73, at 478.

232. *Id.*

233. *Id.* Hyman and Wiecek quote Washburn's lecture in arguing that "his call to judges to lead in Reconstruction was far off the mark," at least until the later years of

As in his 1861 lecture, Washburn stressed the duty of lawyers to assert their discursive authority—to use law and their expertise in legal science to shape the public mind. “[T]he thinking of the country is done by a very few, compared with the whole mass,” and lawyers alone are positioned to create “a pervading sentiment” that supports “new policy ... conforming to the altered condition of things.”<sup>234</sup>

The notion that lawyers were as responsible as politicians for “the general wreck and ruin”<sup>235</sup> of the war was, if not unthinkable after the wartime professional acrimony, at least unutterable. If the Constitution itself had become “the subject of conflict and debate,” if “[t]he very standard and text which the fathers devised to guide posterity in questions of doubtful import, ha[d] itself been made the theme of speculation and grave controversy,” it was only because “passions,” “popular frenzy,” and “so-called statesmen” who did not understand the “framework of our government” brought the country to “a condition which was never contemplated by the framers of our government, and, consequently, never provided for, in terms, either in the Constitution or the laws.”<sup>236</sup> Popular sovereignty cannot be eliminated, he reasoned, but the influence of expert opinion can check its evils, such as corruption, demagoguery, irrational passions, and ensure “the dominion of well administered law.”<sup>237</sup>

Washburn could be confident in 1864 that lawyers would “put ... matter[s] right” not just because they are trained “to weigh and

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Reconstruction. HYMAN & WIECEK, *supra* note 7, at 335-36. I read the lecture as more concerned with the role all lawyers would play, and thus much more consistent with his 1861 essay in enjoining the profession as a whole to embrace Story's vision of professionalism. As Washburn emphasized:

I care not who he may be, nor where he may settle, there is not one who has had the benefit of your training, who not only can, but will make himself felt in the opinions of others. It does not require that you should be members of Congress, or judges of courts, or leaders of the bar, to do this.... [E]very man has a sphere ....

Washburn, *supra* note 73, at 483.

234. *Id.* at 481-82.

235. *Id.* at 478.

236. *Id.* at 479.

237. *Id.* at 478; see also THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE 120-21 (1977) (noting the general turn to expert opinion after the war); cf. BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA (1976) [hereinafter BLEDSTEIN, CULTURE OF PROFESSIONALISM].

examine propositions, ... to look at both sides of questions," and to use skills of persuasion to "impress upon others the judgments and opinions they form for themselves," but because he still firmly believed that the tools of legal science, correctly applied, would produce professional consensus:

[T]here is, moreover, so much of identity in the conclusions to which well-trained minds come upon any given question submitted to them, that we may reasonably assume that there will be scattered all through the land a body of men who not only can and will think for themselves, but will make their own convictions tell upon the opinions of others.<sup>238</sup>

Just as the writings of lawyer statesmen at the founding "furnished the element of the thought which the people adopted as their own, and acted upon accordingly," he now looked to the "[legal] profession ... more than to any other class of men, to take the lead in the great moral and political revolution through which the nation is to pass before it settles down into quietness and peace."<sup>239</sup>

But behind the optimism and protestations of confidence in lawyers and legal science lurked typical Whig-Federalist anxieties, all the more acute because of the wartime strife between lawyers. The country, Washburn conceded, was "in trouble"—a "divided, broken empire" wracked by lawlessness and the "mischief" of "so-called statesmen."<sup>240</sup> Washburn was not saying that lawyers *could* play a role if they wished, he was pitching Story's vision of the lawyer as public sentinel—reminding elite lawyers that the safety and peace of the nation, and, to be sure, the future prosperity of the profession, depended upon their engagement and their ability to reach consensus.

Elite lawyers heeded the call, and a professional consensus would eventually develop, but less as the result of legal science than frustration with legal failure.<sup>241</sup> The antinomies between force and consent (Fisher's worry about the durability and constitutional validity of a "compelled union"), and between order and

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238. Washburn, *supra* note 73, at 479, 483.

239. *Id.* at 481-82.

240. *Id.* at 478-79, 484.

241. See HYMAN & WIECEK, *supra* note 7, at 347-49.

liberty (whether the doctrine of necessity saved or destroyed the Constitution), continued to defy resolution. And when Union soldiers prevailed over their Confederate brethren in the field, early debates over civil liberties and the legal status of secession resurfaced in fractious exchanges about the status of occupied southern states.<sup>242</sup>

If, as the North had insisted in 1861, secession was a legal nullity, then the southern states were never legally out of the Union, and upon Lee's formal surrender at Appomattox, they were constitutionally entitled to have their status as states "restored" through representation in Congress—now with apportionment of House seats counting freedmen as whole persons.<sup>243</sup> Individual southerners might be prosecuted for treason or other offenses, assuming no amnesty or pardon, but, if the states had never left the Union, there was no constitutional power to punish them by denying their representatives' seats in Congress. If, on the other hand, secession was legal, a fact the administration had steadfastly denied since before the start of the war, then the southern states were out of the Union and Congress or the President arguably possessed the power to initiate a process to "reconstruct" and "readmit" the states.<sup>244</sup>

As David Donald has written, Reconstruction raised "constitutional problems of almost metaphysical subtlety":

What was a state? Was it the territory, the people, or the government of an area—or all three? Were the Southern states in or out of the Union? If, as the Republicans had claimed throughout the Civil War, states had no right to secede and had, therefore, always been in the Union, by what constitutional authority could Congress regulate their elections or exclude their chosen representatives from its halls? Had the Southern states committed suicide? Were they in a state of suspended animation? Or were they conquered territories? Was the United States still at war with these Southern states, or was it at peace—or was there, according to international law, still a third possibility, that of *bello cessante*?<sup>245</sup>

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242. See *id.* at 295.

243. See *id.* at 295-96, 299.

244. See *id.* at 295-98.

245. DAVID DONALD, *THE POLITICS OF RECONSTRUCTION 1863-1867*, at 55-56 (1965).

Matters were further complicated by the Supreme Court's interventions in the 1866 term with *Ex parte Milligan* and the *Test Oath Cases*, as well as President Johnson's proclamations in the spring of 1865 and 1866. The first proclamation granted "amnesty to the great mass of ex-Confederates who would swear future loyalty to the Union" and offered pardons by petition to prominent Confederate officers ineligible for amnesty.<sup>246</sup> The second proclamation, issued April 2, 1866, declared the rebellion "entirely suppressed and the southern states fully restored."<sup>247</sup>

Congressional Republicans and their supporters held a starkly different view of conditions in the South. Using their majority in 1867, Republicans refused to seat southern representatives and passed legislation replacing Johnson's provisional governments in the South with military districts.<sup>248</sup> When Johnson still refused to capitulate, Congress enacted supplemental legislation encroaching on the President's power to command troops in those districts. Finally, Congress conditioned readmission of the southern states on ratification of the Fourteenth and Fifteenth Amendments, a dubious form of obtaining "consent" under Article V.<sup>249</sup>

For his part, Johnson, with the dedicated assistance of Attorney General Henry Stanbery, did everything in his power to resist congressional Reconstruction. "Denounc[ing]" it in his veto messages "as unconstitutional, centralizing, and despotic," he made a mockery of federal law enforcement in the South long enough to embolden—indeed, to inspire—violent white southern resistance.<sup>250</sup>

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246. HYMAN & WIECEK, *supra* note 7, at 304. Pardon brokering became a business in Washington, *see id.*, and "Johnson rebuilt the southern Democracy." *Id.* at 314; *see also* BLOOMFIELD, *supra* note 31, at 297 (describing William Pitt Ballinger's pardon brokering practice after the war); JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898, at 111-12 (Greenwood Press 1977) (1953); 6 FAIRMAN, *supra* note 8, at 143-44 (summarizing *Milligan* and the *Test Oath Cases*); HYMAN, *supra* note 204, at 48-50 (describing Johnson's amnesty proclamations).

247. HYMAN & WIECEK, *supra* note 7, at 326.

248. *See id.* at 372-73.

249. A similar condition had already been imposed in 1865 to ensure ratification of the Thirteenth Amendment. *See* 2 ACKERMAN, *supra* note 37, at 140; HYMAN & WIECEK, *supra* note 7, at 305.

250. HYMAN & WIECEK, *supra* note 7, at 445; *see also* DORRIS, *supra* note 246, at 335-36; DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868, at 136 (1979) [hereinafter NIEMAN, TO SET THE LAW IN MOTION]. For a description of the ensuing violence resulting from Johnson and Stanbery's

Stanbery prevented district Army commanders from removing southern judges who refused to implement federal civil rights statutes invoked by black plaintiffs,<sup>251</sup> and he wrote and circulated opinions to southern federal attorneys construing away power clearly conferred in Congress's reconstruction bill to disenfranchise disloyal southern voters.<sup>252</sup> When low-level Confederate officers challenged disenfranchisement, "Stanbery ruled that minor rebel officers were not included, and that the voter registration boards had no power to look behind a voter-applicant's statement on rebel offices held. If he swore that he was not disqualified, he was not ...."<sup>253</sup> In another opinion, Stanbery extended the logic of *Ex parte Milligan* by arguing

that a Reconstruction commander had only a power "to sustain the existing frame of social order and civil rule, and not a power to introduce military rule in its place. In effect, it is a police power to be used only when the state failed to perform." And the President, not the on-scene commander, would decide if state nonperformance existed.<sup>254</sup>

With such mixed messages coming from Congress and the Executive branch, and with only 15,000 soldiers "on southern duty," just 900 Freedmen's Bureau field agents, and a growing number of civil damage suits against federal agents by aggrieved southerners in

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resistance, see GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 14 (1984); ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION*, at xxxiv (1971).

251. Generals who were too sympathetic to the plight of blacks at the hands of white southerners, by contrast, were removed and replaced. See, e.g., HYMAN & WIECEK, *supra* note 7, at 446-47.

252. See *id.* at 445. As Hyman and Wiecek observed:

[T]he Reconstruction Act excluded certain classes of ex-rebel officeholders from voting. The *Test Oath* decision magnified the effect of the President's pardons. Thousands of pardoned persons held themselves to be immune from both the oath qualification or other disfranchisement under the [Reconstruction Act], a position the Attorney General officially both broadcast and sanctioned.

*Id.*

253. *Id.* at 445. Congress passed a supplemental bill "authorizing Reconstruction commanders to suspend and remove officeholders, and registration boards to look behind an applicant's loyalty qualification. But initiatives came from the southern whites and Stanbery. Congress, if it wished to persist, had to descend ever deeper into local situations, from constitutions to constables. The descent was unwelcome ...." *Id.*

254. *Id.* at 446 (quoting Attorney General Stanbery).

hostile southern state courts, Army officers were not only confused, but became "increasingly timid."<sup>255</sup> Their timidity, combined with increased violence and manipulation of state law by white southerners, eventually helped secure Redemption in 1877, the return of "home rule" to whites in the South.<sup>256</sup>

It is easy to accuse Johnson of political opportunism (he foolishly believed he could abandon the Republican party and build a coalition of southern Democrats and northern conservatives) and racism (his speeches are littered with virulent anti-black tirades), and thus dismiss the legal positions he took as purely self-serving.<sup>257</sup> But southern resistance was present before Johnson revealed his cards on Reconstruction. And racism was not a flaw unique to Johnson—it was disturbingly pervasive in the North, even among abolitionists and Radical Republicans.<sup>258</sup> The charge of craven political ambition also cuts both ways. However much Republicans fretted over the fate of freedmen and unionists in the South, they were also concerned about losing political power if rebels controlled the vote in the South, the remaking of southern constitutions, and the choice of southern representatives to Congress.<sup>259</sup> And most tellingly, by the Compromise of 1877, Johnson's rhetoric about states' rights (not to mention his racism) would become legal and political dogma.

Behind the political strife between Johnson and Congress were elite law writers insisting that legal constraints mattered, even as the question of the status of the southern states forced them into hopeless contradictions. Stephens, for example, who insisted that secession had not led to anarchy, as Lincoln had predicted,<sup>260</sup> turned a blind eye to southern postbellum violence against blacks and open

255. *Id.* at 444.

256. See *id.* at 443-44; see also WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879*, at 184 (1979); HYMAN, *supra* note 7, at 487-89; C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913*, at 24 (1951) (discussing factors leading towards Redemption); Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870-1890*, 53 J. S. HIST. 421 (1987); Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. NEGRO HIST. 34 (1964).

257. See, e.g., HYMAN & WIECEK, *supra* note 7, at 303 (discussing Johnson's racism).

258. See FONER, *supra* note 32, at 237-38.

259. See JOEL PARKER, *TWO LECTURES: REVOLUTION AND RECONSTRUCTION 86* (1865) (arguing that Congress should set aside these concerns when deciding whether to re-admit Southern states to the Union) [hereinafter PARKER, *TWO LECTURES*].

260. 2 STEPHENS, *supra* note 148, at 452.



defiance of federal authority.<sup>261</sup> His book railed against the “unblushing, double-faced, insolent and *infamous* iniquity[sic]”<sup>262</sup> and despotism of congressional Reconstruction, calling it a betrayal of Lincoln’s solemn assurances in 1861 that the war was fought to preserve the Union and states’ rights, without noticing that Johnson’s supposedly states’ rights-oriented reconstruction policy was, as historians have shown, “the most spectacular exhibition of unilateral national executive authority in American history.”<sup>263</sup>

Northern proponents of Reconstruction, for their part, struggled mightily to specify constitutional doctrines that would fit both events and perceived needs. Often this required either ignoring their earlier positions on the legality of secession or abandoning legal argument and simply trying to reason up from facts on the ground.<sup>264</sup> A welter of theories on the status of the southern states emerged: the states had committed “suicide,” were in the “grasp of war,” a conquered province, no longer had “republican” governments under the Guarantee Clause, and had forfeited their rights but not their duties.<sup>265</sup> But if law is a prescribed rule of action, most of the theories proffered were lawless, having little, if any, foundation in precedent and lacking identifiable limits on federal power.<sup>266</sup> And as

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261. See, e.g., NIEMAN, TO SET THE LAW IN MOTION, *supra* note 250, at 24 (describing “the persistence of unredressed violence against blacks”); TRELEASE, *supra* note 250, at xxxiv (discussing southern post-bellum violence).

262. 2 STEPHENS, *supra* note 148, at 641.

263. HYMAN & WIECEK, *supra* note 7, at 304; see also *id.* at 303, 305 (claiming that Johnson’s “employments of national executive authority in the ex-Confederate states were extraordinary, perhaps unprecedented” and made “the presidency imperial”).

264. As Charles Sumner contended:

It only remains that we should see things as they are, and not seek to substitute theory for fact. On [the status of the southern states] I discard all theory, whether it be of State suicide or State forfeiture or State abdication, on the one side, or of State rights, immortal and unimpeachable, on the other side.

Sumner, *supra* note 130, at 521.

265. See HYMAN & WIECEK, *supra* note 7, at 390 (describing advocates of the Guarantee Clause theory of congressional power); Richard Henry Dana, Jr., The “Grasp of War” Speech (June 21, 1865), in SPEECHES IN STIRRING TIMES AND LETTERS TO A SON 243 (1910) (claiming that the Confederate states were still in the grasp of war); Timothy Farrar, *Adequacy of the Constitution*, 21 NEW ENGLANDER 51, 55-58 (1862) (examining the ability of the Constitution to withstand rebellion); Fisher, Diary Entry (Feb. 16, 1866), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 509-10; Sumner, *supra* note 130, at 519-22 (canvassing different theories); *The Legal Status of the Rebel States Before and After Their Conquest*, *supra* note 123.

266. Lincoln was perhaps right that the status of the South defied legal categorization. See Abraham Lincoln, Last Public Address (Apr. 11, 1865), in LIFE AND WRITINGS, *supra* note 27,

southern recalcitrance became painfully clear, each theory had to bear the weight of justifying deeper and deeper federal incursions into state and local institutions, raising again, with each extension of force, not just concerns about fidelity to antebellum federalism principles and civil liberties, but also the question of how effective law can be without consent.

#### 4. *The Desire for Consensus*

Deeply troubled by the impact of the war and Reconstruction on the integrity of legal science, Joel Parker began using his end of the year lectures at Harvard (also published as pamphlets) to argue that constitutional interpretation had to be placed on less political footing.<sup>267</sup> His 1865 and 1866 lectures are especially noteworthy, not only because of the doctrinal solution he proposes to rescue the Constitution from the sectional conflict, but also because of his deep concern that *lawyers* had become part of the problem—frustration that professional consensus of the kind Washburn predicted had not yet emerged. All the familiar Whig-Federalist tirades against the subversion of law and the contamination of the public mind by political demagogues are present. But Parker is unable to avoid the fact that other elite law writers were feeding the fires, and he lashes out at his peers for allowing politics and conditions on the ground to corrupt their analysis.<sup>268</sup> The concept of professionalism he articulates in response is intimately related to his conservative doctrinal solution for Reconstruction—indeed the two are mutually reinforcing. The lectures thus offer an early and revealing window into the constellation of concerns that tied modern professional organization to the retreat from Reconstruction.

After peremptory remarks about his “hesitation respecting the expediency of discussing, in the Lecture-room, topics of present interest on which men differ widely,”<sup>269</sup> Parker began his 1865

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at 849 (arguing that the question of whether southern states are in or out of the Union is “a merely pernicious [abstraction]” and that “[w]e all agree that the seceded States, so called, are out of their proper practical relation with the Union, and that the sole object of the government, civil and military, in regard to those States, is to again get them into that proper practical relation”).

267. See PARKER, TWO LECTURES, *supra* note 259, at 12.

268. *Id.*

269. *Id.* at 1.

lecture by insisting that "[w]hether we admit it or not, whether we perceive it or not, we are in the midst of a double attempt at revolution."<sup>270</sup> One attempted revolution, he continued, is secession:

The other is the attempt, of persons who appear to control the majority of the Northern States, to make this war one which shall change the laws and institutions of the seceding States ... by the abolition and prohibition of slavery; and to do this in those parts of the country still held by the rebels, against the will of the people there ....<sup>271</sup>

Parker insisted that he was no friend of slavery<sup>272</sup> and no friend of secessionists,<sup>273</sup> but emancipation (unless by constitutional amendment or "by the actual operations of the war severing the relation of master and slave")<sup>274</sup> was extralegal—a revolution "which, if successful, subverts in effect the guarantees of the Constitution, and gives the death-blow to constitutional liberty."<sup>275</sup> Any attempt to impose Reconstruction on the southern states, he added, would be equally revolutionary. Secession was a nullity and southern rebels could be duly prosecuted for treason,<sup>276</sup> but for this very reason, the southern states were still in the Union, and no constitutional power permitted interference with traditional states' rights:

State rights have been pressed out of their proper sphere, and into antagonism with the Constitution ... by the mad action of Southern conspirators; but their preservation, in their legitimate sphere, is essentially necessary to the safety of our Republican institutions.

....

The United States cannot consistently with the Constitution, acquire a greater right to make laws affecting the internal affairs of [a] whole State, by reason of the treason of the

270. *Id.* at 4.

271. *Id.*

272. *See id.* at 7-8.

273. *See id.* at 9.

274. *Id.* at 10.

275. *Id.* Parker echoed the views of Benjamin R. Curtis. *See* CURTIS, *supra* note 123, at 11-12, 14, 19, 22.

276. On secession as a nullity, see PARKER, TWO LECTURES, *supra* note 259, at 30-33, 37. On the treason issue, see *id.* at 69.

inhabitants, however numerous the traitors. The General Government cannot by reason of such treason, divest itself of its duties to the State ....<sup>277</sup>

Far from authorizing Congress to impose conditions on federal recognition of southern states, Parker argued, the Guarantee Clause, the constitutional peg on which Republicans most often hung their assertions of federal power, required *protection* of southern state laws and domestic institutions—including slavery.<sup>278</sup> However perverse the consequences, legal reasoning demanded strict logical consistency and commitment to constitutional continuity. Arguments from necessity, fairness, and political expediency were irrelevant.

By his next lecture in January 1866, the Thirteenth Amendment had been ratified, southern state constitutions had been redrafted, and additional amendments to protect freedmen were already under consideration.<sup>279</sup> The circumstances of ratification only confirmed Parker's earlier fear that a "counter-revolution" motivated by vengeance and political ambition was under way.<sup>280</sup> "The President, as a condition of the removal of military rule, has required the States to abolish slavery, and they have done it."<sup>281</sup> The ratification was technically "effective, because in any legal controversy, involving the freedom of the slave, the courts cannot ... inquire

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277. *Id.* at 21, 38-39.

278. *See id.* at 38-39. Parker argued:

It is almost wonderful how fully and completely this account of the origin, progress, and adoption, of this guaranty of a republican form of government, refutes and destroys all the glosses which have lately been attempted to be put upon it, as an authority for the United States to interfere in the internal concerns of the States.

*Id.* at 83. Recall that before ratification of the Thirteenth Amendment, Lincoln's proclamation freed slaves in designated regions but did not otherwise impact state laws in the South protecting the right to own slaves and regulating race relations. *See* HYMAN & WIECEK, *supra* note 7, at 252-54, 276-78.

279. Congressman John Bingham "introduced a resolution for a Fourteenth Amendment that authorized Congress to pass all laws necessary to secure every person in each state equal protection for the rights to life, liberty, and property" on the first day of the Thirty-Ninth Congress—December 6, 1865. HYMAN & WIECEK, *supra* note 7, at 405.

280. PARKER, TWO LECTURES, *supra* note 259, at 6.

281. *Id.* at 72.

whether the people were, or were not, coerced into their adoption."<sup>282</sup> Still, Parker complained, coercion could not make law:

[W]e know well enough, in point of fact, that the people of these States were compelled to abolish slavery, as a condition of their being permitted to reorganize their State governments. And this is revolution, thus far. The authorities of the United States compelled the surrender of what has been known as a State power and a State right, since the Declaration of Independence,—for more than half a century an acknowledged State right.<sup>283</sup>

Having gone this far, Parker lamented, there were now, naturally, calls to go further—to empower the federal government to protect freedmen by legislating civil rights and granting the vote.<sup>284</sup> But honesty required conceding that further steps would be equally offensive to first principles of federalism:

[L]et us meet the exigency fairly, and say that having through revolution subverted the rights of the States to hold slaves and regulate slavery, we have thereby incurred a duty which makes it necessary for us, by another revolutionary measure, to subvert certain other rights of the States to regulate the political rights of freemen, in matters which concern their relations to the States; and then we shall have the case stated in its true aspect ....<sup>285</sup>

No constitutional power, Parker reasoned, could justify imposing conditions on recognition of the southern states, even if that meant abandoning freedmen.<sup>286</sup>

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282. *Id.*

283. *Id.*

284. Parker was utterly devoid of any real sympathy for the freedmen, but he had no delusions about white southern intentions either. He referred to emancipation as "a most fatal gift" and sarcastically noted that he "could have been better satisfied, if the boon could have been bestowed in a mode somewhat less deadly." *Id.* at 73.

285. *Id.*; see also Joel Parker, *The Origin of the United States; and the Status of the Southern States, on the Suppression of the Rebellion*, in LECTURES, *supra* note 123, at 66-67, 69-71 (arguing that the Fourteenth Amendment is unconstitutional).

286. For Parker's rejection of the Guarantee Clause argument, see *supra* note 278; see also PARKER, *supra* note 259, at 63 (elaborating on his rejection of the Guarantee Clause). On the war powers and conquered territory theories, see *id.* at 68, 85. On Congress's power to judge

With a firmness and formalistic indifference to circumstance only the prospect of legal failure could have produced, Parker thus set about defending the view that constitutional fidelity demanded immediate, unconditional restoration of the southern states. Against claims that Reconstruction was necessary to guarantee the future loyalty of the southern states, Parker warned, now echoing Alexander Stephens and Sidney Fisher,<sup>287</sup> that raw force and the suppression of civil liberties in the South would only invite disunion and anarchy: "No such guaranty can possibly be given. Place the heel of military despotism upon the necks of the people of those States, and you have only the greater probability that they will eventually attempt to cast off the oppression."<sup>288</sup> Moreover, the Constitution provided no power to require such a guarantee. To enforce existing law

within these States, and to have the States [not the federal government] providing within their sphere for the welfare of their people, and complying with the requirements of the Constitution, is not only all that the United States can require, *but all that they can have under the Constitution*. All beyond this is revolutionary.<sup>289</sup>

The North, he concluded, would either return to the ideas that animated the war effort in 1861 and respect antebellum federalism principles—respect what Fisher called the "character & value of this union"—or lose its constitutional mandate.<sup>290</sup>

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the election of its own members, see *id.* at 85-86.

287. See 2 STEPHENS, *supra* note 148, at 452.

288. PARKER, *supra* note 259, at 70.

289. *Id.* at 71 (emphasis added). He was equally emphatic about the illegality of incursions on civil liberties in his lecture the following year. See Parker, *Right of Secession*, *supra* note 154, at 213-22, 228, 230.

290. Fisher, Diary Entry (Dec. 4, 1860), in PHILADELPHIA PERSPECTIVE, *supra* note 69, at 372. Parker admonished his audience to remember those early ideas:

Let it be impressed upon our memories, that the leading principle of those who denied the right of the States to interpose, to nullify, to secede, has been, from the first, that the Constitution was an organic fundamental law, of perpetual obligation, and not a compact; that there was no right in any State or States ... to escape from the bonds of the Union in any other mode than by a successful revolution, and that all attempts so to do were treasonable ....

....

The war must be held to have rendered the judgment of arms against the

Parker's doctrinal views sharpened not just because he believed Reconstruction to be unconstitutional, "that [the federal government was] exercising powers aside from and beyond the Constitution,"<sup>291</sup> but also because he saw legal science and the discursive authority of law becoming the plaything of power. As with secession, the Constitution was being perverted to give revolutionary acts a veneer of legality. "I shrink ... from revolution" all the more, he argued, when it is "masked under the cover of an assumed constitutional authority, derived from false constructions of the Constitution. I start back from the abyss which yawns before us."<sup>292</sup> War and Reconstruction, he worried, presented a direct threat to the rule of law:

The old maxim, *inter arma silent leges*, expresses but half a truth. War does not merely silence the law. It perverts it. It does not merely substitute force as the governing power for the time being, but it makes force take upon itself the name of law,—not only to stand in its place, but to claim to be law itself ....<sup>293</sup>

"Most especially has this been true," he continued, "during the late war, as regards Constitutional Law. There has not been anything that it was supposed it might be desirable to do, in reference to the rebellion, that there has not been some one found ready to swear that the Constitution authorized that very thing."<sup>294</sup>

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doctrine ... that this is a compact of States ... but having thus ... maintained that the acts of secession are unlawful and void, and so not the acts of the State, but the unlawful acts of persons who are liable for their offences [sic], *we are not at liberty to turn round and say that these void acts, which no State could pass, did notwithstanding change the relations of the State to the United States, so that the war was in all respects like a foreign war, and that the suppression of the rebellion was the conquest of the States.*

PARKER, TWO LECTURES, *supra* note 259, at 56-57 (emphasis added); *see also id.* at 80 (insisting that the war created "no new meaning" in the Constitution).

291. PARKER, TWO LECTURES, *supra* note 259, at 10; *cf.* JOEL PARKER, CONSTITUTIONAL LAW: WITH REFERENCE TO THE PRESENT CONDITION OF THE UNITED STATES 4 (Cambridge, Welch, Bigelo 1862) (advocating the rejection of political arguments when interpreting the Constitution).

292. PARKER, TWO LECTURES, *supra* note 259, at 9.

293. *Id.* at 41.

294. *Id.*; *see also id.* at 73 ("There seems to be a great reluctance to say 'Revolution,' and so the Constitution is subjected to a new process of construction, and a new discovery is made."); *id.* at 78 ("The thing must be done, and so the right to do it is to be deduced in some way from the Constitution.").

Parker was painfully aware that it was not just laymen and party hacks who were pushing the country toward an abyss of lawlessness (though he spared them no venom),<sup>295</sup> but lawyer-statesmen and law writers. Scattered through both of his lectures are extended quotations from legal commentators purporting to justify specific war and reconstruction measures, followed by Parker's elaborate refutations.<sup>296</sup> Parker was especially perturbed, for example, that Whiting's pamphlet defending Executive war powers—a "sophistical text-book of ultraism," as he branded it<sup>297</sup>—had been "lauded by great and little periodicals, received the commendation of reverend doctors of divinity as an exhaustive treatise on the constitutional powers of the President and Congress, been multiplied in its editions, circulated by societies, and has arrived at last to the dignity of stereotype plates and pasteboard covers."<sup>298</sup> Lawyers like Whiting were using the language of the Constitution and the tools of legal analysis to defy its constraints, perverting not only law and the public mind, but also Story's vision of professionalism.

The remedy? Denounce Reconstruction as revolutionary, denounce its advocates, both lawyers and laymen, as intellectually corrupt partisans,<sup>299</sup> disregard the plight of blacks in the South, affirm constitutional continuity with the framers, and, above all, raise legal science and professionalism above the fray by grounding

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295. See, e.g., *id.* at 74-78 (criticizing the Addresses at Faneuil Hall in 1865).

296. For his critique of Sumner's views on Reconstruction and the status of the southern states, see *id.* at 29-30. For his critique of an anonymous lawyer's pamphlet arguing that secession did change the status of the southern states, see *id.* at 58-62.

297. *Id.* at 29. "[T]he most strenuous advocate of despotic power," he adds, "would desire nothing further in time of war" than Whiting's theory. See *id.* at 28.

298. *Id.* at 28-29; see also *id.* at 43. Parker was not alone in noticing that lawyers had been fueling the fire. Speaking during the war, Cooley lamented the poisoning of southern minds by exaggerated legal arguments on states' rights:

When bad men planned to destroy the American Union, they set deliberately at work to educate the people in erroneous principles of national law. With thirty years persistent instruction, it is scarcely to be wondered at that a large section of the country came at last to believe that allegiance was due to the State only, and that when the State saw fit to sever its connection with its fellows, individual obligations to the nation ceased.

Cooley, 1863 Address, *supra* note 118, at 15; see also *supra* note 9 and accompanying text (discussing suggestion in the Test Oath Cases that southern lawyers could have prevented secession).

299. See PARKER, TWO LECTURES, *supra* note 259, at 8 (describing subservience to party opinion as "political slavery"). Parker chillingly claimed that "[t]he horrors of this slavery outmatch those of African bondage." *Id.*



constitutional interpretation in assiduously apolitical devotion to history and text, whatever the social consequences.<sup>300</sup> In his 1867 lecture, the synthesis of Parker's doctrinal views with professional duty was complete. "Some lawyers in Congress," he warned his students, "have sunk their constitutional law in their adherence to party. Others, outside of that body, have let their indignation against the rebellion run away with it." He continued:

Let me urge upon you, gentlemen, a careful study of the past,—of "the dead past,"—to use the favorite phraseology of those who reject its warnings .... Let me suggest that sophistry is none the less specious in the law than it is in religion, where false prophets and false apostles deceive even the very elect ....

Be it yours, gentlemen, without regard to the transitory interests of the hour, or the excited passions of the hour, to exhibit a steadfast, unswerving adherence to the principles of civil liberty .... And rest assured that these principles are to be preserved only by a firm and unflinching maintenance of the great divisions of political power in separate, and to a great extent, independent departments of government; and by the preservation of the State and the National governments, confining each to its proper sphere of action and of duty, within its constitutional limits.<sup>301</sup>

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300. As he told his students in his first lecture after quoting Washburn's 1864 essay: I join most heartily in this attempt to impress upon the members of the School the full sense of the duty which they thus owe to their country, and the responsibility attaching to the due performance of it. And I urge you, most emphatically, not to form your opinions respecting constitutional rights and constitutional duties, upon partisan newspaper paragraphs, stump speeches, flippant discussions in periodicals of higher pretensions, dignified assertions of opinion by those who assume a knowledge of all constitutional law without any study of it, heated Congressional debates, or even *sophistical* arguments by ambitious politicians who are members of the profession .... I appeal to you to seek your knowledge at the fountain-head, by an exhaustive study of the Constitution itself, and of its history, with that of the State constitutions, and to form your own opinions, upon what you shall find to be true upon such research.

*Id.* at 12; see also *id.* ("In many instances the true construction of the Constitution can only be learned from a study of its history."); *id.* at 49 ("He who desires to have accurate ideas upon this subject will do well to study carefully the amendments to the Constitution, made immediately after its adoption, in connection with similar provisions in the constitutions of several of the States ...."). On constitutional continuity, see *id.* at 80. On Parker's view that the Constitution should not be sacrificed regardless of the consequences, see *id.* at 70.

301. Parker, *Three Dangers*, *supra* note 123, at 34-35.

With the exception of Copperheads, few elite northern lawyers were prepared to embrace Parker's anachronistic doctrinal "solution" in 1866 and early 1867. His assertion that no federal work remained to be done in the South<sup>302</sup> was at odds with facts on the ground and the current of northern political sentiment.<sup>303</sup> But when the legal and political frustrations of congressional Reconstruction set in, his affirmation of constitutional continuity and robust federalism principles offered a safe way out of the antinomies opened by the war.<sup>304</sup> This conservative turn—a concatenation of racism, federalism, and incipient liberalism—has been well documented. In the decade leading up to the Compromise of 1877—the nation's formal abandonment of Reconstruction, resolving the contested presidential election of 1876 by withdrawing federal troops from the South and restoring so-called "home rule" to white southerners in exchange for southern acceptance of Hayes in the White House—elite professional opinion began to galvanize against Reconstruction and constitutional innovation.<sup>305</sup> As early as 1868,

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302. As he stated in his second lecture: "To-day there is no actual obstruction to the exercise of that [federal] authority in either of its branches" in the South. PARKER, TWO LECTURES, *supra* note 259, at 68.

303. See FONER, *supra* note 32, at 176-280.

304. "Safe" at least for northerners—the real cost would be paid by blacks in the South left to the devices of southern white "Redeemers." See GILLETTE, *supra* note 256, at 367-69; WOODWARD, *supra* note 256, at 205-25.

305. On lawyers' turn against Reconstruction and evidence of their influence, see HYMAN, *supra* note 7, *passim*; HYMAN & WIECEK, *supra* note 7, at 335-472 (tracing the roots of formalism and constitutional conservatism to reaction against the New York City draft riots in 1863); *id.* at 353 (describing the influence of Cooley); PALUDAN, *supra* note 29, at 109-248 (discussing Joel Parker, Sidney George Fisher, John Norton Pomeroy, and Thomas M. Cooley); Michael Les Benedict, *Preserving the Constitution: The Conservative Basis of Radical Reconstruction*, 61 J. AM. HIST. 65, 75-89 (1974); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 759-71 (1967) (discussing Thomas M. Cooley); McCurdy, *supra* note 32, at 971-87 (discussing Justice Stephen Field); van Ee, *supra* note 25, at 113-61 (discussing David Dudley Field). On Gilded Age constitutional conservatism, see ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH 1887-1895*, *passim* (1960); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT*, *passim* (1962); *cf.* WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* (1998); Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 LAW & HIST. REV. 541, 545-52 (2002); Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 590-601 (2002); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 327-

John Norton Pomeroy, Dean of the New York University Law School, would dismiss normative constitutionalism out of hand in the introduction to his new treatise on constitutional law. "The nation," he flatly insisted, "has passed the point in its history when any other scheme [of constitutional order] could be possible."<sup>306</sup> Dean Pomeroy continued:

The general form of our government, and all of its important elements, are fixed .... [N]o one thinks of substituting in its place any new or different form of government; no one suggests any fundamental, or even important, change in its detail ....

This Constitution being thus accepted as a fact, and universally regarded as substantially permanent, *neither the educated citizen nor the professional student needs to ask ... whether any particular clause is better or worse than some other which might have been incorporated in the instrument; he needs to inquire what is the meaning of this clause, and what powers does it*

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31 (1985); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1469-81, 1502-10 (discussing the constitutional theories of John Norton Pomeroy and Thomas M. Cooley). On the influence of constitutional conservatism in the Thirty-Ninth and Fortieth Congresses, see PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 55-60 (1999); GILLETTE, *supra* note 256, at 363-64. On popular opinion, see *id.* at 24 (describing growing "impatience to be done with ... reconstruction" early in the first Grant administration, and widespread belief that, with ratification of the Fifteenth Amendment, "[t]he Negro ... could take care of himself"); JOHN G. SPROAT, "THE BEST MEN": LIBERAL REFORMERS IN THE GILDED AGE 79-88 (1968) (describing a Liberal Republican break with the Grant administration in the 1872 election).

Writing of the split in the Republican party, Sproat argues that it is doubtful that a full-blown revolt ... would have ensued had it not been for the continued rankling of the Reconstruction issue. *This irritant above all originally inspired reformers to start the Liberal Republican movement ....* [By 1871,] liberal reformers opposed the [enforcement] acts and began to call publicly for an end to Reconstruction.

*Id.* at 76 (emphasis added); *id.* at 79-88 (describing the Liberal Republican break with the Grant administration in the 1872 election).

306. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 9-10 (N.Y., Hurd & Haughton 1868). The book was hardly free from normative constitutional argument. See, e.g., *id.* at 78 (concerning pro-Union nationalism); see also PALUDAN, *supra* note 29, at 240 (describing John Norton Pomeroy's conservative turn); John Norton Pomeroy, *Amnesty Measures*, 12 THE NATION 52, 53-54 (1871) (criticizing Section 3 of the Fourteenth Amendment as an affront to the Ex Post Facto Clause); Siegel, *supra* note 305, at 1472-75 (discussing John Norton Pomeroy's relation to historical jurisprudence).

confer or limit, and how does it affect the relations between the government and the members of the body politic.<sup>307</sup>

Taking the deanship at Harvard two years later, Langdell would spurn public law altogether—rebuilding legal science and education around the law of contract, property, and torts, and the quest to ensure generality, impartiality, and predictability.<sup>308</sup>

As Reconstruction wore on, culminating in the enactment of the Civil Rights Act of 1875, Charles Sumner's last and fleeting stand for racial equality,<sup>309</sup> the synthesis of professionalism and constitutional conservatism matured.<sup>310</sup> David Dudley Field's May 1875 address to the graduating class of the Albany Law School reveals the synthesis in action.<sup>311</sup> After reciting standard injunctions about honesty and integrity in client representation and before the courts, Field shifted to the public aspects of professionalism—the opportunity and duty of lawyers, especially in a society with a written constitution, “to correct abuses in the government of their country

307. POMEROY, *supra* note 306, at 9-10.

308. See Gordon, *supra* note 70, at 54; cf. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-11 (1983); Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law”: The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870-1883, 17 LAW & HIST. REV. 57, 72-77 (1999); Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631, 631-37 (2002) (canvassing revisionist accounts of formalism). Three years later, the Supreme Court would add its imprimatur to Parker's views by using federalism principles to read away the mandate of the Reconstruction Amendments. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80-83 (1873).

309. See GILLETTE, *supra* note 256, at 278 (noting ways in which the Civil Rights Act of 1875 “marked the end of reconstruction”); *id.* at 279 (noting that the law became “the ‘deadest of dead letters’”); *id.* at 294-95; see also *The Civil Rights Cases*, 109 U.S. 3, 13-26 (1883) (holding the 1875 Civil Rights Act unconstitutional on the grounds that the Fourteenth Amendment reaches state action only, not private conduct, and narrowly construing the power to legislate under the Thirteenth Amendment). For the Court's other decisions restricting civil rights legislation, see *United States v. Harris*, 106 U.S. 629, 635-44 (1883) (Ku Klux Klan Act), and *United States v. Reese*, 92 U.S. 214, 220-22 (1876) (Enforcement Act); see also *Hodges v. United States*, 203 U.S. 1, 16-20 (1906) (Civil Rights Act of 1866); *James v. Bowman*, 190 U.S. 127, 136-42 (1903) (Enforcement Act).

310. See GILLETTE, *supra* note 256, at 296-99; HYMAN, *supra* note 7, at 367-78; HYMAN & WIECEK, *supra* note 7, at 335-58.

311. See David Dudley Field, *Responsibility of American Lawyers for the Government of Their Country*, Address to the Graduating Class of the Albany Law School (May 20, 1875), in 11 ALB. L.J. 345 (1875) [hereinafter Field, *Responsibility*], reprinted in 9 CLASSICS IN LEGAL HISTORY: SPEECHES OF DAVID DUDLEY FIELD 562, 562-73 (William S. Hein & Co. 1971) (A.P. Sprague ed., 1884) [hereinafter CLASSICS IN LEGAL HISTORY].

and to ameliorate its laws."<sup>312</sup> In his prior lectures on professionalism, Field tended to argue that lawyers should aid law reform by supporting codification.<sup>313</sup> But speaking just ten weeks after the passage of the civil rights law, Field moved instead "to a contemplation of the actual condition of the country and a consideration of the consequent duties and responsibilities of lawyers."<sup>314</sup> "That condition," he warned, "is not so good as I wish it were," echoing the standard concern of elite lawyers with corruption during Reconstruction in "the machinery of our government."<sup>315</sup> Notwithstanding marvelous accomplishments and progress in other fields, he lamented, "we have not advanced in that greatest of all sciences and arts, the science and art of government, but have actually gone backward."<sup>316</sup> And the blame, he insisted, could not simply be laid on ignorant voters and selfish politicians.<sup>317</sup> Read the congressional debates, he urged:

[R]ead the articles of the magazines and newspapers; read the resolutions of political conventions, and say in how many do you find the great subjects that have agitated the country for the last fifteen years, treated as they would have been treated by those who in just reverence we call the fathers.<sup>318</sup>

If voters and statesmen were going astray, it was because lawyers had failed in their duty to shape public opinion and to "lift[] politics out of the degradation into which they have fallen."<sup>319</sup>

Like Parker, Field then fused professionalism with constitutional conservatism, resolving the antinomy between order and liberty on classical liberal terms and arguing that lawyers should defend principles of federalism. A lawyer "should[] do more, than if he were

312. Field, Responsibility, *supra* note 311, at 346.

313. See, e.g., David Dudley Field, Reform in the Legal Profession and the Laws, Address to the Graduating Class of the Albany Law School (Mar. 23, 1855), in CLASSICS IN LEGAL HISTORY, *supra* note 311, at 503-16.

314. Field, Responsibility, *supra* note 311, at 347. Grant signed the Civil Rights Act of 1875 on March 1, 1875. See GILLETTE, *supra* note 256, at 272.

315. *Id.* The concern was widespread. See Grossman, *supra* note 305, at 617.

316. Field, Responsibility, *supra* note 311, at 347.

317. *Id.* ("My object is to call the attention of lawyers to the fact of their great responsibility for this wrong ....").

318. *Id.* at 348.

319. *Id.* at 349.

in any other calling, for the promotion of order and liberty among his countrymen".<sup>320</sup>

[T]hese two words express the end and aim of human law; order, with as much liberty as is consistent with order. All the functions of government, legislative, executive and judicial, are, or should be, exerted for these ends ....

....  
... [And] we know that the maintenance of the Federal and State governments, in the plentitude of their respective powers, is our only guaranty of liberty and order. These are fundamental principles with which every lawyer must be acquainted. [The lawyer's] opportunity to influence the public servant and the voter is exceptional ... and his responsibility is commensurate with his opportunity.<sup>321</sup>

"We must begin with ourselves," he concluded, by embracing constitutional continuity, by "studying anew the history of free governments and the fundamental maxims of our own," and by having "the courage to utter unwholesome truths, if they are worth uttering, regardless of their unpopularity," to expose "the abuses of the times."<sup>322</sup>

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320. *Id.* at 346.

321. *Id.* at 346-48. He would go on to criticize the Fifteenth Amendment's extension of suffrage to blacks as blindly egalitarian and inconsistent with the framer's political principles. *Id.* at 348.

322. *Id.* at 349; see also *Professor Washburn's Closing Lecture Before the Harvard Law School, June 7, 1876*, 14 ALB. L.J. 321, 326 (1876) (admitting that "everybody now understands that the country owes the late lamentable civil war in which she was involved to the passions and opinions of a few, and that it was, in fact, what it was proclaimed to be, a war of ideas" and urging lawyers to dedicate their skills to "work out a revolution in the public mind" against political corruption). For emphasis on federalism principles and constitutional continuity similar to Field's, see Virginia lawyer J. Randolph Tucker's address before the American Social Science Association (ASSA) in 1877. J. Randolph Tucker, *The Relations of the United States to Each Other, as Modified by the War and the Constitutional Amendments*, 16 ALB. L.J. 234 (1877) (discussing the evolution of federalism and the relationship between and among the colonies and states from the Colonial era to the post-Civil War era). Tucker would sign Simeon Baldwin's "Call" to establish the American Bar Association the following year. The idea of a national bar association developed out of the 1877 ASSA meeting. See Matzko, *supra* note 44, at 84; cf. *id.* at 80-81 (describing a bungled attempt in 1876); see also Judge Ro. Ould, *The Last Three Amendments to the Federal Constitution, Lecture Before the Constitutional Law Class of Richmond College (July 1878)*, in 2 VA. L.J. 385 (1878) (disputing Chief Justice Chase's statement that the Reconstruction Amendments "changed the character of our Government and converted the people of the

Corruption, not only in politics, but also in law, loomed large for the lawyers who supported the institutional structures we associate with the modern profession. Bar associations and formal law training, it was hoped, might mitigate the "abuses of the times" and repair the damage done to professional integrity. The formation of the Association of the Bar of the City of New York (ABCNY) in response to the scandals of judicial corruption arising from the Tweed Ring is the standard example.<sup>323</sup> But Field's address suggests that concerns about corruption ran well beyond the local crimes of party machine politics to the threat posed to legal science by Reconstruction and the profession's war of ideas.<sup>324</sup>

## V. PROFESSIONAL ORGANIZATION AND REDEMPTION

Elite lawyers active in the professionalization movement of the Gilded Age "kept looking for social stages on which to enact the role of Tocqueville's lawyer-aristocrats."<sup>325</sup> But the social stages they sought out were different, more humble, than the stage implied by the strongest version of antebellum professional ideals. Chastened not only by the legal frustrations of the war and Reconstruction but also by their own war of ideas on the grand stage of constitutional law and national politics, the profession retreated to organizational structures that provided collective, less directly political, venues in which to secure professional authority. Saving the state and

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Union into a Nation").

323. See POUND, *supra* note 40; Gordon, *Legal Thought*, *supra* note 66; see also William Maxwell Evarts, *Speech at Meeting of the Bar to Organize the Bar Association of the City of New York* (Feb. 1, 1870) in 3 ARGUMENTS AND SPEECHES OF WILLIAM MAXWELL EVARTS 259, 262 (SHERMAN EVARTS ed., 1919).

324. See also EDWARDS PIERREPONT, ORATION OF THE INFLUENCE OF LAWYERS UPON FREE GOVERNMENTS, AND THE INFLUENCE OF MORAL FORCES UPON THE PROSPERITY OF GOVERNMENTS 36, 45 (New Haven, Law Department of Yale College 1874) (discussing the duty of lawyers in the face of corruption); SPROAT, *supra* note 305 (discussing the dedication of Liberal Republicans to civil service reform as a response to corruption during Reconstruction).

325. Gordon, *supra* note 70, at 56. Gordon suggests they felt "special urgency" to enact "roles of public virtue" both because "they were not really aristocrats at all, but rather, the sons of [patriarchs from] small New England and upstate New York towns," and because they were "deeply implicated" in the scandals of corporate commercialization and "rough tactics"—"the very practices that they wanted to reform." *Id.* But he is less interested in the influence of Reconstruction, noting in passing that "whether one blamed the railroads or Reconstruction," elite lawyers perceived the need for law reform. *Id.* at 54.

controlling the public mind remained professional goals.<sup>326</sup> There was, however, a decided shift in professional effort from individual disquisition and political engagement to providing apolitical technical expertise through administrative government service and client representation in the boardroom rather than the courtroom; ensuring judicial independence and improving standards in education and practice; refining the science of jurisprudence through academic and bar association committee work; and honing a classroom pedagogy stressing, with renewed conviction, that there are two sides to every case, in order to sever moral and political sentiment from legal analysis.<sup>327</sup> Gone was the claim of “any special

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326. In a perverse sense, this was especially true in the South. *See infra* notes 356-57 and accompanying text (discussing the redrafting of state constitutions and laws by southern lawyers that resulted in de jure subordination of blacks).

327. WASHBURN, LECTURE 1861, *supra* note 123, at 20; *see also* Gordon, *supra* note 70, at 52; Grossman, *supra* note 305, at 595-601; *cf.* Kimball, *supra* note 308; Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215, 251-59 (1995) (emphasizing moral and religious elements of nineteenth century Classicism); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1518-27 (2001) (describing classical legal thought and comparing it to the methods and theories pursued by Christopher Columbus Langdell). In emphasizing the impact of the Civil War and Reconstruction on professional organization, I do not mean to diminish other well recognized social, political, and economic factors. Indeed, there are strong parallels to postbellum trends in other disciplines and Gilded Age conservative social reform movements in general. *See generally* BLEDESTAIN, CULTURE OF PROFESSIONALISM, *supra* note 237; HASKELL, *supra* note 237, at 120-21 (discussing the postbellum turn to “communit[ies] of the competent” and “expert authority,” institutionally cultivated and certified, in social sciences and professions, and increased emphasis on technical expertise in social reform to “depoliticize social questions”); *id.* at 220-21 (discussing the connection between the ASSA and the creation of the ABA); SPROAT, *supra* note 305; Arthur M. Schlesinger, *Biography of a Nation of Joiners*, 50 AM. HIST. REV. 1 (1944) (describing the political and cultural roots of American associationalism).

In an October 5, 1872, editorial, the Albany Law Journal specifically invoked this broader trend in its call for the professional organization of lawyers:

The legal profession in America has not yet thoroughly learned the lesson of the period, the lesson of organization. The distinguishing characteristic of modern times is the prevalence of organization and co-operation among individuals .... Associations, societies, conventions, congresses, and the less dignified, but not less effective, “rings” form the mode, *par excellence* of modern advancement in science, religion and politics. But we search in vain for a corresponding system among the members of the legal profession ....

Editorial, *Professional Organization*, 6 ALB. L.J. 233, 233 (1872) [hereinafter *Professional Organization*]. The journal was not satisfied with the ABCNY, founded two years earlier in response to scandals of judicial corruption arising from the Tweed Ring, because it was the result of “the law of self-preservation.” *Id.*; *see also* Matzko, *supra* note 44, at 78-79 (discussing various motives for the formation of bar associations). The editorial continued:

The central idea of professional co-operation has not been developed, for



competence on the part of legal scholars or judges to prescribe behavior in particular situations.<sup>328</sup>

The records of the American Bar Association's first meetings vividly reveal both this transition from personal and direct political engagement to more neutral terrain as well as the impetus the war and Reconstruction experience provided to find and hold that new terrain. The ABA's first president, James O. Broadhead, emphasized on taking the chair in 1878 that the Association "should seek to avoid becoming an agitator of the law, and rather aim to codify and harmonize, than to revolutionize or reform the law."<sup>329</sup> The choice of words (abjuring revolutionary reform or any other agitation of the law), coming as it did just eighteen months after the

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organization is not mainly for the purposes of self-preservation, but for the purposes of promotion, improvement, power, dignity ....

....

... the development of a better *esprit du corps*, the founding of legal institutions, the fostering of a higher legal education, the discussion, promotion, and utilization of the great principles of law and law reform.

*Professional Organization*, *supra*, at 253. Individual greatness might have sufficed in the profession's "heroic period" before the war, but now, bar associations were necessary so that "the unity and organization of the profession will be secured." *Id.*; *See also* Matzko, *supra* note 44, at 80 (quoting Albany Law Journal editor, Isaac Grant Thompson's claim "that the lawyers of the nation 'should be combined in an organic whole'"); *Some Recent Decisions*, 9 ALB. L.J. 265, 268 (1874) (praising the founding of the Chicago Bar Association and emphasizing that uniform law could not emerge "until the legal profession shall bring its unified influence to bear to that end").

328. Gordon, *supra* note 70, at 88. Law practice as a form of "combat" did not disappear, but was restricted to the level of client representation. The hope was that legal science would draw as clearly and sharply as possible the boundary lines beyond which the conduct of social actors would be sanctioned and behind which it would not. Legal science would thus create, as it were, combat zones of free conduct in which individuals might do as they willed without fear of legal reprisal, and it would specify the precise legal consequences of infringing on someone else's zone.

*Id.*

329. *Proceedings of First Meeting*, 1 A.B.A. REP. 21, 24 (1878).

Compromise of 1877,<sup>330</sup> signaled a truce in the profession's war of ideas.

Like David Dudley Field, Broadhead had not yet relinquished the notion that the profession had a duty to shape public opinion. As he reminded the Association in his first formal speech the following summer, "[e]fforts at social reform, political convulsions and domestic insurrections agitate the sea of public sentiment until the tempestuous waves threaten to sweep away ... the barriers which protect individual right."<sup>331</sup> It is therefore the duty "of those who have studied the science of human rights ... to see that public sentiment springs from a pure fountain and flows in an unobstructed channel."<sup>332</sup> But he emphasized that *collective* effort was necessary for lawyers to be successful in fulfilling this responsibility ("[i]ndividual effort may accomplish much, but concerted action will accomplish more"),<sup>333</sup> and that the role of law should be limited to "impos[ing] so much restraint only upon each as is necessary for the good of all"—an open endorsement of classical liberalism.<sup>334</sup>

In the ABA's first annual address, Vermont lawyer and soon to be Yale law professor Edward J. Phelps was even more explicit about the relationship between the goals of the Association and the retreat from Reconstruction. A signatory to the original "Call" sent out by

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330. Simeon Baldwin sent a circular and letters even earlier to test the waters and build support. See RUTHERFORD, *supra* note 56, at 10 (noting the roots of his idea in a meeting of the ASSA's Section on Jurisprudence in 1877). See generally FREDERICK H. JACKSON, SIMEON EBEN BALDWIN: LAWYER, SOCIAL SCIENTIST, STATESMAN 66-69, 78-81 (1955) (describing Baldwin's modest engagement in the war of ideas during Reconstruction and his later role in organizing the ABA); Matzko, *supra* note 44. The written responses sent to Baldwin from lawyers around the country confirm the sentiments Broadhead later expressed. As Illinois judge Gustav Koerner wrote:

It is obvious also that such an association and its meetings would have a most powerful tendency to weaken mutual prejudices, to produce harmonious and fraternal feelings amongst an influential and leading class of men, and would be a means of cementing our Union, so lately disrupted. On that account alone the undertaking proposed in the circular would meet with my heartiest approval and I hope that success may crown the labors of the meeting.

Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 A.B.A. J. 658, 680 (1917) (quoting a letter from Gustav Koerner dated August 3, 1878); see also *id.* at 681-82, 686, 687.

331. *Address of James O. Broadhead*, 2 A.B.A. REP. 51, 70 (1879).

332. *Id.*

333. *Id.* at 69.

334. *Id.* at 70.

Simeon Baldwin,<sup>335</sup> Phelps enjoined his colleagues to use the Association to promote the kind of professional consensus on matters of constitutional law that had been so lacking in the war and Reconstruction period. "When we reflect upon all this country has passed through, is there no light," he asked, "to be gathered from experience?"<sup>336</sup> If lawyers are rightly "charged with the safekeeping of the constitution ... [s]hould not the lawyers of this country meet as on a common ground, in respect to all questions arising upon the national constitution, dealing with them as questions of jurisprudence and not of party?"<sup>337</sup> The profession, he pleaded, should put aside politics in constitutional analysis and build up a "broad, national, elevated, independent, fearless spirit of constitutional jurisprudence."<sup>338</sup> Phelps continued:

God alone can estimate ... the harvest of the effort to settle constitutional questions by force of arms. Let it all pass. We come to bury the armed Ceasar, not to praise him. To renew again, in faith and hope, the work which Marshall and his associates began, of cementing and building up on firm and lasting foundations, the American constitution. Is it the court alone that is charged with that duty? Have we no part or lot in the matter? ... [L]et us join hands in a fraternal and unbroken clasp, to maintain the grand and noble traditions of our inheritance, and to stand fast by the ark of our covenant.<sup>339</sup>

This call for sectional reconciliation among lawyers, couched in a patriotic tribute to the nationalism and constitutional genius of Chief Justice Marshall, is reported to have brought members of the association to tears.<sup>340</sup>

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335. See *Call For a Meeting to Form an American Bar Association*, 1 A.B.A. REP. 4, 4 (1878). For biographical details on Phelps, see JAMES GRAFTON ROGERS, *AMERICAN BAR LEADERS: BIOGRAPHIES OF THE PRESIDENTS OF THE ABA*, 1878-1928, at 14-18 (1932).

336. *Address of E.J. Phelps*, 2 A.B.A. REP. 173, 190 (1879).

337. *Id.* at 188, 190 (emphasis added).

338. *Id.* at 191.

339. *Id.* at 191-92.

340. As one observer contended,

[t]he most important event in the Association's history was the selection of Professor Edward J. Phelps ... to deliver the first annual address in 1879 .... As he unfolded the great work of Marshall in moulding and construing the Constitution, and fitting it to the work which it was designed to perform, and before the address was half delivered, Mr. Phelps ... had the strong minds of the

The formal work of the bar would be decidedly less ambitious, less oriented toward public law, and, in the initial years of the Association, less concerned with law reform than gathering to take the waters in Saratoga Springs.<sup>341</sup> But in many respects, the act of gathering each summer for “cordial intercourse,” as the mission statement of the Association’s constitution put it,<sup>342</sup> affirmed and strengthened professional consensus on the retreat from the war of ideas and the separation of law from politics.<sup>343</sup>

Many of the first members of the Association had been deeply engaged in the Civil War and Reconstruction. The membership roll included Benjamin Bristow, a Kentucky federal attorney in 1866

Association at his feet in tears.

Jacob Weart, *American Bar Association: Its History for the First Sixteen Years of Its Existence and Its Impress upon the Thought of the Nation*, 27 N.J. L.J. 292, 295 (1904).

341. For a number of years, little in the way of formal work was undertaken at all. Even the serious committee work concentrated on the more humble, practical and technical issues that fit into the elite’s post-war reform agenda. SUNDERLAND, *supra* note 56, at 13-14, 17, 61-80. Norbert Brockman confirms that the emphasis on social activities was not unique to the ABA: “For almost all the state and local associations, the social activities were a dominant part of the program of any meeting.” Brockman, *supra* note 56, at 126.

342. See RUTHERFORD, *supra* note 56, at 13 (quoting the ABA constitution).

343. As late as 1884, Cortlandt Parker’s presidential address to the annual meeting emphasized the relationship between friendly intercourse, the Association’s law reform goals, and sectional reconciliation:

To help make the nation one is an evident result to be expected from the complete success of this Association .... Familiar communion among [lawyers] tends to harmonize opinions and action, and to do away with those variances, if not conflict, in the institutions, legal customs, laws, and polity of the different states, which so powerfully interfere with the oneness of the whole people ....

....  
... [The ABA] tends to lead us to forget state divisions, and to love the whole great country....

....  
... Let us strive to make these delightful convocations something more than simple occasions of enjoyment. Let us strive to become a power ... to tighten the bonds of union.

*Address of Courtlandt Parker, President of the Association*, 7 A.B.A. REP. 147, 147 (1884). Early speeches at the annual meetings often supported the spirit of sectional reconciliation by celebrating legal heroes from both regions, lamenting the suffering of the South in Reconstruction, and embracing the theory that federalism principles survived the war. See, e.g., Richard M. Venable, *Partition of Powers Between the Federal and State Governments*, 8 A.B.A. REP. 238 (1885); see also Matzko, *supra* note 44, at 89 (writing that “even sociability could be viewed in the more serious light of the restoration of national harmony after the bitterness of the Civil War and Reconstruction” and noting that lawyers “moderate in political stance and representing the interests of national economic development, might have been expected to stand in the vanguard on the ‘road to reunion’”).

(soon to be the nation's first Solicitor General) and an early and aggressive civil rights enforcer who was wounded at Shiloh while serving as a Lieutenant Colonel in the Union Army;<sup>344</sup> Senator Lyman Trumbull, a Chicago lawyer and "leader in the civil rights cause" during Reconstruction as chair of the Senate Judiciary Committee in the Thirty-Ninth Congress;<sup>345</sup> Secretary of State William Evarts, founder of the ABCNY, counsel in the *Prize Cases*, and one of several lawyers who represented President Johnson at his impeachment trial;<sup>346</sup> John B. Henderson, conservative Republican senator from Missouri;<sup>347</sup> at least five Confederate generals and two Union generals (including Alexander R. Lawton, a firm proslavery secessionist from Mississippi and former Quartermaster General of the Confederate Army who, during Reconstruction, defended several members of the Ku Klux Klan "charged with violating the civil rights of black[s]," and who opposed federal intervention while representing Mississippi in Congress);<sup>348</sup> Thomas M. Cooley, then sitting on the Michigan Supreme Court; Ohio Senator and former Union colonel, Stanley Matthews, who was instrumental in brokering the Compromise of 1877;<sup>349</sup> and Governor George Hoadly of Ohio and J. Randolph Tucker of Virginia (both of

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344. See ROGERS, *supra* note 335, at 10; *Members: August, 1878*, 1 A.B.A. REP. 40, 42 (1878) [hereinafter *Members*].

345. See *Members*, *supra* note 344, at 41; HYMAN & WIECEK, *supra* note 7, at 413; see also *id.* at 404 (noting Trumbull's role on the Senate Judiciary Committee). By 1870, however, "leading Republicans including Lyman Trumbull were coming to agree that federal authority must never reach private conduct, else fatal upsets to federalism might occur." *Id.* at 465; see also *id.* at 490.

346. See *Members*, *supra* note 344, at 46; HYMAN & WIECEK, *supra* note 7, at 264, 457.

347. See HYMAN, *supra* note 32, at 395; *Members*, *supra* note 344, at 45.

348. Confederate generals included: R.L. Gibson (Louisiana), Alexander R. Lawton (Georgia), William H. Payne (Virginia), James C. Tappan (Arkansas), and W.F. Tucker (Mississippi). The Union generals were Walter Q. Gresham (Indiana) and Gilman Marston (New Hampshire). See *Members*, *supra* note 344, at 40, 41, 42, 45, 46, 49; see also WARNER, GENERALS IN BLUE, *supra* note 23, at 188-89, 312 (describing the life and careers of the Union generals); WARNER, GENERALS IN GRAY, *supra* note 24, at 104-05, 175-76, 311 (describing the life and careers of the Confederate generals). On Lawton, see Carrington, *Lawyers Amid Redemption*, *supra* note 71, at 54; ROGERS, *supra* note 335, at 24.

349. See see WOODWARD, *supra* note 256, at 44; Matzko, *supra* note 44, at 85; *Members*, *supra* note 344, at 44, 47; see also II THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 655-65 (Leon Friedman & Fred L. Israel eds., 1997) (describing the life of Stanley Matthews); Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 700 (2000) (noting that Cooley served as a justice on the Michigan Supreme Court).

whom represented Jefferson Davis).<sup>350</sup> President Broadhead—“[a] strong Union man during the Civil War”—had been “in great part responsible for preventing the fall of Missouri to the Confederacy.”<sup>351</sup> “[A]fter the war, disgusted with the ‘test-oath’ act and the ‘Force Bills,’ he became a Democrat [and] took a former Confederate officer as a law partner.”<sup>352</sup> He also served as an “informal moderator” in the Hayes-Tilden dispute.<sup>353</sup>

Cordial intercourse was not, for this collection of lawyers, a mere sideshow to the main event of “advanc[ing] the science of jurisprudence, [and] promot[ing] the administration of justice and uniformity of legislation throughout the Union” (the other objectives included in the ABA Constitution).<sup>354</sup> Viewed in the context of the war and Reconstruction experience, it was both a condition and effect of the professional consensus necessary to accomplish these goals. As ABA member and New Jersey lawyer Jacob Weart recalled:

The country was struggling with the question of reconstruction, and had been at that work for thirteen years, when suddenly the great intellects of the land were brought together in union and harmony by the formation of the American Bar Association .... At the first meeting of the Association the work was commenced for the restoration of the Union and the establishment of good will and fraternal feeling among the people of the whole country. How could this work go forward except through the efforts of the great men of the country, who led its advanced thought and controlled the actions of men? ... At the annual dinners, with

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350. See *Members*, *supra* note 344, at 44, 49. See generally Matzko, *supra* note 44, at 85-87.

351. Matzko, *supra* note 44, at 90. Southern enrollment was strong in the Association and “Louisiana had the largest representation at the organizational meeting,” though Matzko attributes this at least in part to the “yellow fever epidemic ... ravaging the lower Mississippi Valley.” *Id.* at 87. Matzko notes that the early population of active members fluctuated, often with prominent members being replaced by lesser known lawyers in their state. See *id.* at 86.

352. *Id.* at 90. For descriptions of the range of views held by other early ABA Presidents on the Civil War and Reconstruction, see ROGERS, *supra* note 335, at 19-23 (Clarkson Nott Potter); *id.* at 29-32 (John Cortland Parker); *id.* at 33-36 (John White Stevenson); *id.* at 37-41 (William Allen Butler); *id.* at 42-45 (Thomas Jenkins Semmes); *id.* at 50-55 (David Dudley Field); *id.* at 56-60 (Henry Hitchcock); *id.* at 71-76 (John Randolph Tucker).

353. *Id.* at 4.

354. Matzko, *supra* note 44, at 89 (noting the significance of social gathering in the wake of the “bitterness” of the war and Reconstruction period).

closed doors, all restraint was thrown off, and the welfare of a common country was the uttermost thought of all.<sup>355</sup>

National professional organization predicated on an end to the war of ideas on Reconstruction was equally important in freeing up southern lawyers to "redeem" their state laws from the forced egalitarianism of the preceding decade. Elite southern lawyers and nascent southern state bar associations in the Gilded Age were conspicuously engaged in the effort to redraft state constitutions and laws around the letter and spirit of the Reconstruction Amendments.<sup>356</sup> By the 1890s, the fruit of their work was

355. Weart, *supra* note 340, at 337-38 (emphasis added).

356. Southern members of the ABA were prominent in Redeemer law and politics in the South. See WOODWARD, *supra* note 256, at 18, 61, 93 (discussing Senator James Z. George of Mississippi and John W. Daniel of Virginia); see also *id. passim* (noting the prominent role of other lawyers in Redemption throughout the south); Michael de L. Landon, *Another False Start: Mississippi's Second State Bar Association, 1886-1892*, in NEW HIGH PRIESTS, *supra* note 44, at 187, 194-96 (describing Solomon Saladin Calhoun's role in the organization of the Mississippi bar and service as presiding officer in the 1890 constitutional convention, which reversed the state's Reconstruction constitution and subverted black suffrage under the Fifteenth Amendment); Carrington, *Lawyers Amid Redemption*, *supra* note 71, *passim*. Landon links professionalization in Mississippi in 1886 to a determination among elite white lawyers to overturn the state's 1869 Reconstruction constitution and disenfranchise black voters. *Id.* at 195-96. He writes:

Blacks outnumbered whites in the state by 16 percent in 1890, and ... were still an important factor in local, state, and federal elections .... [A]mong the members of the bar association concern over that situation evidently was far deeper than any concern they might have had to see particular law reforms enacted .... [S]everal members of the leadership elite of the bar association ... played a prominent role in the [1890] constitutional convention .... Obviously, the main purpose of Mississippi's 1890 Constitution was to be the firm establishment of white supremacy in the state.

*Id.*; see also *id.* at 197 (noting that with the new 1890 Constitution, the bar association's mission was accomplished, and the bar association collapsed in 1892); Marston, *supra* note 54, at 486-88 (noting the relationship between white elite lawyers' anxiety about race relations during Reconstruction, the organization of the Alabama state bar association, and the drafting of the first state code of ethics).

Many southern lawyers had also been active during Reconstruction in litigative efforts to stymie federal enforcement. See HYMAN & WIECEK, *supra* note 7, at 234, 322, 325 (describing proliferation of post-war suits against federal military and other officers in southern state courts by "inventive lawyers"); *id.* at 318 (quoting a Tennessean's complaint to the President that "[m]ost civilian lawyers ... received the President's pardon for wartime support of the Confederacy. Generally abler than the government's counsel, these lawyers, in addition to becoming rich, ... 'ingratiate themselves with members of the [military] court and gradually draw them under the influence of the governing class.'").

firmly entrenched, de jure racial subordination.<sup>357</sup> Thus, modern professional organization did not simply coincide with the retreat from Reconstruction in the 1870s, it also played an important role in the undoing of Reconstruction.

Even where organized legal reform efforts were not tied to racial subordination and other Reconstruction issues, state and local bar associations provided a convivial setting in which lawyers who had been sharply divided over the Civil War and Reconstruction could reconcile, rebuild professional consensus, and redirect professional effort. Walter B. Hill's 1888 address to the Georgia Bar Association, republished for general consumption in the *American Law Review*, suggests the success of this project.<sup>358</sup> As President of the Association, Hill conducted a survey of the constitutions, by-laws, and publications of all state and local bar associations listed in the Tenth Annual ABA Report.<sup>359</sup> He also opened personal correspondence with bar secretaries around the country to learn "what had been actually accomplished by each organization."<sup>360</sup> His address emphasized "one exceedingly pleasant impression" from the survey:

The solidities of the North and the South have completely melted under the genial influence of associated effort, inspired by the high and disinterested purposes for which these organizations are formed. The bar, at least, has learned that solidity and solidarity are not the same. The gentlemen who politically still continue to fire their ballots as they fired their bullets in 1861, exhibit in the association records a completely restored fraternity. Party lines as well as sectional divisions have been wholly ignored.<sup>361</sup>

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357. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 31 (2d ed. 1966) (stating that "[t]he Redeemers who overthrew Reconstruction and established 'Home Rule' in the Southern states conducted their campaign in the name of white supremacy"); *id.* at 34 (noting the delay between the Compromise of 1877 and de jure segregation). See generally *Plessy v. Ferguson*, 163 U.S. 537, 542, 548-49 (1896).

358. Walter B. Hill, *Bar Associations*, Address to the Georgia Bar Association (Aug. 7, 1888), in 23 AM. L. REV. 213 (1889).

359. The Report listed "twenty-five State associations, four territorial associations, two in the District of Columbia, and ninety-three county and city associations." *Id.* at 216.

360. *Id.*

361. *Id.* at 234; see also *id.* at 223 (describing "[c]ordial [i]ntercourse" of bar associations as a fitting substitute for "the old days of circuit practice with its social intermingling").



With bar associations spreading across the country, Hill could confidently insist that "fraternity ... *esprit du corps* ... has always been one of the marked characteristics of the bar," and that lawyers, notwithstanding their forensic contests, "are the most fraternal of men, exceeding in their generous recognition of mutual worth and intellectual prowess even the reverend clergy."<sup>362</sup> Ten years after E.J. Phelps addressed the ABA, Hill confirmed that bar associations were indeed helping to create "solidarity" and provide a vehicle for attaining more immediate professional goals.<sup>363</sup>

### CONCLUSION

Ironies abound in the inward turn of modern professional organization. Langdellian legal science would falter in practice almost as soon as it had been articulated because elite lawyers (its very exponents) quickly helped their corporate clients draft around or defy its neat formal categories.<sup>364</sup> The jurisprudence of constitutional continuity and strict adherence to federalism principles was brushed aside when it came to protecting corporations against hostile state legislation and labor unrest. Perhaps most significantly, the war and Reconstruction may have enhanced rather than diminished the authority of law and the legal profession. Elite lawyers' anxieties about the status of law and professional authority in the period were, as we have seen, painfully real. But the vernacularization of law they both promoted and resisted in their war of ideas helped to expand the discursive authority of the profession. The point is not that the public came to share elite lawyers' specific doctrinal positions on legal matters (it did not, though there was a convergence regarding Reconstruction), or that public respect for the profession increased appreciably,<sup>365</sup> but

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362. *Id.* at 214-15.

363. *See id. passim* (canvassing other bar association objectives, including law reform, the improvement of legal education and professional standards, judicial independence, and the administration of justice).

364. Gordon, *Legal Thought*, *supra* note 66, at 72-74; Gordon, *supra* note 70, at 57-58.

365. *Cf.* HYMAN & WIECEK, *supra* note 7, at 338 (stating that "[n]ot only did familiarity with legal and constitutional writers grow more widespread during the war; Americans expressed an increasing respect for law, lawyers, and judges"). Against the latter claim has to be weighed the stark evidence of violence and lawlessness in the period—riots, southern defiance of Reconstruction, local government debt repudiation, railroad and corporate malfeasance, and government corruption—as well as the fact that lawyers remained anxious about their status.

rather that social questions continued to be imagined, articulated, and answered in the language of the law. Americans, an English observer noted in 1865, would "cling to written law 'as to a rock in the midst of a storm.'"<sup>366</sup> And as William Wiecek has so ably shown, an unprecedented and enduring expansion of federal law occurred between 1863 and 1877—the Reconstruction Congresses repeatedly turned to law, especially to the federal courts, to do the work of securing the guarantees of the Constitution. Notwithstanding the enduring social and legal effects of Redemption, this has helped keep lawyers busy ever since.<sup>367</sup>

The profession's inward turn in the 1870s remains significant because the institutional structures it produced helped to stabilize, and now help to maintain, the monopoly lawyers enjoy on providing legal advice by regulating entry and exit and by forestalling public

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*See id.* (conceding that lawyers were keenly aware of the need to "retain the recent affection, or at least respect, the public exhibited toward them").

366. *Id.*

367. "In no comparable period of our nation's history," Wiecek writes, "have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction." William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333, 333 (1969). Over and over again, the Reconstruction Congresses turned to federal court jurisdiction as a vehicle for securing federal rights and respect for national power. The unprecedented expansion of removal jurisdiction "first gave the federal courts new responsibilities for protecting the rights of Negroes and federal officials in the South. [But] [i]t was later used by corporations seeking to evade the hostility of Granger juries in state courts by resorting to the more sympathetic purview of the federal courts." *Id.*; *see also id.* at 338, 342 (noting that, because of the retreat from Reconstruction, removal jurisdiction was not frequently invoked to protect blacks or Unionists in the South, though it would eventually become central to the twentieth-century civil rights movement, and it "was quickly and enthusiastically resorted to by railroads and other interstate corporations"); *id.* at 333 (discussing federal bankruptcy legislation, the organization of the U.S. Court of Claims, and Congress's massive extension of federal habeas corpus jurisdiction); William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 547-48 (1970). In his discussion of habeas corpus, Wiecek states that as a result of the 1867 act:

Habeas corpus emerged [in the mid-twentieth century] as a primary means of protecting federal constitutional rights specified in the first eight amendments to the Constitution, the most important of which were the procedural safeguards guaranteed in criminal trials.

....

... An individual no longer had recourse only to the states to protect his constitutional rights; he had the additional and supervening protection of the federal government acting through its courts.

*Id.* It is important to note that the turn to law, and particularly to litigative remedies, can be seen as a turn away from the more burdensome work that would have been required to truly reform the South. *See FONER, supra* note 32; GILLETTE, *supra* note 256, at 24.

intervention. But it is just as important to professional authority that the discourse of law is so pervasive in American social life. This proved frighteningly true in the war and Reconstruction period, as law and legal argument first sharpened the sectional conflict and then emboldened its protagonists. But the failure of law was ultimately as unthinkable for the American people as it was for its lawyers. Histories of the profession that skip the war and Reconstruction period on the way to celebrating or condemning the ideology and institutional structures that shape modern professional identity miss the extent to which professional anxiety and authority turn on what I have called discursive power—the power that derives from convincing Americans to cling to law even in the face of its persistent failure.

A final note on professional ethics. The trajectory of Story's vision of professionalism from the age of Jackson through the war and Reconstruction period reveals discursive authority, with all its anxieties and opportunities, at work among elite lawyers. Because this concept of professionalism operated on a different and underexamined, though not entirely unrelated, plane from ideologies of practice, I have deliberately said less about the latter.<sup>368</sup> But a few words are in order. In the neo-Marxist account, professionalization is said to coincide with professional failure—bar associations, law firms, and law schools supposedly endorse an amoral, technical, client-centered approach to practice, at least in part to neutralize criticism that bar elites were caving to the interests of corporate capital.<sup>369</sup> The charge is carried forward to the present, giving the impression that the principal moral dilemma in law practice centers around the capitulation of the profession to capitalism and that the ideology of zealous, ethically neutral client service is morally suspect from the start.<sup>370</sup>

I am less interested than the neo-Marxists in the project of looking to history for evidence of the profession's systemic moral failure. Given the evidence of antebellum commercialization and ideologies of practice equally committed to amoral, client-centered

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368. The relationship, especially in the period between 1863 and 1873 (from emancipation to *The Slaughterhouse Cases*), deserves attention. Many elite lawyers who later played important roles in professional organization were actively involved in litigation over the constitutionality of Reconstruction.

369. See *supra* Part II.B.

370. See *supra* Part II.B.

service, I am considerably more skeptical about the nexus between the rise of corporate capitalism at the end of the nineteenth century and any specific ideology of practice. If, however, we are to look for moral failure in the period, it seems to me the more revealing place to look is in the profession's turn with the nation away from the plight of blacks in the South and away from federal laws, both statutory and constitutional, that depended for their efficacy on the willingness of lawyers to bring suit on behalf of black plaintiffs. Here, it must be said, the problem was not the prevalence of an amoral, client-centered ideology, but just the opposite—decisions about representation and professional responsibility driven by personal moral convictions and community prejudices about the rights, humanity, and capabilities of freed blacks. To state it plainly, racism directly influenced not only the retreat from Reconstruction, but also ideologies of practice.<sup>371</sup> Even if law and the legal profession recovered from the trauma of the war and Reconstruction, a deeper

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371. Sidney George Fisher's diary is remarkably frank on the subject. A late and tepid supporter of abolition, he would soon tire of Reconstruction. In the late 1860s, when northern support for Reconstruction was strong and moving in the direction of giving blacks the right to vote, Fisher wrote:

The American people worship a villainous Mumbo Jumbo ... called universal suffrage .... [T]hey are about to place their necks under the ... foot of the Negro & to abdicate their rightful power over their country and its destiny ....

....

I hoped to see the Negroes of the South in the position of a peasantry, working for wages & enjoying all civil rights but not the right of suffrage ....

Fisher, Diary Entry (Jan. 20, 1866), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 508; Fisher, Diary Entry (Mar. 4, 1866), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 510. The Civil War, he would later add, created "an immense increase to the popular passion for liberty & equality ... impossible to undo when the madness is over & the evil results are evident." Fisher, Diary Entry (Jan. 20, 1866), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 508. Additionally, Fisher viewed the resolution of the equality question as a hypocritical exercise in futility:

It seems our fate never to get rid of the Negro question .... No position for the Negro that would please the South would agree with enlightened opinion in the North. But how can the North enforce its views? Only by such an exertion of the power of the general government as would be inconsistent with its plan & theory .... I can see no way out of these difficulties consistent with the preservation of the Union & free government.

Fisher, Diary Entry (June 8, 1865), in *PHILADELPHIA PERSPECTIVE*, *supra* note 69, at 499. For a discussion on the racial views of lawyers and the general public, see generally FONER, *supra* note 32; GILLETTE, *supra* note 256; HYMAN, *supra* note 32; NIEMAN, *TO SET LAW IN MOTION*, *supra* note 250; Carrington, *Lawyers Amid Redemption*, *supra* note 71; Cresswell, *supra* note 256; Paludan, *supra* note 26.

problem for lawyers, which I leave to another day to explore, may be that ideologies of practice have not.