ARTICLES

THE RULE OF LAW IN ANTEBELLUM COLLEGE LITERARY ADDRESSES: THE CASE OF WILLIAM GREENE

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INTRODUCTION

When Ralph Waldo Emerson delivered his *American Scholar* address to the Harvard Phi Beta Kappa Society in 1837 he celebrated the vibrant spirit of exploration of new ideas in America and the rejection of irrational precedent. The scholar occupied a central role in promoting progress in Emerson's world:

> Whatsoever oracles the human heart, in all emergencies, in all solemn hours, has uttered as its commentary on the world of actions, -- these he shall receive and impart. And whatsoever new verdict Reason from her inviolable seat pronounces on the passing men and events of to-day, -- this he shall hear and promulgate.[1]

Emerson's American Scholar sounded a great deal like the American jurists who were retesting old principles, rejecting outmoded precedent, and rationalizing American law.[2] Both

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[1] RALPH WALDO EMERSON, *The American Scholar, in* RALPH WALDO EMERSON: ESSAYS & LECTURES 51, 64 (Joel Porte ed., 1983) (1837).

[2] *See, e.g.*, Joseph Story, *Science and Letters in Our Day, in* REPRESENTATIVE PHI BETA KAPPA ORATIONS 37, 48-9 (Clark S. Northup ed., 1927); CHARLES SUMNER, THE SCHOLAR, THE JURIST, AND THE ARTIST (1848); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (discussing the reformation of American law to comport with dominant American attitudes towards economic growth). Emerson built on the tradition of Phi Beta Kappa lectures that celebrated the role of learning in reshaping the American mind. *The American Scholar* bears a striking resemblance to Buckminster's 1812 lecture. *See* J.S. Buckminster, *Dangers and Duties of Men of Letters*, 7 MONTHLY ANTHOLOGY 145-58 (September 1809); *see also Phi Beta Kappa Orations*, 24 N. AM. REV. 129, 133 (1827) (observing of Buckminster's oration

the scholar and the jurist could agree that "[w]hen we can read God directly, the hour is too precious to be wasted in other men's transcripts of their readings."[3]

On the other hand, many of the Phi Beta Kappa lectures delivered in the years after the *American Scholar* were not optimistic Transcendentalist statements.[4] Instead, they opposed Emerson and sometimes mocked Transcendentalism. In his oration to the Yale Phi Beta Kappa Society in 1839, two years after Emerson's *American Scholar*, President Heman Humphrey of Amherst College mocked the Transcendentalist:

> It is getting to be the popular doctrine, that not only should every exciting topic be freely discussed in college, but that the students should be organized into as many societies as possible, for efficient and heated action; -- and, in fine, that, since every young man in America was demonstrably born to move the world, it is a monstrous waste of time and power, to spend so many years in finding the *pou sto*. The lever of Archimedes must therefore be put into the hands of the tyro, long before he has learned where to place the fulcrum, or at which end the power is to be applied.[5]

Emerson and the Transcendentalists frequently faced the contempt of conservative orations. I.N. Tarbox, speaking at Geneva College (now Hobert and Smith College), employed colorful language to depict the way Emerson beguiled his listeners into chasing after new ideas, when they should be learning old ones:

> Ralph Waldo Emerson is like unto a man who saith unto all the children and dear middle-aged people of his neighborhood, "O come and let us go yonder and dance a beautiful dance at the foot of this rainbow. There will be treasures beneath our feet, and drops of all colors over our heads, and we shall be in the presence of the mysteries of nature, and we and the raindrop shall be one. [6]

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that "the public attention and curiosity were excited and gratified to a degree, which has left a permanent and not yet expended effect").

[3] EMERSON, *supra* note 1, at 58.

[4] Marta Wagner's exhaustive study of Phi Beta Kappa orations before Emerson observes that the lectures spanned a wide spectrum of political ideology and found a predominance of Federalist ideology in them. *See* Marta Wagner, The American Scholar in the Early National Period (Ph.D. dissertation, Yale University, 1983) (on file with the author).

[5] HEMAN HUMPHREY, A DISCOURSE DELIVERED BEFORE THE CONNECTICUT ALPHA OF PHI BETA KAPPA AT NEW HAVEN, AUGUST 14, 1838 (New Haven, L. H. Young 1839).

[6] I.N. TARBOX, AN ADDRESS ON THE ORIGIN, PROGRESS & PRESENT CONDITION OF

This article introduces a lecture given by the lawyer William Greene to the Brown University Phi Beta Kappa Society in 1851, which also opposed the vibrant search for new principles.[7] It uses Greene's lecture as a focal point for exploring Phi Beta Kappa lectures as a source of evidence about jurisprudential ideas. It first sets forth the major ideas circulating in antebellum thought about precedent and progress, which were at the center of debate about reform of -- and respect for--the law. The lectures might illuminate the intellectual world of judges and lawyers. The discussion then turns to the usefulness -- and limitations -- of using college lectures in recovering some of the main currents of antebellum legal thought. Finally, it focuses on William Greene's ideas about law and precedent, which he delivered in the wake of the Fugitive Slave Act of 1850.

I. THE STRUGGLE OVER PRECEDENT

There was a struggle in American society in the years leading up to Civil War over how desirable it was to reject precedent as opposed to following established modes of thought. The arguments related to religious outlook and political ideology between Democrats and Whigs. The differences between Democrats and Whigs are elusive. One might contrast Daniel Walker Howe's portrayal of Whig thought[8] with the studies of Democratic thought by Marvin Meyers[9] and Charles Sellers.[10] Howe portrays the range of ideas within Whig thought, from Harriet Beecher Stowe and Abraham Lincoln to Alexander Stephens, the Vice-President of the Confederacy.[11] Stowe cer-

PHILOSOPHY, DELIVERED BEFORE THE HAMILTON CHAPTER OF THE ALPHA DELTA PHI SOCIETY 23 (Utica, R.W. Roberts 1843). For other examples of strong opposition to Emerson, *see* JOHN C. LORD, "THE HIGHER LAW," IN ITS APPLICATION TO THE FUGITIVE SLAVE BILL: A SERMON ON THE DUTIES MEN OWE TO GOD AND TO GOVERNMENTS (New York, Union Safety Committee 1851); S. HENRY DICKSON, ORATION DELIVERED AT NEW HAVEN, BEFORE THE PHI BETA KAPPA SOCIETY, AUGUST 17, 1842 (New Haven, B.L. Hamlen 1842).

[7] WILLIAM GREENE, SOME OF THE DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT: A DISCOURSE, PRONOUNCED BEFORE THE RHODE ISLAND ALPHA OF THE PHI BETA KAPPA SOCIETY, JULY 8, 1851 (Providence, John F. Moore 1851). Greene's oration is reprinted in the appendix to this essay. Subsequent references are to the page number in the original, which appear in brackets in the appendix.

[8] DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS (1979).

[9] MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (Vintage Books 1960).

[10] CHARLES SELLERS, THE MARKET REVOLUTION (1993).

[11] *See* DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 151, 221, 238-98 (1979).

tainly rejected formal modes of legal thought and encouraged judges to do the same,[12] whereas one of Lincoln's earliest speeches emphasized the control of passions through law.[13] A dominant theme in Whig thought was order through law.[14]

The Democrats were also diverse in outlook, though they differed from Whigs in approach to law. Some Democrats, such as Theodore Sedgwick, the son of one of Meyers' main subjects, were sophisticated lawyers who parsed legal doctrine as well as any Whig lawyer -- maybe even better than any Whig lawyer. It would be difficult to find a treatise that rivals in quality or depth of analysis to Sedgwick's *Treatise on Constitutional and Statutory Interpretation*.[15] Sedgwick's *Treatise* presents a far more subtle reading of constitutional doctrine than does Story's three volume *Commentaries on the Constitution*.[16] Sedgwick also presents a balanced interpretation of constitutional law, even where Whigs and Democrats differ on interpretation, such as property rights.[17]

Other of Meyers' Democrats migrated further from established precedents. Massachusetts lawyer Robert Rantoul's July 4, 1836 oration at Scituate urged a rejection of outmoded laws.[18] Rantoul rejected the common law as precedent -- its age was no basis for its authority.[19] In his oration Rantoul stated that "Sin and death are older than the Common Law; are they, therefore, to be preferred to it?"[20] Many said the common law is "the perfection of . . . reason," but Rantoul thought the analogy misleading.[21] It was the perfection of reason "just as alco-

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[12] *See generally* Alfred L. Brophy, *"Over and Above . . . There Broods A Portentous Shadow, - - The Shadow of Law": Harriet Beecher Stowe's Critique of Slave Law in Uncle Tom's Cabin*, 12 J. L. & RELIGION 457-506 (1995-96).

[13] *See* Abraham Lincoln, *The Perpetuation of Our Political Institutions*, *in* 1 COLLECTED WORKS OF ABRAHAM LINCOLN 108-15 (Roy P. Bassler, ed. 1953); *see also* DAVID HERBERT DONALD, LINCOLN 80-83 (1995) (characterizing Lincoln's thought that uncontrolled emotion would lead to "unimpassioned reason").

[14] *See* DANIEL WALKER HOWE, *supra* note 11, at 34.

[15] THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW (2d ed., New York, Baker, Voorhis & Co. 1874).

[16] *Compare* SEDGWICK, *supra* note 15, *with* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Fred B. Rothman & Co. 1991) (1833).

[17] *See* SEDGWICK, *supra* note 15, at 580-654.

[18] *See* MEYERS, *supra* note 9, at 231-32.

[19] *See* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 223 (Perry Miller ed., 1962).

[20] ROBERT RANTOUL, JR., *Oration at Scituate*, *in* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 222, 223 (Perry Miller ed., 1962).

[21] *Id.* at 223-24.

hol is the perfection of sugar."[22]

When George Bancroft delivered an oration at Springfield, Massachusetts on July 4, 1837, he distinguished between Democrats and Whigs. The Democrats, Bancroft thought, were optimistic. They sought progress in human thought by freeing society from outmoded ideas. But Whigs, according to Bancroft, had a political theory based on contract. They regarded

> society as established by a compact, which, when once formed, is held to be irrevocable, and incapable of amendment. This system regards liberty as the result of a bargain between the government and the governed; and as measured by the grant. The methods of government being once established, are therefore esteemed fixed forever. The immutability of oriental despotism is claimed for the compact, and freedom is but a privilege covenanted for; it seeks its title deeds in the records of the past; it looks for its security to the graves of the dead; it adduces no arguments in its support but from the musty archives of the past. Instead of saying, It is right, it says, It is established. It asserts an immortality for law, not for justice; it perpetuates established wrong on the plea of a vested right. Happy is it for a nation, on this theory, if its authors made for it originally a good bargain for be it evil or be it good, the bargain must be kept by all posterity. This theory of compact is the theory of whiggism; it is the citadel of aristocracy: it is, in a good measure, the creed of our whig doctors of to-day.[23]

Bancroft's division was between Democratic Love and Whig Law, a theme that Harriet Beecher Stowe had explored in one of her first published short stories,[24] and a theme that Emerson explored in his essay on *The Conservative*.[25] Emerson divided the world into two parties -- those of conservatism and reform.[26] "Conservatism makes no poetry, breathes no prayer, has no invention; it is all memory. Reform has no gratitude, no prudence, no husbandry. It makes a great difference to your figure and to your thought, whether your foot is advancing or

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[22] *Id.*

[23] GEORGE BANCROFT, AN ORATION DELIVERED BEFORE THE DEMOCRACY OF SPRINGFIELD . . . JULY 4, 1836 (Springfield, 1836).

[24] *See* HARRIET BEECHER STOWE, *Love versus Law*, *in* THE MAYFLOWER; OR, SKETCHES OF SCENES AND CHARACTERS AMONG THE DESCENDANTS OF THE PILGRIMS 19 (New York, Harper & Brothers 1844).

[25] *See* RALPH WALDO EMERSON, *The Conservative*, *in* RALPH WALDO EMERSON: ESSAYS & LECTURES 173 (Joel Porte ed., Lib. Am. 1983) (1841).

[26] *See id.* at 174-75.

receding."[27]

Emerson identified the conflict between the materialist, who relied upon law, and the reformer, who opposed it. "The materialist insists on facts, on history, on the force of circumstances, and the animal wants of man; the idealist on the power of Thought and of Will, on inspiration, on miracle, on individual culture."[28] Emerson described the materialist as one who, "secure in the certainty of sensation, mocks at fine-spun theories, at star-gazers and dreamers, and believes that his life is solid, that he at least takes nothing for granted, but knows where he stands, and what he does."[29] And yet,

> [t]he sturdy capitalist, no matter how deep and square on blocks of Quincy granite he lays the foundations of his banking-house or Exchange, must set it, at last, not on a cube corresponding to the angles of his structure, but on a mass of unknown materials and solidity, red-hot or white-hot, perhaps at the core, which rounds off to an almost perfect sphericity, and lies floating in soft air, and goes spinning away, dragging bank and banker with it at a rate of thousands of miles the hour, he knows not whither, -- a bit of bullet, now glimmering, now darkling through a small cubic space on the edge of an unimaginable pit of emptiness.[30]

Even reformers at some time become the conservatives. "You quarrel with my conservatism, but it is to build up one of your own; it will have a new beginning, but the same course and end, the same trials, the same passions; among the lovers of the new I observe that there is a jealousy of the newest, ..."[31] The problem with reformers' arguments, such as incomplete analysis of the consequences, is a result of their aspirations. For it is difficult to completely think out each consequence of a scheme that has never been tried. The trick is to combine elements of the conservative and the reformer:

> Nature does not give the crown of its approbation, namely, beauty, to any action or emblem or actor, but to one which combines both these elements; not to the rock which resists the waves from age to age, nor to the wave which lashes incessantly the rock, but the superior beauty is with the oak which

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[27] *Id.* at 175.

[28] RALPH WALDO EMERSON, *The Transcendentalist, in* RALPH WALDO EMERSON: ESSAYS & LECTURES 191, 193 (Joel Porte ed., 1983) (1842).

[29] *Id.* at 194.

[30] *Id.*

[31] EMERSON, *supra* note 25, at 171, 178.

> stands with its hundred arms against the storms of a century, and grows every year like a sapling;[32]

The differences among the parties was summarized by *The American Whig Review* in 1846: "There is a law and order, a slow and sure, a distrustful and cautious party -- a conservative, a Whig party; and there is a radical, innovating, hopeful, boastful, improvident and go-ahead party -- a Democratic, a Loco-Foco party!"[33] Daniel Walker Howe identified three themes running through Whig political thought.[34] The first theme, a commitment to improvement in society, led them to try to harness the government to promote change.[35] The second theme was an emphasis on morality and duties versus the Democratic emphasis on equality.[36] The last theme is the "unity of society" versus a Democratic talk of the divisions within society, such as the divisions between producers and consumers.[37]

The differences related to the role of government in the promotion of progress, as Whigs often told college literary societies. Francis Gray told a Brown University audience about the challenges facing the rising generation of Americans.[38] It was unclear whether America could maintain its freedom without degenerating into either anarchy or despotism.[39] Complex laws were necessary to protect against anarchy.[40] However, people "in a very rude state of society, having few wants to be supplied, few interests to be protected, few trusts or contracts of any kind, require but few laws."[41] However, America's complex society demanded more regulation.[42] "[F]or to leave them unprotected is anarchy, and to determine questions concerning them, not according to previous law, but by subse-

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32 *Id.* at 175.

33 *Responsibility and the Ballot Box*, 4 AM. WHIG REV. 435, 445 (1846). Or, as Howe wrote, "Antebellum constitutionalism well illustrates the power of culturally transmitted attitudes to constrict the range of political choice." HOWE, *supra* note 8, at 25; *see also* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY 68-69 (1999) (distinguishing Whigs and Democrats along the axes of "property, morality, education, and the rule of law").

34 HOWE, *supra* note 8, at 21.

35 *Id.*

36 *Id.*

37 *Id.*

38 FRANCIS C. GRAY, AN ORATION BEFORE THE PHI BETA KAPPA SOCIETY OF BROWN UNIVERSITY (Providence, B. Cranston & Co. 1842).

39 *Id.* at 12.

40 *Id.* at 18.

41 *Id.*

42 *Id.*

quent arbitrary decision, is despotism."[43] Civilization and liberty could only exist with complex law.[44] For Gray, the equality of condition sought by some was a vain dream.[45] And the attacks on monopolies and corporations "lead multitudes astray, and induce them to support measures hostile to the public interests and to their own, and which tend to hurry them the downward path to anarchy, and thence to despotism, so often trodden by republics."[46]

Whig lecturers also told college literary societies about the dangers of excessive democracy. Theophilus Parsons asked the Harvard Phi Beta Kappa Society in 1835 about the threats to property.[47] "In a word, is not the power of this country now attacking the property of the country? If this be not the case, what means the fearful cry which already resounds throughout the land, of the 'poor against the rich?'"[48]

That conflict between rejection of precedent and respect for ancient modes of thought played out in the antebellum judiciary as well. Often the differences appear in property rights cases.[49] The *Charles River Bridge* case illustrates the judges' dif-

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[43] *Id.*

[44] *Id.*

[45] *Id.* at 27.

[46] *Id.* at 30.

[47] THEOPHILUS PARSONS, AN ADDRESS DELIVERED BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY, 27 AUGUST, 1835 ON THE DUTIES OF EDUCATED MEN IN A REPUBLIC 14 (Russell, Odiorne & Co. 1835).

[48] *Id.* Even though the orators viewed American law in class terms, legal historians have recently begun to move away from such analysis. *See, e.g.*, Mark Steiner, *Lawyers and Legal Change in Antebellum America: Learning from Lincoln*, 74 U. DET. MERCY L. REV. 427, 432 (1997) (noting that Lincoln served diverse client base, which limited his ability to argue for rules systematically benefiting corporations).

[49] Those divisions seem to track differences in political ideology as well. *See generally* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN THOUGHT, 1776-1970, at 185-210 (1997) (discussing differences between Whigs and Democrats over property rights and referring to the distinctions as based in views of "entrepreneurial republicanism" and "democratic entrepreneurs"); William W. Fisher III, *Ideology, Religion and the Constitutional Protection of Private Property: 1780-1860*, 39 EMORY L.J. 65, 121 (1990) (suggesting preponderance of Whig modes of reasoning in vested rights cases); Alfred L. Brophy, *"Necessity knows no law": Vested Rights and the Confederate Conscription Cases*, 69 MISS. L. J. 1123 (2000) (distinguishing between Whig and Democrat property jurisprudence).

Professor Sergienko's study of changes wrought by the antebellum New York Court of Appeals confirms that changes were often made to promote economic growth. *See* Greg Sergienko, *"A Body of Sound Practical Common Sense": Law Reform Through Lay Judges, Public Choice Theory, and the Transformation of American Law*, 41 AM. J. LEGAL HIST. 175-224 (1997). Although Sergienko does not make this point, I think the findings suggest the role of political ideology in shaping judicial decisions because the Whig-dominated senate appears to have been responsible for many of the changes. At least the Whigs and Democrats differed in attitude towards economic development, although those differences did not relate to differences in economic

ferent approaches to precedent and vested rights. The proprietors of a bridge spanning the Charles River from Boston to Cambridge, who held a charter from the State of Massachusetts, sued to prevent the construction (and later operation) of a nearby bridge.[50] The proprietors of the first bridge, the Charles River Bridge, argued that the chartering of the new bridge violated an implied condition of their charter, which stated that they would have a monopoly over the Charles River.[51]

Justice Taney's approach advocated deference to legislative wishes and emphasized that a sovereign legislature did not contract away its rights lightly. Taney surveyed English precedent construing charters as well as American ones.[52] The cases consistently construed grants from the legislature narrowly.[53] One of Taney's most fruitful precedents came from Justice Marshall's opinion in *Providence Bank v. Billings*,[54] which construed the Rhode Island legislature's charter of a bank.[55] Against the Bank's claim that the legislature could not impose a tax, because it might use the tax to "render the franchise of no value,"[56] Marshall held that "the whole community is interested in retaining [the taxing power] undiminished."[57] Marshall gave effect to that interest by requiring an explicit exclusion from increased taxation in the charter.[58]

Taney extended *Providence Bank* to protect other areas where the government acts "to promote the happiness and prosperity of the community."[59] Taney told his audience that he protected the community rights against private property: "While the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[60] Having decided upon the narrow construction

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status. *See* LEE BENSON, THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE 86-109 (1961).

50 Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 423-24 (1837).

51 *Id.* at 421.

52 *See id.* at 420.

53 *Id.* at 545-46.

54 29 U.S. (4 Pet.) 514 (1830).

55 *Charles River Bridge*, 36 U.S. at 546.

56 *Id.* at 547.

57 *Id.* at 547 (citations omitted).

58 *Billings*, 29 U.S. at 531-33.

59 *Charles River Bridge*, 36 U.S. at 547.

60 *Id.* at 546; *see also* Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. (16 How.) 415, 435 (1853); West River Bridge Co. v. Dix, 48 U.S. (6 How.) 507 (1848); Richmond, Fredericksburg, and Potomac R.R. Co. v. Louisa R.R. Co., 54 U.S. (13 How.) 71 (1851);

doctrine, as dictated by both English precedent and American experience, Taney easily decided that the Charles River Bridge owners had no right to the injunction.[61] "[T]he practice and usage of almost every state in the Union,"[62] as well as Taney's assessment of the disastrous implications of protecting the Charles River Bridge, dictated the result:

> If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? . . . We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science . . . . Nor is this all. This court will find itself compelled to fix . . . the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants.[63]

Justice Joseph Story's dissent, on the other hand, illustrates an alternative vision of contracts clause jurisprudence.[64] Story was a prominent Massachusetts Whig, one of the most respected jurists of his time, and author of influential treatises on various aspects of law from contracts to the Constitution. He proposed a broad reading of the charter that would have fulfilled the expectations of the proprietors of the first bridge.[65] At base was a difference in political visions. Story's conservative Whig tradition impelled his opposition to the legislature interfering with individuals' property rights, which were necessary, in his view, to maintain a democratic government.[66] Story's lengthy opinion carefully parsed the English precedents regarding grants from the crown, as well as American precedents regarding grants from the legislature, to suggest that the Charles River Bridge's grant permitted the proprietors to be free from competitors, so that much of the opinion appears to

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Baltimore and Susquehanna R.R. Co. v. Nesbit, 51 U.S. (10 How.) 395 (1850); Planters' Bank v. Sharp, 47 U.S. (6 How.) 301 (1848).

61 *See Charles River Bridge*, 36 U.S. at 545-53.

62 *Id.* at 551.

63 *Id.* at 552-53.

64 *See id.* at 583-650.

65 *See id.*

66 *See id.*

be a dry legal discussion of the scope of government grants as inferred from precedent.[67] In a few places, however, Story's Whig vision appears. For instance, he notes that the "erection of a bridge may be of the highest utility to the people. . . . And if no persons can be found willing to undertake such a work, unless they receive in return the exclusive privilege of erecting it, and taking toll," that privilege is not against the public interest.[68]

Close to the end of the dissent, Story's frustration appeared when he said "[n]ot a shadow of authority has been introduced, to establish the position of the" majority.[69] The difference between the Story and Taney opinions is in the mode of constitutional interpretation. Taney wanted a strict construction based on the nature of the relationship of the legislature to the people. Story favored a broad construction because, he reasoned, the people have spoken and fairness dictates treating government grants like any other contract.

The differing approaches of Whigs and Democrats towards *Charles River Bridge* appear in two essays. The first, by James Kent, appeared in 1838 in the *New York Review*.[70] The second, probably by Philadelphia lawyer Charles Ingersoll, appeared in 1840 in the *United States Magazine and Democratic Review*.[71] Kent's review began with an examination of the august place of the United States Supreme Court:

> It is looked up to as the last asylum of persecuted justice. . . . If civil liberty should, in the progress of human events, find no other resting place where her rights and her blessings could be secure, it was fondly hoped, by those eminent patriots and statesmen who framed, adopted, defended, and for many years cherished the Constitution of the United States, that they had at length provided a tribunal where all citizens, and all local communities, might find redress, and non be permitted to oppress.[72]

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[67] *See id.*

[68] *Id.* at 605. Another classic Whig statement appears in that paragraph: "I know of no power or authority confided to the judicial department, to rejudge the decisions of the legislature upon" the public utility of a grant. *Id.*

[69] *Id.* at 638; *see* MERRILL PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN 398-400 (1987); MAURICE G.BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 98-118 (1984).

[70] [James Kent], *Supreme Court of the United States*, 2 NEW YORK REV. 372 (1838).

[71] [Charles J. Ingersoll], *The Supreme Court of the United States*, U.S. DEMOCRATIC MAGAZINE & REV. 497, 497 (1840).

[72] Kent, *supra note* 70, at 372.

But the Taney Court was not living up to Kent's vision. "The change is so great and so ominous; that a gathering of gloom is cast over the future. We seem to have sunk suddenly below the horizon, to have lost the light of the sun."[73] He found "most alarming and heretical . . . the new-fangled doctrine, that the contracts of the State are to be construed strictly as against the grantee."[74]

Ingersoll responded to Kent's article because he viewed it as "representative of the Whig party at the North on constitutional questions, and as such makes statements, and utters sentiments, that ought not to be kept unknown to the body of the People, nor be allowed to go unanswered."[75] Ingersoll keenly perceived the partisan nature of both the dispute over Taney's decision and Kent's position. In response to Kent's argument that the decision was "a desolating doctrine" -- "meriting the severest animadversion which indignant patriotism can bestow," Ingersoll thought the opinion necessary to protect the community's rights.[76] If the Charles River Bridge "had succeeded in their recent attempt, they would have established one of the most oppressive rights, as far as the community of Boston was concerned, ever attempted to be enforced in the worst days of public monopolies in the middle ages."[77] Had the decision come out differently, Massachusetts would not have had the power to "act for the public convenience by providing new and increased facilities for commercial and social intercourse."[78]

Charles River Bridge thus represented a difference of opinion on how much courts should respect vested rights and, even more importantly, to what extent should they respect precedent. A decade and a half after the decision, Taney's doctrine had become established constitutional law. Then Justice Joseph Lumpkin of the Georgia Supreme Court, a Whig, decided *Shorter v. Smith*,[79] a case similar to *Charles River Bridge*.

In *Shorter*, the plaintiffs owned ferries across two rivers.[80] They sought to enjoin the construction of nearby bridges, based

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[73] *Id.* at 385.
[74] *Id.* at 389.
[75] Ingersoll, *supra* note 71, at 497.
[76] *Id.*
[77] *Id.* at 506.
[78] *Id.* at 514.
[79] 9 Ga. 517 (1851).
[80] *Id.* at 521.

on their franchise.[81] Lumpkin dismissed the claim in an opinion rich with Whig rhetoric regarding the importance of competition and Democratic rhetoric regarding the importance of preserving the government's power.[82] Although English precedent supported broad construction of rights from grants and some early American cases also construed franchises "to exclude all contiguous competition," Lumpkin would not grant such exclusive rights.[83] *Charles River Bridge* had entered the mainstream of American legal thought regarding vested rights in the 1850s, for, as Lumpkin said, "if there be one principle settled in this country beyond the hazard of a change, it is, that in grants by the public, nothing passes by implication."[84]

Many jurists, like Thomas Ruffin, reminded their audiences of the importance of following precedent. Precedent was often so strong Ruffin thought it impossible to break. In applying the fellow servant rule, he noted that,

> If the opinion of this court had been otherwise upon the point, as an original question, it would not have been possible to resist the authority of such an array of consistent decisions of able courts in both hemispheres, coming so rapidly after each other, with but a single adjudication against them.[85]

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81 *Id.*

82 *Id.* at 527.

83 *Id.* at 524.

84 *Id.*

85 Ponton v. Wilmington & Weldon R.R. Co., 51 N.C. 246, 248 (1858). *Accord* Harris v. Harris, 42 N.C. 84, 88-89 (1850) (consistent precedent in married women's property adjudications); Jackson v. Hampton, 32 N.C. 417, 425 (1849) ("the precedents from time immemorial cannot be safely departed from. I own, indeed, that I think the precedents right in themselves, and that it would lead to great mischiefs to disregard them"). Similarly, a lack of precedent was itself revealing. *See* Carroll v. Hussey, 31 N.C. (9IFED) 89, 90 (1848) ("The rule, which is laid down by writers of high character, that goods taken in execution are not repleviable; the want of precedents of such actions in the old books, and the very grave inconveniences which would arise from extending the action to property in custodia legis; all concur in producing the conviction, that it will not lie in any case.").

There were instances in which even Ruffin allowed a court to change its operating principles, but they were rare. For instance, Ruffin upheld the alteration of recording principles to upset a title:

> Indeed there might be the same objection urged against overruling at present this last case since it would affect the rights of persons, who, in the mean time, have acted on the faith of it as law: a consideration always extremely grave in the mind of a Judge and leading him to follow precedents rather than unsettle the law or shake titles, as long as he sees he can do so without producing more evils than overruling them can possibly bring about; but it is inseparably incident to human tribunals, that opinions should vary upon questions, what is the law, and that the course of adjudication at one period should be modified at another, and

Ruffin rarely ventured away from common law precedent. As he wrote in *The Matter of Spier*, "It is . . . a bold and hazardous assumption in judges, to change and upset settled law, under the pretext that it was adopted in a state of society to which it was suitable, but that circumstances have now so varied . . . that the rule . . . ought therefore to be altered."[86] Other jurists moved more freely from the monuments of precedent.

There was some correlation between judicial philosophy and respect for precedent; however, at times both Democrats and Whigs seemed willing to depart from it. The range of respect for precedent (or rejection of it) was narrower within judicial minds than in the popular literature.[87] There were differences, then, across a broad spectrum of beliefs for antebellum Americans. Those differences were reflected in college lectures, when judges and lawyers vied with Emerson and his followers over the respect that should be given precedent. An important part of that debate was the role that law and legal institutions played in facilitating the progress of society.

It was the Fugitive Slave Act of 1850, however, which brought into focus the struggle over the role of precedent and respect for the majesty of the law in legal and popular thought. The Act required Northern law enforcement officers to aid in the return of fugitive slaves. It allowed slave-owners to track slaves into a free state, then enlist the aid of local law enforcement officers in recapturing the slaves. The slaves were brought before a local magistrate for a summary proceeding, where the alleged slaves were not allowed to testify.[88] The Congressional debates over the Act are filled with discussion of the need to obey the law.[89] A popular position was that the law

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> men must deal subject to that degree of uncertainty, as to the rule of law on a particular point, an uncertainty, which probably pervades our country, and that from which we derive the elementary principles of our law and the model of our judiciary, less than any others that ever existed.

Green v. Cole, 35 N.C. 291, 294 (1852).

[86] State v. Ephram, 19 N.C. 162, 166-67 (1836).

[87] Given the imperative duty that law imposed upon judges and, to a lesser extent, politicians, judicial philosophies ought to occupy a narrower band of territory than those of novelists. *See, e.g.*, Michael D. Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1 (2000) (exploring legal and political constraints on John Quincy Adams' attitudes towards slavery).

[88] 9 Stat. 462 (1850).

[89] The Fugitive Slave Act debates are an important, though as yet underutilized, source of popular ideas about the duty to obey law and the connections between popular sentiment and duty to obey law. *See, e.g.*, CONG. GLOBE, 31st Cong., 1st Sess., Appendix 1590 (1850) (Senator Winthrop) ("all laws depend more or less for their

should be followed, even if a minority thought it was unjust. Senator Underwood of Kentucky explained in debate over the Act:

> I have but little respect for those who set up their code of natural rights, or what they are sometimes pleased to call the *laws of God*, as paramount to the laws of society. In the first place, it should be presumed that governments will not make laws violating the laws of God. In the next place, we should, especially in a republic, presume that, if such laws are inconsiderately made, an appeal to the public reason and morals would result in their speedy repeal. And in the last place, if such repeal cannot be had, the presumption is, the law complained of is not unjust.[90]

And so Americans debated the role of precedent, of ancient modes of thought, of the rule of law. One important vehicle for conveying those ideas was through college literary societies.

II. THE UTILITY AND LIMITATIONS OF COLLEGE LECTURES

Lectures to college literary societies provide an important, and as yet untapped, source for evidence of the beliefs of lawyers and judges in precedent and the role they believed law should play in American society. Much like Fourth of July speeches, which have been mined effectively for evidence about ideas of American political thought,[91] college literary addresses offer evidence about jurisprudential ideas. The lectures, of course, have severe limitations. They offer, at best, what the speakers thought were appropriate ideas for public consumption—not, by any means, what the speakers themselves truly thought. But when consulted carefully, in conjunc-

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success and efficiency, upon the fact that they are framed in conformity with the public sentiment of the people over whom they are to operate"); CONG. GLOBE, 31st Cong., 1st Sess., Appendix 529 (1850) (Senator Hale) ("The evils of slavery exist by force of law. . . .").

[90] CONG. GLOBE, 31st Cong., 1st Sess. Appendix 529, 530 (1850).

[91] Rush Welter, for instance, employed public lectures to create a picture of political and religious ideology in this period. *See* RUSH WELTER, THE MIND OF AMERICA, 1820-1860 (1975). Marta Wagner began her study of Phi Beta Kappa lectures with the hope that they would illuminate the connection between changes in American philosophy and changes in American politics, economy, and society. *See* Wagner, *supra* note 4, at iii. Dean Hoeflich mined books for young students for evidence of the centrality of the theme of liberty through law in antebellum America. *See* M.H. Hoeflich, *Law in the Republican Classroom*, 43 U. KAN. L. REV. 711 (1995). Similarly, Susannah Blumenthal has mined lectures about judges. *See* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151 (1998).

tion with cases and treatises, the lectures help to suggest ways that legal thought related to larger cultural movements.[92] Public lectures were an important source of Perry Miller's 1966 book, *Life of the Mind in America from the Revolution to the Civil War*.[93]

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[92] The statements of the conservative leaders like Greene may be just as helpful in understanding the world as statements of outsiders, which have yielded so much data in recent years. *See, e.g.*, Melissa J. Ganz, *Wicked Women and Veiled Ladies: Gendered Narratives of the McFarland-Richardson Tragedy*, 9 YALE J.L. & FEMINISM 255, 263-77 (1997) (exploring ways that jurors' cultural ideas influenced trial); Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347, 362-72 (1995) (employing abolitionist writings to recover a meaning of the Fourteenth Amendment); Ian C. Pilarczyk, *The Terrible Haystack Murder: The Moral Paradox of Hypocrisy, Prudery and Piety in Antebellum America*, 41 AM. J. LEGAL HIST. 25 (1997) (discussing a trial as reflecting the social and cultural values of the time).

[93] *See* Alfred L. Brophy, "Perry Miller's Sources for *Life of the Mind in America from Revolution through Civil War* and the Trajectory of American Legal History" (unpublished paper) (on file with the author). Professor Miller published excerpts from many of the most important sources in his 1964 volume, *The Legal Mind in America: From Independence to the Civil War*.

Professor Miller relied in his final book, as he had in his previous works, upon published works, rather than private papers. He also avoided close reading of cases. Indeed, one of the most striking features of *Life of the Mind* is the absence of references to cases. Miller brilliantly latched onto some cases and brought them into the canon of legal history scholarship. His dissection of *Hart's Executors* is one case that was unknown to legal historians before Miller rescued it from obscurity. It is now central to several interpretations of American legal thought at the time. *See* Robert A. Ferguson, *The Girard Will Case: Charity and Inheritance in the City of Brotherly Love*, *in* PHILANTHROPHY AND AMERICAN SOCIETY 1, 9-10 (Jack Salzman ed., 1987); A.G. Roeber, *The Long Road to Vidal et al v Philadelphia: Charity Law and Religion in the Middle Colonies and States*, *in* THE MANY LEGALITIES OF EARLY AMERICA (1996). Because he sought to record the "temper that lay behind" legal arguments, rather than the technical arguments themselves, Miller argued that lectures and other non-doctrinal writings were useful for recovering the "quality of [the] mind [rather] than . . . its technical competence." LEGAL MIND IN AMERICA, *supra* note 19, at 12. Because his project was that of "discover[ing] a philosophy," Miller thought that the extra-judicial writings told about patterns of thinking and feeling. *Id.* at 12. One might wonder how Professor Miller would square that focus on non-technical writing with his brilliant reconstruction of the grammar of religious thought in New England in the seventeenth and eighteenth centuries. *See* PERRY MILLER, THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY (1939); PERRY MILLER, THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE (1953).

No one doubts that there was a divergence between public and private statements. Chancellor Kent worried about judges' "dangerous discretion [ ] to roam at large in the trackless field of their own imaginations," 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 321 (Oliver W. Holmes ed., 1873), even while he stated in private correspondence that he looked to the justice of the cause and then usually decided regardless of precedent:

> I saw where justice lay and the moral sense decided the cause half the time, and I then sat down to search the authorities until I had exhausted my books, and I might once in a while be embarrassed by a technical rule, but I *most always found principle suited to my views of the case.*

David W. Raack, *"To Preserve the Best Fruits": The Legal Thought of Chancellor James*

Over the last twenty-five years, legal historians have rediscovered the idea among antebellum jurists that the law changes to keep pace with changing societal conditions.[94] An understanding among jurists of an evolving common law allowed them, so the argument goes, to recraft the law to comport with their economic, religious, and political beliefs.[95] The lectures show well the intellectual context for those ideas about change in law. They show that jurists understood that the law changed—and ought to change. Even a conservative thinker like William Kent, son of Chancellor James Kent, spoke about changes in the law and other parts of human thought:

> [T]he gradual advance of our distinctive principles, in asserting the equality of all men - in the removal of all regulations not essentially necessary - in the jealousy of unusual wealth - in the reduction of the magistracy to the level of the commu-

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Kent, 33 AM. J. LEGAL HIST. 320, 344 (1989) (quoting from a letter that Kent wrote on October 6, 1828 to Thomas Washington, a lawyer in Nashville, Tennessee) (emphasis in original). Kent's reference to common sense philosophy is intriguing. It indicates his confidence that the moral sense will dictate a result in many cases - and an appreciation that Americans' moral sense is bringing the law into line with reason. Kent acknowledged--and celebrated--the common law's evolution in America in his *Commentaries*:

> Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time.

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 445-46 (New York, O. Halstead 1826). Nevertheless, there was a divergence between Kent's public and private statements about the importance of precedent. His private statement makes him appear more instrumental than do his *Commentaries*.

I am indebted to David Langum for raising Kent's statement and for his questioning of how to square those private sentiments with his public adherence to precedent. The contrast points to the problem of taking public statements about precedent and modes of reasoning at face value.

[94] *See, e.g.*, G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, 76-156 (1988) (discussing conception that law evolves).

[95] This is a distillation and restatement of Professor Horwitz' thesis that judges had an "instrumental" conception of the law as an instrument to promote economic growth. HORWITZ, *supra* note 2, chapter one. There are more recent historians who have argued that judges remade the law to comport with their ideas about religion and politics. *See* TIMOTHY S. HUEBNER, THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790-1890 (1999); PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997); Howard P. Walthall, "Thanks to Blind Luck, That's Our Judge": The Jurisprudence of Head and Heart in the Nineteenth Century American South (unpublished manuscript, on file with the *Cumberland Law Review*). *See generally* Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (reviewing PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA (1997)) (discussing emerging consensus among legal historians that judges self-consciously remade the law in the nineteenth century).

> nity - in the relaxation of the strictness of jurisprudence, and the sternness of the sanctions of law - in the abatement of reverence for the individual, and the elevation, and even tyranny, of public opinion - all this we shall see, and it were madness to resist, and folly to deplore.[96]

The lectures do not contain stark evidence of instrumentalism of judges speaking about their self-conscious bending of precedent to promote economic growth. They present, at most, a milder version, which shows their understanding that legal rules ought to change as society evolves. When North Carolina Justice William Gaston spoke to Princeton students in 1835, he emphasized the importance of precedent and the steady following of the rule of law.

> Order is heaven's first law, and there can be no order without subordination. A deliberate breach of law shows profligacy and folly, the ferocity of an untamed, or the ignorance of an uniformed nature, but a cheerful submission to wise rule is the highest evidence of that reasoning energy and decision of purpose, which are among the noblest attributes of an intellectual being.[97]

Law, in Gaston's opinion, was not a restraint on freedom; it was the facilitator of it. "There can be no freedom without law. Unrestrained liberty is anarchy; domination in the strong; slavery in the weak; outrage and plunder in the combined oppressors; helpless misery in the oppressed; insecurity, suspicion, distrust, and fear to all. Law is the guardian of freedom."[98] Gaston expressed similar sentiments in his opinions:

> One of the duties of judges is to hand down the deposit of the law as they have received it, without addition, diminution or change. It is a duty, the faithful performance of which is exceedingly difficult. They must refrain from all tempting novelties, listen to no suggestion of expediency, give in to no plausible theories, and submit to be deemed old fashioned and bigoted formalists, when all around are running on in the supposed career of liberal improvement. But perhaps there are few duties in which they can so effectually serve the State. A

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[96] WILLIAM KENT, AN ADDRESS PRONOUNCED BEFORE THE PHI BETA KAPPA SOCIETY OF UNION COLLEGE 15-16 (1841).

[97] WILLIAM GASTON, AN ADDRESS DELIVERED BEFORE THE AMERICAN WHIG AND CLIOSOPHIC SOCIETIES OF THE COLLEGE OF NEW JERSEY 11 (Princeton, John Bogart 1835).

[98] *Id.* at 31.

> pause is thus created for thought, amid the hurry of action. Stability is given to the public institutions--and, above all, there is that recurrence to fundamental principles, which is enjoined in our constitution, and is essential for the preservation of liberty and order.[99]

Nevertheless, even Gaston acknowledged the changing nature of the common law in his opinions.[100]

This recognition that the common law was changing was closely related to the understanding that law was part of a larger intellectual movement in American culture: the recognition that ideas were related to Americans' search for new principles, which were themselves often principles based on considera-

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[99] State v. Miller, 18 N.C. 500, 526 (1836) (Gaston, J., dissenting).

[100] *See, e.g.*, State v. Will, 18 N.C. 121, 168 (1834) ("When a case of homicide happens in which the fact of provocation occurs, and the legal character of that fact has been settled by precedents, the judicial duty is comparatively plain. But where the legal character of the fact has never before been settled, it then becomes one of vast responsibility, and often of no little difficulty. The principle to be extracted from former adjudications must then be diligently sought for, and prudently applied."). In *Johnson v. Cawthorn*, 21 N.C. 32, 34 (1834), Gaston explained the process of changing rules of common law. He recognized the relative freedom of judges to adopt rules based on reason when they were unrestrained by precedent. When constrained by precedent, judges were limited to changing rules to instances when there was a consensus that the rule needed changing:

> A doctrine leading to such results ought to be well considered before it is adopted, or if already adopted, should, if possible, be well guarded, lest it should be followed by the same consequences. But upon this question, the rules by which it is our duty to be guided are exceedingly different, accordingly, as the doctrine may or may not have been sanctioned by our predecessors. An adjudication by them is a precedent, which we are bound to regard as evidence of the law, unless it can be conclusively shown to be erroneous, and by which we must be guided even when so shown, if a departure from it occasions greater public inconvenience than the error itself. Where there is no such precedent, we then ascertain the true rule by the deductions of reason from settled principles. After several conferences, we are unable to agree upon this general question, and as a determination of it is unnecessary in the present case, we must leave it, reluctantly leave it, in the state in which we find it.

Id. at 34.

Gaston assessed the right of vendors to place a lien on land they sold when they did not receive purchase money. *See* Fox v. Horah, 36 N.C. 358 (1841) (*overruled in part by* Wilson v. Leary, 120 N.C. 90 (1897)) (limiting escheat because rules were based on feudal principles); Adams v. Hayes, 24 N.C. 361, 368 (1842) (applying property precedent based on feudal principles and acknowledging that "[w]hen rules of property are once settled, it is not necessary, before we yield them obedience, that we should perceive the reasons upon which they are established"). Often the changes were introduced through legislation, Gardener v. Rowland, 24 N.C. 247 (1842), and through expansion of principles. *See, e.g.*, State v. Davis, 24 N.C. 153, 157 (1841); *Fox*, 36 N.C. at 361 (changes by common law and statute). Another cause of change was the Revolution. *See* State v. Manuel, 20 N.C. 144, 151-53 (1838); O'Daniel v. Crawford, 15 N.C. 197 (1833).

tions of utility.[101] When the orators say that the age is utilitarian, they open to inspection ideas about using law to promote economic growth, as well as to use technology to promote economic and social progress.[102] That promotion took many forms, from rationalizing the law,[103] to making it more accessible,[104] to

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[101] *See, e.g., Speech of Mr. Hunter,* CONG. GLOBE, 31st Cong., 1st Sess., Appendix 375, 380 (1850) ("[W]hat if I can show that if the object of emancipating our slaves in the South were accomplished, the infallible consequence would be, the absolute ruin of the country, the deepest injury to both races; would you not be convinced that any political measure designed for this purpose would be wrong?").

[102] *See* WILLIAM SEWARD, ADDRESS BEFORE THE PHI BETA KAPPA AT YALE COLLEGE (New Haven, B. L. Hamlen 1854); JOHN ANDREWS, AN ORATION PRONOUNCED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA SOCIETY AT YALE COLLEGE 7 (New Haven, B.L. Hamlen 1850); JOSEPH INGERSOLL, AN ADDRESS DELIVERED BEFORE THE PHI BETA KAPPA SOCIETY, ALPHA OF MAINE IN BOWDEN COLLEGE 13 (Brunswick, 1837).

[103] Treatises, like Kent's four volume COMMENTARIES, provide a mechanism for gauging how lawyers thought law was changing and why. *Cf.* Alfred L. Brophy, *"Ingenium est fateri per quos profeceris": Francis Daniel Pastorius' Young Country Clerk's Collection and Anglo-American Legal Literature, 1682-1716,* 3 UNIV. CHI. L. SCH. ROUNDTABLE 637-738 (1996) (employing the first practical treatise written in British North America as a gauge of the interaction of religious beliefs and legal doctrine in early Pennsylvania). One writing the intellectual history of Kent's COMMENTARIES would be inclined to call it "the understandable science of the law," not, as Daniel Boorstin did of Blackstone's *COMMENTARIES,* "The Mysterious Science of the Law." *See* DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW (1948); *cf.* John H. Langbein, *Chancellor Kent and the History of Legal Literature,* 93 COLUM. L. REV. 547, 585-93 (1993) (identifying Kent as an institutionalist who sought to make law accessible).

Kent acknowledged at the beginning of his discussion of property that property law "forms a technical and very artificial system . . . it is still very much under the control of principles derived from the feudal policy." 3 JAMES KENT, COMMENTARIES 307 (New York, O. Halstead 1828). But even in an area as arcane as property law, there had been improvements. "[I]t has felt the influence of the free and commercial spirit of modern ages . . . ." *Id.* Kent's discussion of property law, for instance, frequently referred to the ways that Americans had - or ought to - rationalize it. In discussing mortgages, an area of property law unsurpassed in importance, Kent proudly tells us that the "law of mortgage, under the process of forensic reasonings, has now become firmly established on the most rational foundations." 4 JAMES KENT, COMMENTARIES 129 (New York, O. Halstead 1828). In explaining the complex rules surrounding mortgages, Kent referred to such guiding principles as certainty and security. *Id.* at 161 ("The policy of this country has been in favour of the certainty and security, as well as convenience of a registry . . . ."). The common law produced "reasonable" mortgage doctrine. Thus, when purchasers had notice of a prior deed, they took subject to that deed, even though continental law produced a different result. *Id.* at 162-63. There were, nevertheless, doctrinal inconsistencies between jurisdictions. *See, e.g., id.* at 173-74 (discussing various states' approaches to equity of redemption, with no explanation as to why the states differed). At other times, the common law produced "unreasonable" results. *See, e.g., id.* at 169 ("This doctrine, harsh and unreasonable as it strikes us, has, nevertheless, its root in the Roman law."). Mortgage law, like other areas, led to progress. But he concluded "it will not do to take our doctrines of mortgages from Littleton and Coke." *Id.* at 188 n.a; *see also* 2 JAMES KENT, COMMENTARIES 279 (New York, O. Halstead 1828) (discussing changes in fixtures law). I am indebted to Dawn Stone for sharing her research on fixtures with me.

In her article exploring the rights of aliens to purchase land, Professor Price linked Kent's discussion to a close reading of the cases, to show the influence of economic

adopting rules that limited liability for economically productive use of resources, such as water law, nuisance, adverse possession, and innocent improver law.[105] They also present a catalog of the ideas that jurists thought were appropriate and important for public discussion. They illustrate the public legal mind and, frequently, the celebration of the rule of law.

III. THE CASE OF WILLIAM GREENE'S BROWN LECTURE

William Greene's lecture at Brown University was part of the conservative response to the Fugitive Slave Act of 1850. Greene had been born in 1797 into a prominent political family in Rhode Island. His father served as a United States Senator from 1797 until 1801, and his grandfather had been governor of Rhode Island. Greene had delivered one other lecture at Brown. He gave the valedictory address upon his graduation in 1817.[106] Following graduation from Brown, Greene studied law at the Litchfield Law School, and then moved to Ohio to practice law; he was also active in politics, first as a Whig and then later as a Republican. He returned to Rhode Island during the Civil War and later became Lieutenant Governor.

Greene's lecture is characteristic of many college lectures at the time delivered by Whigs. His oration stood at the intersection of thoughts about popular education and popular voting, the inequalities inherent in nature, and the rule of law. His lecture revolved around the following question: how might Americans best operate their system of government? This question was motivated by the swirling passions over the Fugitive Slave Act and the concern over how to respond to the claims of

considerations on the common law's progression. *See* Polly Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomoy Paradigm*, AM. J. LEGAL HIST. (forthcoming 2001), *available at* http://papers.ssrn.com/paper.taf?abstract_id= 233142. There are others, however, who focus on the role of precedent rather than efficiency in property law. Professor Watson, for example, interprets American water law as relatively static and driven by concerns of continuity of legal doctrine rather than economic efficiency. *See* Alan Watson, *The Transformation of American Property Law: A Comparative Law Approach*, 24 GA. L. REV. 63 (1990).

[104] *See, e.g.*, TIMOTHY WALKER, THE REFORM SPIRIT OF THE AGE 11-12 (J. Munroe Cambridge, 1851) (urging codification).

[105] *See generally* William W. Fisher, The Law of the Land (1991) (unpublished Ph.D. dissertation, Harvard University) (detailing changes in antebellum property law); Alfred L. Brophy, The Intersection of Property and Slavery in Southern Legal Thought from Missouri Compromise through Civil War, chapter one, section 3 (forthcoming 2001) (unpublished Ph.D. dissertation, Harvard University) (detailing changes in property doctrine that were justified at least partly on the basis of their utility).

[106] 8 NAT'L CYCLOPEDIA OF BIOGRAPHY 193 (1924).

individual conscience that played upon respect for the rule of law.[107]

Greene began by acknowledging the importance of educating the public about the administration of government, for free discussion of those principles "is indispensable to their proper appreciation by the masses."[108] Greene knew that Americans rarely had an interest in such abstract principles, but he thought that their discussion might avoid some errors. In America, quite simply, the public controlled the government, and there was a need to discuss the guidelines for that government. Greene's oration was part of a design to shape public opinion.

Greene lived in an organic world of hierarchy, and Greene created a three-stage story. The first was the role of inequality between individuals. He argued that inequality was inherent in nature and in political society. According to Greene, "The principle of inequality pervades all nature, inanimate as well as animate. We have it in the varieties of hill and plain that characterize the surface of the earth. . . . So with inequalities of human condition . . . ."[109] That inequality was part of a divine plan. And no one should try to overcome the inequalities. It was part of a pervasive ethic among conservative Whigs, which celebrated the world as it was. That ethic counseled against rapid change.

Greene then turned to the second of his themes: the connection between the people and their representatives. He built upon his first theme of inequality to show that the inequality brought with it duties. Representatives were to take their general instructions from their constituency, but they also had the right to act independently, exercising their own judgment. This theory supported Greene's opposition to the unyielding deference to public sympathy for slaves.[110] For, as Greene worried,

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[107] Those competing visions of humanity and law continue to perplex historians. *See generally*, Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (reviewing E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975)); Richard P. Cole, *Orthodoxy and Heresy: The Nineteenth Century History of the Rule of Law Reconsidered*, 32 IND. L. REV. 1335 (1999) (reviewing DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH (1998)). The concept of the rule of law seems to be regaining popularity. *See, e.g.*, Daniel H. Cole, *An Absolute Human Good: E.P. Thompson and the Rule of Law*, JOURNAL OF LAW AND SOCIETY (UK) (forthcoming 2001).

[108] GREENE, *supra* note 7, at 4.

[109] *Id.* at 8.

[110] *Id.* at 19. "The theory itself cannot be changed without reversing the order of things--without indeed assuming that men are to be elected with the express view to

"public sentiment may express itself as loudly and as strongly as it pleases, through the press, at the hustings, and by the instrumentality of popular resolutions."[111] But sentiment should not, by itself, remake the law: "it can *act*, without revolution, only through organic forms of its own previous creation. The wisdom of these forms, indeed, is proved by nothing so much, as that through their instrumentality, useful changes may be made with any frequency and in any number, without violence."[112]

While public sentiment could incite changes, it could not by itself overrule law. According to Greene, "[i]t can, at the most, only express the tone with which the powers of government should be administered, in the opinion of those by whom that sentiment is entertained."[113] Greene would not allow any deviance from the forms of the law based on public sentiment. There are two possibilities when there is a law inconsistent with public sentiment: "first, by direct resistance to the law; and, second, by patiently awaiting its repeal, by the election to power of a new and more faithful set of men."[114] The first was not proper. It was simply "rebellion; which in resisting one law, violates all; and thus breaks up the government."[115] The second was proper because it:

> in due time, breaks up the law and maintains the government. The first, in correcting one evil, perpetrates a thousand others. The second, by correcting an evil, does a good and nothing more. The first, is anarchy, with a liability to all the desolating mischiefs that pertain to it. The second, is the every day experience of the best systems of government, and nobody is disturbed. The government itself, remains sacred as it was.[116]

The lesson for Greene's audience was clear. Abolitionists who appealed only to public sentiment were acting improperly.[117] They threatened anarchy.[118]

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their being instructed, and not because their qualifications place them beyond the necessity of it." *Id.*

111 *Id.* at 21.

112 *Id.*

113 *Id.* at 22.

114 *Id.*

115 *Id.*

116 *Id.* at 22-23.

117 On abolitionist appeals to sentiment, *see generally* ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS: FREEDOM AND SLAVERY IN EMERSON'S BOSTON (1998); THOMAS J. BROWN, DOROTHEA DIX: NEW ENGLAND REFORMER (1998); Brophy, *supra* note 12, at 466-79 (discussing Stowe's appeal to sentiment against proslavery law in *Uncle Tom's Cabin*).

Greene's final theme flowed from the appeals to public sentiment: the influence of political parties. The question for Greene was how "the spirit of them shall be directed and controlled, in its bearing upon the welfare of the State."[119] Par-

[118] Greene's attack on abolitionists was similar to those made by many others. Those attacking abolitionists frequently pleaded the cause of law and thought that abolition would lead to anarchy. *See, e.g.*, Louisa McCord, *Review of Uncle Tom's Cabin*, *in* LOUISA MCCORD: POLITICAL AND SOCIAL ESSAYS 245, 280 (Richard C. Lounsbury ed., 1995) ("Utopias have been vainly dreamed. That system is best which, not in theory, but in practice, brings the greatest sum of good to the greatest number."); Louisa S. McCord, *British Philanthrophy*, *in id.* at 281, 309 ("Law is the voice of reason curbing the rule of might. . . . A revolution which seeks to abolish law, must end necessarily in despotism."); THOMAS R. DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS (1853). Such arguments were powerful because in making change fearful, they prevented it. Reconstruction, however, demonstrated how the world might be remade, even as white Southerners struggled to regain control of the political process. *See, e.g.*, THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION (1977). The process by which white Southerners, particularly in Louisiana, regained political power, presents an important case study in the breakdown of the rule of law. *See* TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM, AND RACE IN LOUISIANA, 1862-1877 (1984) (detailing extended violence of white societies).

Historians of proslavery thought have identified the centrality of law (sometimes phrased as order) to the proslavery cause. *See, e.g.*, SHEARER DAVIS BOWMAN, MASTERS AND LORDS: MID-19TH CENTURY U.S. PLANTERS AND PRUSSIAN JUNKERS 184-216 (1993); PETER KOLCHIN, UNFREE LABOR: AMERICAN SLAVERY AND RUSSIAN SERFDOM 173-78 (1987).

[119] GREENE, *supra* note 7, at 23. Greene accepted the problems that political parties brought, such as political strife. These parties were acceptable because their "incidental evils must be borne for the sake of the good which could not exist without them; instead of being made the ground of denunciation to the system, which the necessity of human infirmity compels to tolerate them." *Id.* at 24. Greene's analysis was part of the utilitarian calculations that pervade antebellum political ideology. *See* Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113 (1998) (portraying abolitionists' understanding of utility in proslavery thought).

Considerations of expediency frequently appeared in debate over slavery. During debate over the Fugitive Slave Act, for instance, Senator Underwood criticized the abolitionists' failure to consider consequences:

> The northern mind, in selecting the institution of slavery as the particular object against which its crusade of philanthropy is directed, instead of securing any good or beneficial result, has procured only evil, and that continually. I think I may speak upon this subject with considerable personal knowledge as to the effect of this agitation upon men and upon communities. I know that in reference to my own State this interference from abroad has had the worst possible effect. Its direct tendency has been to prostrate those who have been disposed to ameliorate the condition of the black race, and ultimately to adopt measures of final emancipation. Sir, this is not a most natural result. This northern war of agitation against the particular institution of slavery, which seems to overlook all the other ills flesh is heir to, has excited a counter spirit on the part of those who hold slaves, who live among them, and who are familiar with all the operations of the system of slavery.

ticularly dangerous were third parties, which were composed of people who were "never satisfied with any present state of things, however comparatively good; and who, in a state of unrest in relation to some matter of present absorbing interest, have a feverish desire of instant realization."[120] Those radical third parties wanted immediate change:

> They are not willing to regard the highest attainments of humanity as things of progress; but they would have them all at once; and the judicious patience, which awaits the natural growth of things, step by step, is not theirs. Their condition would seem to be, one of complaint at what they have not, rather than of thankfulness for what they have. In their exclusive thought of an ideal, they overlook the actual which is indispensable to enable them to reach it. And thus their world is made one of imagination rather than of fact-of desire rather than of acquisition.[121]

Greene expressed contempt for those who stood firm on moral grounds without paying attention to the long-term consequences of their actions. They were "apt to lose sight of a general purpose . . . in their exclusive devotion to what should be regarded only as a particular step in the attainment of it."[122] In short, they disregarded utilitarian calculations. They failed to look at the whole system, but focused on one aspect.

> [F]or their influence is to impair the force or lessen the estimation of a great general purpose, by the disproportionate attention bestowed upon only a part, and perhaps a very *small* part, of it. Of relations that pertain to ordinary life, the benevolence which should embrace them all, as parts of one great whole, is dwarfed by its devotion to some single part, as though that were the whole.[123]

Or, as a senator said during debate over the Fugitive Slave Act, abolitionists urged extreme—and improvident—measures:

> The idea of immediate abolition is about as wise and moral as would the prescription of a quack who should direct a person overheated by extreme exercise to cool himself *immediately* with large quantities of ice, or who should undertake to thaw a frozen limb by immediate immersion into the red-hot lava of

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CONG. GLOBE, *supra* note 90, at 530.

120 GREENE, *supra* note 7, at 25.

121 *Id.* at 25.

122 *Id.*

123 *Id.* at 25-26.

an iron foundry.[124]

The problem of single-minded devotion to change was compounded because parties wanted immediate reform. The word reform was problematic:

> In itself, and in its ordinary signification, it expresses an idea of inappreciable value; but frequently, in its cabalistic application, it means anything but good. In its practical uses in the history of governments, it means quite as often to upheave and overturn as to improve and make better. The first movers in reforms, however innocently, often mistake change for improvement. They think that something must be better than the present, because, as every body knows, the present is not perfect; and that something, they think they have discovered.[125]

Greene, like most speakers of his time, wanted gradual reform.[126] Such reform "adapts itself to circumstances; and by seeming to submit to them, really controls them; and thus is aided by them, in a natural and certain growth."[127] Sudden change, however, is difficult to sustain, for reform must be supported by the entire political community:

> In political communities, all true and permanent reform must stand, ultimately, upon the convictions of the masses that compose them. These convictions are necessarily of slow growth: for the public mind reasons by events rather than by principles. Affairs affect and influence communities by action and not by contemplation.[128]

Support would come not just from reason, but from experience; for as Greene said, "The wisdom of a given measure, is ascertained at once to the Philosopher by the force of reason. To the masses, that wisdom can be learned only by actual experience."[129] One is tempted to think of Ralph Ellison's 1979 lecture discussing the formulation of the gradual, glacial historical process by which ideas—as simple and elegant as equal-

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[124] CONG. GLOBE, *supra* note 90, at 531.

[125] GREENE, *supra* note 7, at 27.

[126] *See, e.g.*, L. P. HICKOCK, THE IDEA OF HUMANITY IN ITS PROGRESS TO ITS CONSUMMATION: AN ADDRESS DELIVERED BEFORE THE PHILADELPHIAN SOCIETY IN MIDDLEBURY COLLEGE, AT THEIR ANNIVERSARY (New York, S.W. Bennedict 1847) (discussing education as a vehicle for advancement); ORVILLE DEWEY, THE LAWS OF HUMAN PROGRESS AND MODERN REFORM: A LECTURE DELIVERED BEFORE THE MERCANTILE LIBRARY ASSOCIATION OF THE CITY OF NEW YORK 7 (New York, C.S. Francis & Co. 1852).

[127] GREENE, *supra* note 7, at 27.

[128] *Id.* at 27-28.

[129] *Id.* at 28.

ity—become a part of the American democratic landscape:

> Our perception of justice attained doesn't always square with our conception of that which is best for our own interests. Sometimes it works its transformations of society so quietly (as during periods of war or economic depression) that we fail to realize that in such interruptions of normal order, injustices that have been long accepted have been resolved. . . . And so it is often on this unrecognized level that our democratic ideals are most successful in nudging us toward our goal.[130]

The temptation is all the greater because the chasm that separates Greene and Ellison is so extraordinarily large—and yet both talks were delivered at Brown University!

The coincidence that both Greene and Ellison would deliver lectures at the same University, nearly one hundred thirty years apart, so similar in content, but based on such divergent world views, is, perhaps, another "example of the unexpected outdoing itself in demonstrating its power to surprise."[131] Quite simply, "[i]t reminds me of how often I've been told that extremes will meet, and it proves the correctness of those who advised me that in this country it is always wise to expect the unexpected."[132]

Greene drew upon popular allusions -- darkness and shadows -- to make his point: "If a dark and overshadowing evil pervade the land, in the form of some deep and fundamental error in its political condition, no human power, however great, can exterminate it in a day; or would be wise in attempting it."[133] The way to effect change was by gradual retraining

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[130] RALPH ELLISON, GOING TO THE TERRITORY 120, 127 (1986).

[131] *Id.* at 121.

[132] *Id.* at 120.

[133] GREENE, *supra* note 7, at 28. Antebellum Americans lived in a world of darkness, shadows, light. *See, e.g.*, CHARLES B. HADDOCK, THE PATRIOT SCHOLAR: AN ORATION PRONOUNCED BEFORE THE CONNECTICUT ALPHA OF THE PHI BETA KAPPA AT YALE COLLEGE (1848) ("The scholar not only throws upon the dim seen future the light of painfully gathered experience; he shapes by his own creative energy, the very future, which he foreshadows."); Hunter, *supra* note 101, at 382. The language itself conveyed something of what jurists thought. Frederick Hedge discussed the role of the language in revealing the thoughts of speakers:

> The mind of a people imprints itself in its speech, as the light in a picture of Daguerre. The English language is the English mind. We who use the language partake of this mind. Our individual genius, be it never so individual, is informed by it, and can never wholly divest itself of its influence. It may be doubted if the most abstract and original thinker, in his attempts to construct an absolute system of philosophy, can so abstract himself in his speculations, can reason so absolutely, but that the *genius* of his *language* shall appear as a constituent element in his system. For

of the public mind. Here Greene wanted changes in forms of thought and modes of action:

> [B]y a careful and judicious training of the public mind to new forms of thought and new modes of action: -- by the application, from day to day, of principles which everybody can understand and nobody deny, long years can hardly fail to establish the right, which gifted minds would desire to make prevail at once, but which all history proves, can never be fully and profitably realized by the masses, but in the lapse of time.[134]

Third parties were particularly dangerous because they permitted "an exaggerated rule of personal conscience, which places the individual in opposition to the State."[135] Greene thought it improper to follow the abolitionist doctrine that "I will not obey a law because it is unconstitutional; or if it be constitutional, I will not obey it, because it interferes with a higher law of my own mind."[136] That doctrine had dire implications. "It would destroy government, by the very means it proposes to sustain it. It suggests anarchy as a cure for bad legislation—a wisdom of the sort of that which would kill off the whole human race to get rid of sin."[137] And there was no stopping point for assertions of the "higher law."

Greene had a sophisticated defense of the duty to law. His

> the words he employs are not algebraic signs which every new speculator may employ at pleasure to express ever new relations.

F.H. HEDGE, *Conservatism and Reform, in* MARTIN LUTHER AND OTHER ESSAYS 129, 141 (1881).

And the power of language is strong. As Representative Joseph R. Ingersoll, a leading intellectual of the Democratic Party in the antebellum era and an important successor to Jefferson, said:

> Language is not merely the dress, but the organ of thought. An interchange of the fruits of knowledge is interrupted, if the means of communication are imperfect; and knowledge itself languishes, when its terms are inadequate to its wants, or when they are but imperfectly understood by those who use them. If words are not literally things, they are at least the expressive representatives, which must stand for originals. Language, being the growth of ages, traces its commencement as an art, with the commencement of science itself, to a remote antiquity, and perhaps its best condition to times which are long since past; and it brings back to our days, along with the discoveries of departed intellect, terms and phrases which are identified with the wisdom they unfold.

JOSEPH R. INGERSOLL, ANNUAL DISCOURSE BEFORE THE PHILOMATHEAN SOCIETY OF THE UNIVERSITY OF PENNSYLVANIA 7-8 (1827).

[134] GREENE, *supra* note 7, at 28.

[135] *Id.* at 29.

[136] *Id.* at 31.

[137] *Id.* at 32.

contemporaries developed the connection between public sentiment and obedience to law even further. For, as one senator said, "The proclamation and the contemplated legislation must be intended to operate upon the public sentiment of the country, to subjugate the people to the execution of the law."[138]

> The humble and religious citizen regards the laws of the Creator as first in his love. But he can have no difficulty in reconciling his love and duty to God with his obedience to the laws of his country. If these laws are morally wrong, it is the citizen's privilege to attempt to change them, through the ballot-box and right of suffrage. But submission to them, while they are in force, is a duty; and he is no more to be regarded in light of a criminal or sinner for such submission or obedience than the person who, under duress, with the pistol at his bosom, to save his own life, plays the part of hangman for the assassin or pirate in taking the lives of his companions.[139]

Immediate emancipation

> was like pulling down fences, destroying orchards, interfering with the long-settled and familiar arrangements of farms, and making deep cuts and large fills with a view to construct a railroad. . . . But I do not see that the first spade of dirt has been moved to make the grade and foundation of the great moral railroad.[140]

Greene concluded by connecting his abstract talk to contemporary concerns. The citizen has the duty to obey the law. The law is imperative; it must be followed, he concluded. A citizen:

> may condemn it, but not resist it, directly or indirectly. He may speak against it, and write against it, with all the freedom that belongs to the amplest discussion of a nation's policy of administration. But while the law remains upon the Statute Book, it must be sacred as a principle of duty. Until it be repealed as unwise, or set aside as invalid, by competent authority, in a case properly made, no individual judgment can gainsay its authority, without disloyalty—no individual conscience can resist it, without violating a superior duty to the State. In certain things the rule of necessity is as indispensable to political government, as it is to the economy of individual life—and one

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138 CONG. GLOBE, 31st Cong., 2nd Sess., Appendix 310 (1851).
139 CONG. GLOBE, *supra* note 90, at 533.
140 *Id.* at 531.

form of that rule is illustrated in what I have said.[141]

Greene contributed to the vibrant debate about law in the years leading up to Civil War. His oration deserves study not just because it represents the position that triumphed, but also because it illustrates the sophisticated ideas that Americans employed in public debate.[142]

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[141] GREENE, *supra* note 7, at 39.

[142] *See, e.g.*, SECESSION DEBATED (William Freehling et al. eds., 1992) (relocating Georgia's secession debates to the center of our understanding of the coming of Civil War). Greene's oration can be used as part of the sophisticated reconstruction of legal ideas that is now underway. *See, e.g.*, MICHAEL HOEFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 50-73 (1997); Stephen Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Taking" Clause Jurisprudence*, 60 S. CAL. L. REV. 1-108 (1986). There may even be the opportunity to link those ideas to behavior, but that project is even more elusive (and the connections between Greene's thought and other people's action more tenuous) than the description of the rule of law in antebellum legal thought.

APPENDIX

SOME OF THE DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT:

A

DISCOURSE,

PRONOUNCED BEFORE THE

RHODE ISLAND ALPHA

OF THE

PHI BETA KAPPA SOCIETY,

JULY 8, 1851.

BY WILLIAM GREENE

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1851.

[3] DISCOURSE.

The problem of a wise constitution, is of much easier solution, than that of a wise administration of government. A constitution of government is but a generalization of principles, deduced by philosophy from an experience actually realized. An administration of government, on the other hand, is an application of principles to a new experience constantly arising. The one may be said to have an ascertained certainty in the test of the past. The other must remain uncertain until determined by the test of the future. The difference is, between that which is *suggested* by events, and is a deduction from them, and that which *anticipates* events, and is to be judged *by* them. Hence the one is comparatively permanent - standing on great principles, which rarely change; while the other is fluctuating - perpetually subject to outward influences, which are never settled. The grand inference and lesson from all this, is, that the difficulties in government are not, or at least, not so much, in its organic structure, as in the practical carrying out of the principles prescribed by that structure, in the administration of affairs.

[4] Whatever may be the form of a government, its administration must be reflected mainly from the character of the people who are the subjects of it. Hence it is quite as important that the public mind should be rightly informed upon great general principles, as that there should be the right sort of rulers to apply them. In popular systems, especially - such as our own, for instance - there are problems of a disturbing influence constantly arising from the very freedom upon which such systems are founded; and the free discussion of which in a popular form, is indispensable to their proper appreciation by the masses. Such discussion is particularly well for a people who, in high success, are so engaged in the *concrete*, as to overlook, ordinarily the *abstract* of things; and who by not habitually consulting principles must be liable to all the evils of a want of them. Such discussion is farther recommended by the fact, that a sound administration of a government, can never be assured by mere events. The right and the wrong politics strike deeper than the surface of affairs; and though great prosperity may stand up, from day to day, in commendation of a system of administrative policy, there may be hostile influences working underneath, which may upheave all that is worth having, in the foundation on which all rests.

On the present occasion, I propose to discuss some of the problems referred to, as suggested by the experience of our

own political history, and as particularly applicable to our own political and social condition. The topics, to which, under this general announcement, I would invite particular attention I shall class under [5] three heads: first, inequalities of individual power, which exist among a people, notwithstanding their equality of political rights: Second, the fundamental relations of sovereignty, on the one hand, and of representative responsibility on the other, which exist reciprocally, between the people and their appointed ministers of power; and, Third, some particulars connected with the action of political parties. These topics present difficulties which would seem inherent, and therefore unavoidable, in every free system of government; and hence I shall discuss them, not for the purpose of suggesting or discovering radical correctives of them, but for *the* more practical purpose of modifying their tendencies by an attempt at least to understand them: for by comprehending an evil, though we may not entirely remove or overcome it, we may diminish its power for mischief, by enabling ourselves, to some extent, to be on our guard against its influences.

1. First then of inequalities of individual power; and these appear, mainly, in three forms; talent, education, and wealth. All these forms of inequality of individual of individual power, are in greater or less degrees, and in certain bearings, the occasions of jealousy affecting the well-being of the state. But between the first two and the last, there is this radical distinction: The jealousies awakened by superior talent and education, are mainly between individuals of similar ambition and having similar pursuits and aims. The jealousies excited by superior wealth, on the other hand, go beyond individuals and extend to classes. The effects of the [6] first upon the State, are comparatively remote and incidental, as they merely affect the character or career of rivals for political power or place. The effects of the last are direct and instant upon the State, as they are connected with discriminations directly predicated of the pursuits and interests of the whole people of it. The jealousies, again, between rival individuals, are comparatively temporary; for they must cease with the lives of the parties to them. Those between classes may have any length of permanency; for individual life gives no necessary measure of their duration. Of talent and education it may be further said, that they are regarded with respect rather than jealousy by the masses, as giving distinction to the national character, in which every man, however humble, feels instinctively that he is a sharer; and however deficient

of either he may be himself, he claims a portion of the power and glory, associated with the possession of them by others. Besides; talent and education are intangible - metaphysical possessions, if you please - and beyond any man's conscious power of grasping at his pleasure; and no man ever dreams of conflict for a thing which he knows to be beyond his reach. Not so of wealth; for that is a physical affair - a thing which admits of divisibility and distribution; and when large estates are accumulated in few hands, the fact that, by physical possibility, such an advantage is within every ones reach, awakens a feeling that there is something wrong in the system of things which admits of such superiority in some over others; and a fancied unfairness suggests, at once, the correction of such inequality [7] as an evil. It is to the last of these forms, of inequality of individual power, because of its more prominent connection with the well being of the state, that I would invite particular attention.

On this point, then, I would say, that the feeling of hostility, too often indulged by the poorer against the richer classes, as such, is at once, un-philosophical and unjust. It is un-philosophical, because it attacks a condition which is inevitable. It is unjust because that condition being inevitable, the class attacked, exists in conformity with a state of things, ordained by a power higher than their own, and which for that reason, if there be a wrong, can involve no fault of theirs. This would seem to be one of those propositions which are so evident as to preclude all reasoning; and yet, there are those, and of a high class too, who maintain the opposite opinion, seemingly as demonstrable truth; and who insist, that inequality of wealth is a wrong, full of oppression and injustice, and calling for correction as an affair of state. Such persons, it appears to me, commit the too common error of making a particular fact the expression of a general truth. That misery is often associated with poverty, no body will deny. This is a particular fact. But that happiness or misery may depend upon conditions, altogether independent of wealth or poverty, every body must admit; and this is a general truth. Now the error referred to, arises from wrongly ascribing the miseries often attending poverty, as necessary to the condition of poverty itself, rather than to a wrong state of mind too often found in association with it. The first, pov-[8]erty may be unavoidable. But the last, the state of mind must be considered as within every individual's own proper control. The first, because unavoidable in a given case, may be

without fault. The last, because within a control which is not exercised, is attended tended by a misery which is the appointed punishment of a moral wrong. The true proposition then, would seem to be, not that misery is a necessary concomitant of poverty, but that some poor men are miserable; – and being poor, are apt to ascribe only to their poverty, the misery which may mainly be traced to some – thing foreign to and independent of it.

The whole philosophy of this matter I apprehend to lie in this: The principle of inequality pervades all nature, inanimate as well as animate. We have it in the varieties of hill and plain which characterize the surface of the earth; in the differences of soil, whether barren or fertile; in the trees of the forest; in the plants of the garden; in the fruits of the fields, and in the cattle that range upon the hills. Inequalities in all these meet us at every turn; and are evidently as necessary in the constitution of things, as the distinctive character which belongs to every individual existence of them. So with inequalities of human condition, power that is incident to it. They are as certain and as necessary as that humanity is not a unit. As far as creative power has given a distinctive consciousness to every individual life, it has given a capacity of distinct individual action and of distinct individual result. And the varieties of this result must be coextensive with the number of the human family, who are the subjects [9] of them. These varieties, in their character and extent, must depend upon each individual's degree of power and the manner of using it; and this, whether this degree of power be originally given, or acquired by culture: whether it be the endowment of birth, or the acquisition of individual merit.

From all this, it would seem but mere justice, that what is mine cannot be anothers without my volition, because my capacity, and not anothers, has produced it. But it is not merely just. It is in the order of Providence that it shall be so. This order of Providence involves a higher notion than mere justice. It refers the principle of right to the power that ordained it, and not to the individual who is the accidental instrument of giving it effect. The *want* of certain things, which, in a particular application, is called poverty, is, so far as we know, as clearly ordained in the relations of human affairs, as is the *possession* of certain things, which, in a particular application, is called wealth. This is evident from the simple fact, that poverty, as well as wealth, exists; and nothing can be assumed touching the Providential design of either, which would not apply

equally to both; for our knowledge, in kind and degree, is exactly the same in the one as in the other. Now the man of wealth, is the minister of God for the particular end which is his destiny. So is the poorer man equally a minister in another form of action. The question which is the more blessed in his particular allotment, whether to wealth or poverty, is altogether independent of the mode of ministry; and depends upon the faithfulness with which [10] the duties belonging to the one or the other may be fulfilled. Hence the happiness which a rational being should be desirous of, refers, not to the external condition, but to the inward sentiment which should determine and control it; and this is as independent of wealth as it is of station, or any other relation which is purely external to the man.

But again, the inequalities or diversities of human power, in whatever form, in themselves and their result, are obviously, as wise for human good, as we have seen them to be necessary in the essential constitution of things. The great aggregate of human life as expressed in community associations, is made up of an infinite variety of adaptations and pursuits; every one of which could be omitted without injury to each individual of which a community may be composed. We must have our farmers and our merchants; our men to till the soil as well as our men to distribute the products of it; our landsmen and our seamen; our captains to command our ships as well as our men before the mast to work them; and so through all the graduations of human life from the highest to the lowest forms of human power. All these diversities in the application of this power to things necessary to be done, in order to a general prosperity of the whole human family, are equally illustrations of the divine wisdom in the ordering of human life; and equally the occasions of honorable distinction, as the individual duties involved in them may be rightly and honorably performed. The result of this reasoning is, that if it were practicable to [11] overcome the inequalities or diversities of human power, it would not be desirable.

There are two practical views of this matter which I would present before I dismiss it. The first is, that the principle of dependence, as between the rich and the poor, is just as predicable of the one class as of the other. If the wealth of the rich, by its rewards to labor be necessary to the support of the poor, the labor of the poor is just as necessary to the existence and well being of the rich. The idea of compensation is mutual; and the

rendering of it by the one and the other, differs not in the principle but only in the form. Any distinction touching the abstract respectability of the form is purely factitious. Or, if there be any real moral difference between the two classes in this respect, the advantage would seem to be on the side of the poor - for it is certain that labor is always entitled to its reward; whereas it is not certain that wealth is always entitled to the benefits, bestowed by the labor which sustains it. This is a point altogether independent of individual happiness, and must depend upon the manner in which wealth is used; and this presents an issue with which no one but the individual immediately interested, has any thing to do; - an issue to be decided by a tribunal to which all alike must render an account, altogether independent of human conventions and opinions.

The second practical view I would present, addresses itself to a selfish feeling, but is, still, cognizable by enlightened judgment; and is this: that the hostility which the poor man may feel or manifest towards the [12] rich one, might, in time, react upon himself; for the poor man of today may be the rich man of tomorrow; and it may be well for him to take heed, lest in the complaints he makes of a present disparity between his condition and that of his richer neighbor, he be forging a weapon for future use against himself. There are those who started with him, but whom he has outstripped in the race of fortune; and these will not be likely to forget his former companionship with themselves. And the *argumentum ad hominem* attack upon his new position, would not be quite agreeable when the effect of it would be, to show him, on his own principles, to stand in that new position, in a false and unjustifiable relation to those around him. To be sure, the instances may be comparatively few, in which such a state of things would occur. But the right to enjoy it - the only true right of equality by the way - presumes that every man may reach it; and this is all that is necessary to the argument. He who does not, in point of fact, reach it, wants either the worth or the power to reach it; and, has no right to complain; for, as already seen, every man is individual; and, abstractly speaking, must trust his success in life to his own powers and not to anothers, except so far as such other may choose to give him aid. The conclusion of the whole matter would seem to be, that the rich man is rich, because, in an unavoidable course of things, circumstances have made him so; and the poor man is poor, for the same reason;

and that as neither the one nor the other can control the principle, by which these circumstances have produced certain results rather [13] than others, in disparities of individual fortune, each should fulfil the duties of his particular allotment, without jealousy, opposition, or interference as respects the other.

II. From the fundamental relations of sovereignty on the one hand, and representative responsibility on the other, existing, reciprocally, between the people and their appointed ministers of power, (which was the second topic I proposed to discuss,) two difficulties arise. The first refers to the tendency of power in rulers to undue enlargement; and suggests the problem of the true limit of power. The second refers to the tendency of conscious sovereignty in the people to an undue control of their chosen Representatives; and this suggests the problem of Representative instruction. On both these problems, there has long prevailed a diversity of opinion; and, on several occasions in our own history, with bearings eminently important to the practical operations of our own government.

1. As to the first of these problems, I shall discuss it with the view, if possible, of discovering some definite ruling principle that shall solve it. And this, I apprehend, may be found in the proper definitions of sovereignty and power, as contradistinguished from each other. - These terms are most often used as meaning the same things - as conveying the same idea. Whereas, in the strict political application of them, they are as different from each other as the fountain and the stream which flows from it - or as cause and effect. This, I apprehend, will appear from investigation.

Sovereignty, then, is an *absolute* idea, existing in the [14] nature of things. It is a pure abstraction and cannot be annihilated without annihilating the body in which it exists. It is predicable of a single individual, or of a community of individuals. As, for instance, if there were but one man on the face of the earth, it would be predicable of him. It there be a community of a thousand individuals it is predicable of such community; and for the same reason; for in a community, each individual is, politically, an expression of the whole body; and the whole body an expression of each individual. This sovereignty is a unit, and therefore indivisible. This sovereignty is a unit, and therefore indivisible. This would certainly be true of a single man; and for the reason just given, must be equally true of a community. It is also inalienable; for in the case of a single man, it is a por-

tion of his very being; and he could no more part with it, than he could part with his power of breathing, and yet live. So also of a community: it is the essential principle of its compact; and it could no more part with it than it could part with its power of cohesion, and yet remain a compact body.

Now, if sovereignty be indivisible, because a unit, and inalienable, because adhering, intrinsically, to the body in which it exists, can it be delegated? If it can be delegated, it must be to something without the body in which it exists, which is inconsistent with the idea that it can exist only within that body. But if it cannot be delegated, how shall it be exercised? Clearly by *emanations* from itself, rather than *by* itself. And here arises the idea of power as contradistinguished from sovereignty. The sovereignty must create a [15] magistracy with special orders and powers to do the work of government. These powers to a magistracy, may be of a greater or less extent; may comprehend all that could be conceived as applicable to the details of government, or only a part, as experience may suggest the utility of certain limitations in their grants. If only a part of these powers be given, then the capacity of further emanation which the sovereignty retains, remains, so far, in the body in which it exists, in a state of dormancy or inaction; to be given out or not, in future emanations, as *occasion* may require.

If these principles be true, a distinction clearly exists between the sovereignty from which power emanates, and the power itself which emanates from it. The former exists in the community; the latter in the magistracy created by it. Hence, they are not convertible terms; and though sovereignty, as the superior, implies power, power, as the inferior, does not imply sovereignty. The one gives, and the other is given by it; and what is not given of the last, is a residuum in the first. Hence the magistracy in which the power is placed, has its measure of that power, in the constitution or commission which certifies the grant; and in the exercise of power beyond the grant, the magistracy usurps upon the residuum which the sovereignty has thought proper to retain.

These views are equally applicable to all forms of government, whether despotic or free - whether monarchical, aristocratic or republican. For the *only* difference in the different forms of government, is - [16] not in the essential character of the magistracy, as created or affected by the grant of power itself; but only in the greater or less amount of power granted. The sovereignty does not the less exist, that it may have

granted *all* power to the magistracy. It is, in such case, the same sovereignty that it would have been, had it granted only a part, or indeed none at all. This is evident from the fact that it may, at any time it pleases, revoke *all* power as well as it may a *part*, by an entire change in the frame of the government; which it could not do, if it ceased to exist as a sovereignty, by the very act of granting all its power.

From all this reasoning, the distinction results, between the delegation of *sovereignty* which is impossible, and the delegation of *power* which is possible. It also results that the term *sovereign* can never be properly applied to a magistrate, whatever may be the tenure of his office, or however absolute or restricted in his power - whether he be a Russian Autocrat or an American President. The first, is absolute in his power, because the sovereignty has made him so; not because he himself is sovereign. The last, is restricted in his power, for the same reason. And the difference between the absolute Power granted in the other, is simply and only the difference between despotic, and free Institutions.

The practical application of these principles to our American government, as established by the constitution, is all important; for it would seem to settle the question as to the character of that constitution, in [17] especial connection with the Executive Department,[1] whether it be an *enabling* or a *restraining* instrument. Hamilton, in his vindication of Washington's proclamation of neutrality, and Jackson, in his paper to his Cabinet, connected with the removal of the Deposits, in effect, maintain, that our constitution, in regard to Executive power, is only a *restraining* instrument; that is: that all which is not forbidden may be done. For the act, in each case, is distinctly placed upon the ground of inherent power in the Executive, independently of specific constitutional grant.[2] Now, if this

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[1] I say, "in especial connection with the Executive Department;" for it is observable, that the Constitution, in reference to the *Legislative* Department, speaks of "all legislative powers *herein granted;*" whereas, in reference to the Executive Department, no restrictive terms are used. Hence, it is to the latter Department alone, that the remarks in the text are intended to apply. The Constitution prescribes the "true limit of power," in the one case; my remarks are designed to suggest the rule, to ascertain that limit in the other.

[2] It must be observed, here, in relation to the Proclamation of neutrality, that my objection is, not to the act itself, but only to one of the grounds upon which it was vindicated by Hamilton. The act itself was undoubtedly a very proper, as well as constitutional one. It was not an exercise of power, *creating* a new state of things; but, simply, a declaration of the Executive opinion, as to a state of things *already existing;* of which opinion it was right that the people should be informed. Every one must see

doctrine be true, in its application to the particular cases referred to, it must be equally true of all other cases, which may come within the definition of Executive power in the *abstract*; whether power, in such other cases be given by the constitution or not. The effect of this, in all matters in which he is not expressly restrained, would be, to invest an American President with the absolutism which belongs to a Turkish sultan.[3][18]

The problem of representative instruction, the second topic under my second general head, may be discussed in two aspects: the one, referring to the proposition of abstract right in a local constituency, to control the action of the representative by express command: the other referring to a supposed predominating public sentiment, which is regarded by many as entitled to all the authority of an express command. In regard to the first of these aspects, I will present but two thoughts: and the first is, that the theory of all sound government, presumes the wisest and fittest men to be selected for the administration of its powers. And hence, the admission of the right of authoritative instruction in the constituency, would seem to involve the further admission that ignorance shall be, of higher authority than intelligence in the conduct of political affairs. To be sure the theory suggested of electing the best men is not always carried out in practice. This fact, however no farther affects the principle, than as it shows how it may sometimes be abused. The theory must remain the same, whatever mistakes may be made in the action under it. If bad and ignorant men are qualified and intended to perform, it only shows how a wrong judgement in a constituency may pervert a power to evil which was properly designed for good. It may also show how, in a particular case, extraordinary means may be necessary to correct a casual mistake. But it certainly does not prove the abstract proposition, that representative instruction is a necessary element of free government; [19] and this is alone the point we are discussing. The theory of election properly carried out, would render instruction unnecessary; for in fair presumption, the government would be rightly administered without it. If it be not carried out, the resulting evils are the appropriate pun-

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the difference, in this respect, between the proclamation of neutrality, and the removal of the Deposits.

[3] The question of express and implied powers, so much mooted, it is clear has nothing to do with this investigation; for powers may be granted by implication as well as in express terms; and the question, whether an implied power be granted or not, in a given case, must depend upon, and be decided by, principles, altogether foreign to this discussion.

ishment of an abuse of the high power of suffrage. The theory itself cannot be changed without reversing the order of things: without indeed assuming that men are to be elected with the express view to their being instructed, and not because their qualifications place them beyond the necessity of it. In such case, the weak should be placed in power instead of the strong; the foolish instead of the wise; for of none but these could the doctrine be profitably predicated; and these, it is admitted, could not get along without it. But it is only these that require it, or to whom it could consistently be applied.

The second thought referred to is, that government is a unit; and, being so, the true idea of the representative system, is, not so much that each part is represented, as that the whole is represented by the representation from each [20] part. This appears from the fact, that the laws enacted by the whole body of representatives, are for each part as well as for the whole; and hence, the representation from each part is as much the representation of every other part as it is of its own. Nor can there be any difference in this respect between general and local legislation. For a law of our general government, for instance, specifically applicable to a particular local district of Louisiana, involves the action of the representation from each district in Rhode Island, as much as it does the representation from the district in Louisiana. And hence, in regard to that particular law, the representation from the district in Rhode Island, is as exactly the representation of the district in Louisiana, as the representation from that district itself would be. And hence again, if the doctrine of representative instruction be true of the immediate constituency of Louisiana, it must be equally true of the constituency of a district in Rhode Island; and the constituency in Louisiana may instruct the representation from Rhode Island as well as its own. And, further still: the constituency of Rhode Island may instruct the representation from Louisiana, against the very measure, which the constituency of the latter State may especially desire. Now this would be carrying the doctrine further than is claimed; and thus, by consequentially involving too much, it is entitled to nothing, and must fall to the ground. The doctrine of instruction, in the aspect in which I am now discussing it, appears to me to originate in a confusion of ideas. It confounds the idea of a political government, instituted for permanency, having certain prescribed powers, which, in the very nature of them, can be revoked only by a change in the organism which creates them, with the idea of a

mere business agency between individuals, in its very nature temporary, and the powers of which, may be, at any moment revoked, by the single word of the Principal who grants them. In the first, the powers created, are beyond the reach of instruction; because, to be so, it a necessary condi- [21] tion to the complete authority of the government which possesses them: - whereas, in the last, the powers conferred are constantly within instruction, because in the very nature of them, it cannot be absolutely necessary that they should be beyond it. Government then is not a mere agent. It is, for the time being, the principal; the embodiment of the people that created it; the *people themselves*, in a concentrated form. Not so the relation between two individuals - the one giving, and the other receiving, a commission for the performance of some particular service. In the last case, there are two parties; and the one may, by superior relation, instruct and control the other. In the [fix] there is, in fact, but one party; which can be instructed only by itself; and be restrained in its exercise of power, only by the specific rules laid down in the organism which created it.

The second aspect in which I would discuss the doctrine of instruction, refers to a supposed predominent public sentiment for which is claimed all the authority of express command. Now, public sentiment may express itself as loudly and as strongly as it pleases, through the press, at the hustings, and by the instrumentality of popular resolutions. But it can *act*, without revolution, only through organic forms of its own previous creation. The wisdom of these forms, indeed, is proved by nothing so much, as that through their instrumentality, useful changes may be made with any frequency and in any number, without violence. These forms ascertain with certainty, that the public sentiment in question, is a reality and not a sham.[22]

The rule of addition gives an unerring result in the comparative numerical force of the ayes and nose of the ballot box. And he who maintains the ascertainment of an authoritative public sentiment in any other way, in effect maintains the political absurdity, that a minority may, of right, overrule a majority in government for it is only through the instrumentality of the ballot box that the side on which the majority exists can be certainly ascertained.

Public sentiment, however overwhelming, cannot enact law. It can, at the most, only express the tone with which the powers of government should be administered; in the opinion of those by whom that sentiment is entertained. Whether or not it be

entitled to authoritative influence in the administration of the government, the ministers of power for the time being, must, upon their proper responsibility, be the sole judges. If, perchance, the law making power enact a law in opposition to the public sentiment, there are two ways of meeting the difficulty: first, by direct resistance to the law; and, second, by patiently awaiting its repeal, by the election to power of a new and more faithful set of men. The first is rebellion; which in resisting one law, violates all; and thus breaks up the government. The second, in due time, breaks up the law and maintains the government. The first, in correcting one evil, perpetrates a thousand others. The second, by correcting an evil, does a good and nothing more. The first, is anarchy, with a liability to all the desolating mischiefs that pertain to it. The individual second, is the every day experience of the best systems [23] of government, and nobody is disturbed. The government itself, remains sacred as it was.

III. The third and last general topic I proposed to discuss is some particulars in the action of political parties. It is quite too late to discuss the questions of the necessity of political parties in a free State. The whole problem on this subject is solved by the simple fact, that opposing parties are the necessary result of perfect freedom of individual opinion; and the right, by association of numbers of similar ways of thinking, to propose and vindicate such measures of policy as that opinion may designate to be wise and just, is as indispensable to freedom as the right of opinion itself is. As individual opinions vary, so opposition must arise in the expression of them, and in the action upon them. And in this opposition, each party must be assumed to be equally honest and patriotic with every other; and neither can properly be put down, by alledged dishonesty in the motives that may be supposed to actuate it. The question of parties then in a free government, should be, not whether they shall exist, or whether their rights shall be respected; but rather how the spirit of them shall be directed and controlled, in its bearing upon the welfare of the State. Whether this spirit shall be upright or the reverse, is, certainly, a matter vital to the character of the community, whose very freedom, as has been seen, originates and justifies it. But, on this point, no rule can be given for the security of uprightness in the conduct of rival parties, that is not equally applicable to the maintenance of virtuous conduct in the affairs of individual [24] life. In the first, as in the last, there are all the liabilities of moral evil; for in

both, there is the necessary exposure to the influence of human passions. The most that can be said, then, of political parties, touching the question of their existence, is, that their incidental evils must be borne for the sake of the good which could not exist without them; instead of being made the ground of denunciation to the system, which necessity of human infirmity compels to tolerate them.

Generally speaking, the leading parties in a state are only two - the one supporting, and the other opposing, the existing system of administrative policy. And however much the members of these two Parties, respectively, may differ among themselves, upon subordinate matters not vital to their general aims, the integrity or unity of their organization is rarely broken; for they agree in the one grand rallying point, of support or opposition to the existing government. Such a division, standing as it does upon the mere discrimination between those in, and those out of Power, would seem natural and convenient. But this convenient arrangement is now and then disturbed in the operations of a government, by the creation of a third party with particular views, in which in their detached action, they have no sympathy with either, equally opposed to both the other two. And here a complexity arises in the course of party action, of so much importance to the general welfare, as to give it consideration in an investigation of the philosophy of [25] parties. This complexity I propose to discuss; and in what I shall suggest concerning it, I shall speak of the origin, the main source of power, and the influences most likely to control the action, of third parties. And first of their origin.

1. There is a class of men in the world, who, however upright, are never satisfied with any present state of things, however comparatively good; and who, in a state of unrest in relation to some matter of present absorbing interest, have a feverish desire of instant realization. They are not willing to regard the highest attainments of humanity as things of progress; but they would have them all at once; and the judicious patience, which awaits the natural growth of things, step by step, is not theirs. Their condition would seem to be, one of complaint at what they have not, rather than of thankfulness for what they have. In their exclusive thought of an ideal, they overlook the actual which is indispensable to enable them to reach it. And thus their world is made one of imagination rather than of fact - of desire rather than of acquisition. Such minds are characterised by particular views which terminate in themselves, rather

than by general aims, to which these views, to be valuable and useful, should be subordinate. Hence, they make ends of what should perhaps be only means; and are apt to lose sight of a general purpose, however important, in their exclusive devotion to what should be regarded only as a particular step in the attainment of it. Such minds rarely do much good for the whole of a thing. Rather the reverse; for their [26] influence is to impair the force or lessen the estimation of a great general purpose, by the disproportionate attention bestowed upon only a part, and perhaps a very *small* part, of it. Of relations that pertain to ordinary life, the benevolence which should embrace them all, as parts of one great whole, is dwarfed by its devotion to some single part, as though that were the whole. Of matters connected with the movements of a government, the patriotism which should range over them all, in their due proportions, is narrowed down to some single particular, as though the compassing of that, comprehended all that belonged to the great aggregate of patriotic duty. I do not and cannot impeach the integrity of the class of men of which I speak; for their error, as I conceive it to be, consists, generally, not in designing too little, but too much, for human good: - in attempting to do, not what *should* not, but what *cannot,* be done; and thus in *wasting* power, with undiscriminating judgment, rather than *abusing* it, with an unworthy purpose. Now, if I do not greatly mistake, third political parties are mainly recruited from the class of men of which I have been speaking. Not, because, the various individuals composing the class, have, necessarily, anything in common in their purposes; but because their purposes are directed by the same common principles of character, viz; the desire of instant change from a present state idea of things, an imagined better, and the devotion to one idea of a great general subject, to the exclusion of all others.

2. A third Party, thus formed, derives its power in a [27] community, mainly from a cabalistic word - reform - Honest credulity is easily attracted by the sound of that word. In itself, and in its ordinary signification, it expresses an idea of inappreciable value; but frequently, in its cabalistic application, it means anything but good. In its practical uses in the history of governments, it means quite as often to upheave and overturn as to improve and make better. The first movers in reforms, however innocently, often mistake change for improvement. They think that something must be better than the present, because, as every body knows, the present is not perfect; and that

something, they think they have discovered. They over look the fact, however, that the principle of imperfection which never ceases, must equally attach to this new something which they would reach; and that thus, the principle of reform, as they apply it, resolves itself into an infinite series of experiments; the effect of which must be, to keep up perpetual agitation with perpetual disappointment in the objects of it.

But there is such a thing as true reform - and as I apprehend it, it is gradual improvement; not sudden change. The first, adapts itself to circumstances; and by seeming to submit to them, really controls them; and thus is aided by them, in a natural and certain growth. The last quarrels with circumstances; and thus creates a hostile influence, which must meet it at every turn, and perpetually war against it, and, in most instances, defeat it. In political communities, all true and permanent reform must stand, ultimately, upon the convictions of the masses that compose them. [28] These convictions are necessarily of slow growth: for reasons by events rather than by principles. Affairs affect and influence communities by action and not by contemplation. The wisdom of a given measure, is ascertained at once, to the Philosopher by the force of reason. To the masses, that wisdom can be learned only by actual experience. If a dark and overshadowing evil pervade the land, in the form of some deep and fundamental error in its political condition, no human power, however great, can exterminate it in a day; or would be wise in attempting it. But, by a careful and judicious training of the public mind to new forms of thought and new modes of action: – by the application, from day to day, of principles which everybody can understand and nobody deny, long years can hardly fail to establish the right, which gifted minds would desire to make prevail at once, but which all history proves, can never be fully and profitably realized by the masses, but in the lapse of time.

3. The number of a third party, originating as we have supposed it to do, is rarely large compared with the whole population of a State. Its existence at all, is but a form of eccentricity, the very definition of which imports merely a departure from the generally approved course of things, in which but a few are found to sympathize or take a part. The number being thus comparatively small, if their movements were left to the ordinary course of party action, their efforts would signify but little in results. But, there are two important influences liable to bear upon them, which, if unrestrained by some superior control,

may make [29] their position not only significant but dangerous. The first of these influences is from without; the second, from within, themselves. The first refers to alliances with other party organizations than their own, which, though without a particle of sympathy with their principles, are yet ready to offer terms for their power. The second refers to an exaggerated rule of personal conscience, which places the individual in opposition to the State. Both these influences are worthy of particular remark.

As to the first then: In the history of the two great general parties, into which, as we have seen, usually divided, each, in its struggle for predominence, is found to avail itself, without particular scruple, of adventitious aids. Of these, a third party, which, of itself, may be of but little account, may yet, as holding the balance of power, be of the largest importance, as a means of determining the question of power between the other two. Honest and conscientious as this third party may be supposed to be, and generally, in fact, is, the slightest hope of advantage to their peculiar theory, making them forgetful of other interests, must naturally predispose them to alliances, which shall be likely, in any form, to give that theory even an incidental prominence. Such alliances are easily brought about by the negotiations of leading and generally interested men; and, under such pretexts, as to exclude the appearance of any compromise of principle. But whatever may be the particular results of such alliances, they cannot, in their general effects, be otherwise than harmful. If the third party, [30] by the force of such alliance, carry their point, a very small minority, against all fundamental ideas, has been made to exercise a power of state. If the Party in alliance with them, succeed in establishing their predominance, they have done it upon bargain instead of principle. And on this point, I hold nothing to be clearer, than that it is better for a wrong measure to succeed upon right principles, than that a right measure should succeed upon wrong ones. Time, in the one case, will correct the error, which the spirit of truth will be sure to detect and expose. Whereas, in the other, the right can hardly hope for permanence, when sustained by means, perpetually at war with the principle of uprightness, on which, alone, it can be made, consistently, to stand.

The case of *misalliance*, here presented, cannot be redeemed of its offensive character by the apology of compromise. To be sure, compromise is often very proper, and sometimes indis-

pensable, to the carrying on of government; but it must always be predicated of the two leading parties in the state, and always refer to modifications of *measures*. Whereas, any compromise between one of these parties, and a third, can refer, generally, only to men. The compromise, in the one case, is simply a yielding up of something, that something may be accomplished, in the proper and necessary business of administrating the government; and is regulated by the principle in every day use in this imperfect life, that, when we cannot get the whole of what we aim at, we take a part. In the other case, the compromise can have, ordinarily, no other [31] reference than to mere party power; and is practically affected by a concession of higher or lower official place, to third party men, as the consideration of their support. In the one case, the men in power remain the same, notwithstanding the compromise; and without any violation of the principle of suffrage; whereas, in the other, new men are placed in power, whose principles are obnoxious to a large majority of the community, and of course in entire disregard of the principle of suffrage.

But the second of the influences I have mentioned, as liable to bear upon third party organizations, is, of far deeper moment than the first; for it strikes at the very foundation of all government. It is this; that the action of an exaggerated rule of personal conscience, may place the citizen in opposition to the State. Now, if it be right for any man to say, "I will not obey a law because it is unconstitutional; or if it be constitutional, I will not obey it, because it interferes with a higher law of in own mind;" (and such is the language ascribed to Dr. Palfrey - a gentleman for whom I entertain a most sincere respect); I say, if it be right for a citizen to advance and to act upon such a proposition, let it be commended to the world, and that, too, by scholars, as a definite and well ascertained truth in political philosophy. On the contrary, if the proposition be false, let its pretensions be examined and exposed; and that, too, with a freedom and decision, proportioned to the high places in which it has been uttered, and to the character of the distinguished names, by which it has been endorsed.[32]

For one I believe the proposition to be false. Carried out, I believe it to be full of uncalculated and uncalculable mischief. It would destroy government, by the very means it proposes to sustain it. It suggests anarchy as a cure for bad legislation - a wisdom of the sort of that which would kill off the whole human race to get rid of sin.

The proposition, as I apprehend it, suggests an altogether erroneous view of true civil liberty, as connected with the rights of individual conscience. Civil liberty, if I mistake not, in contradistinction to natural liberty, is purely a conventional arrangement - absolutely necessary, to be sure, to the existence of society - but still conventional. It is that portion of natural liberty which is left to the individual, beyond the restraints imposed by the social compact, or the constitution, if there be one, and the laws constitutionally ascertained to exist under it.[4] Now civil liberty, in this view, supposes two parties: the State, or the aggregate of individuals composing it, on the one hand; and each individual, in his separate capacity, on the other. And between these two parties, there is a contract, importing a guaranty of protection on the part of the first, and a promise of loyalty, in consideration of that protec- [33]tion, on the part of the last. These are mutual covenants between the two, each binding upon the party making it; and conscience, in its largest sense, is the security that each shall be faithfully performed. Now, this obligation of loyalty in the citizen must, of course, apply to law in general; and so, doing, forestalls the conscience in every instance of a particular law. For to allow an individual at his pleasure, on whatever pretext, to discriminate between one law and another, in applying the principle of obedience, would be to absolve such individual from the obligation to obedience altogether - extending, as the power of discrimination would, to every other law, as well as to any particular one. For, it must not be overlooked, in the discussion of this "higher law" doctrine, that no rule defining the limits of its application, can be drawn from the particular character of the subjects of it; and that hence, if it be admissible as a principle of action upon one subject, its authority must be admitted as of equal force in all others. And thus every law of the State is brought within the operation of the doctrine; and the question of the obligation to

[4] I say, "the laws *constitutionally ascertained* to exist under it:" For there is a marked distinction between a law constitutional or unconstitutional, on the one hand, and a law constitutionally ascertained to exist, on the other - and this distinction is essential to the very being of a constitutional government. The transactions of every government, are necessarily clothed with certain forms for the expression of them. When a law has been enacted according to these forms, it must necessarily be treated as constitutional, [whether it, in fact, be so or not,] until, through other forms prescribed for the purpose, it shall be ascertained to be otherwise. To say that any individual citizen, however enlightened, and in however palpable a case, may treat a law as unconstitutional, *because he thinks it to be so*, would be equivalent to saying, that every citizen is at liberty to interpret every law, and to hold himself amenable to it or not, according to his own personal will and pleasure.

obey, in the case of any given law, being submitted to the decision of every individual conscience, such law can have no binding force upon any individual whose conscience disapproves it. A most convenient state of things for the felon on the scaffold, who would plead exemption from the impending penalty of crime, that he had despoiled his neighbor of his goods on the philanthropic principle of an equal division of property, or had perpetrated a deliberate homicide for conscience sake. Now, if this ex- [34]treme application of the doctrine be inadmissable, (and who can believe it otherwise,) it must follow, the doctrine failing altogether, that the conscience, however opposed to a particular law, is bound to obey it, on the principle of a prior general pledge to obey it. Nor is there anything in this that forces or constrains the conscience for the case presented is a sort of dilemma, involving a comparison of duty, in which a decision must be made one way or the other; and in which the preference is awarded to what the judgment announces as the superior claim. I say, to what *the judgment announces as the superior claim;* for, though conscience be a distinct and separate faculty of the mind, there is nothing occult or mystical about it. It takes its counsels from the judgment, as do all the other faculties; and must be controlled by them. Conscience is a principle of the mind, not an instinct of the passions. It is a thing of culture, and has its government in the intellect: not a thing prior to intellect, standing out from it, and acting in spite of or independently of it. It is a principle of character, upon which the intellect works, and which the intellect informs and develops as it does other principles of character; and which, in its application to the conditions of imperfect human life, must deliberately submit to the modifications and judgments, which the intellect shall determine to be proper, in its general direction of human affairs. If, then, the obedience of which I have been speaking, be a proper suggestion of the reasoning powers, as connected with the necessary philosophy of government, and indispensable to its existence; [35] and if no discrimination between one law and another can be made in the application of the principle, it follows that disloyalty or disobedience to a particular law, is a proper subject of condemnation to the conscience, however strongly the same conscience may condemn the law itself. The "higher law," then, which an individual may assume as commanding in him resistance to a particular law of the state, is simply the ordinance of an arbitrary personal will, which, in opposition to the wisdom of the government, sets up

an individual wisdom of its own as superior to it.

Nor should it be overlooked that there are two parties in this matter. There are those whose consciences approve a given law, as well as those whose consciences condemn it. And if those, whose consciences condemn the law, are morally absolved from the obligation to obey it, so those whose consciences approve the law, are morally bound by its authority; for the conscience would be equally binding in both cases.— And hence, we have two classes in the State, in respect to the authority of law: the one bound, and the other not bound by it - which is a political absurdity. The fact is, in the case of a law involving conscience, as in the case of one not involving it, the question must arise, (if the government is to be preserved) which class shall rule; and the answer to this question, settles the whole matter. For the alternative of anarchy is just as sure to be presented by an issue of conscience, touching the morality of a law, as it would be by an issue of mere judgment, touching its expediency; and the decision of the question in either case, as [36] claimed by the higher law theory, must necessarily destroy the government; for in dispensing with the principle of obedience, no matter with what apology, when the power of government has given the rule, it must take away the only means by which the government can be preserved.

Two objections may be urged against this reasoning: the one, practical, break its force; the other, abstract, to overthrow it altogether. The first assumes distinction between actual resistance to a law, on the one hand, and simply refusing to aid in carrying it into effect, on the other. The second goes to the principle of revolution.

In respect to the first of these objections, I would say, that, as a practical affair, it may be well enough, as long as the aid referred to shall not be required. But when the cases arises, in which the law cannot be carried out without the aid of every citizen, the refusal of such aid when properly called for, would be equivalent to actual resistance. The same principle, which so far justifies the law, as that it may not be resisted by actual force, equally requires that it be positively supported, when the occasion is such, that, with out such positive support, it would fail of being carried into effect. For the consequence would be the same in both cases - viz.: that of nullifying a law. So that the distinction referred to, in any substantial application of it, is without any admissable difference, in determining the course of individual duty to the state. Nor can the recusant derive any

advantage in this argument, from the suggestion, that he is ready to [37] suffer the penalty of recusancy; for that consideration presents an entirely different issue from the one we are discussing. The true question here is, not whether the nonperformance of a duty shall be punished, but whether a duty shall be performed. The last question is prior to the first, and entirely independent of it; and addresses itself to the ordinary sentiment of patriotic duty, and not to the extraordinary one of martyrdom. But further, if it would be right to disobey a law, because, of something wrong in the law itself, it would be wrong to punish a citizen for his disobedience to it. And in such case, the punishment should be resisted as well as the law. The argument, then, from readiness to suffer, the penalty, is purely gratuitous; and has nothing to do with the discussion. Should the principle of martyrdom however, still be urged, notwithstanding these views, it might be well to bear in mind as a matter of practical importance, that that great principle; may be quite liable to be abused; and that the case might exist, in which, under all the views that might be taken of it, martyrdom for one good cause, might be at the expense of another equally good; and with even this difference in favor of the latter: that the first concerned the martyr alone; whereas the other would refer to the well being of the whole community besides. This would be a selfish martyrdom; and prove, not how much a man would suffer for the public good, but rather how far he could give license to his egotism or his vanity, under the influence of his zeal. A [38] proper case for martyrdom in politics,[5] would really be a proper case for revolution in the government. And in that application, the principle is as grand, as is the spirit of freedom, which on occasion, it might be required to vindicate.

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[5] I say "martyrdom in Politics," in contradistinction to Martyrdom in Religion. For, in the first, as has been seen, the necessities of civil government make the principle of obedience to law, absolutely sacred; and thus, in some sense and degree, subordinate the conscience to convention: Whereas, in the last, no such necessities exist, and the conscience may act to the full extent of its own requirements without reference to the principle of obedience. The distinction is, between what is absolutely indispensable to the very existence of civil government, on the one hand; and what may or may not form an element of it, but is, in no way, vitally essential to it, on the other. The one is predicated of a human relation between one man and a community of men, with whom for certain considerations, it has been necessary for him to make an unconditional promise of obedience: the other is predicated of an extra human relation, between each individual and his God, into which no other principle of duty can enter, but such as each individual conscience shall direct. Religious martyrdom, therefore, is admissible, whenever the conscience shall require it: Political martyrdom never, except when political oppression shall have determined a case for revolution.

But to the second objection: the right of revolution. This objection is liable to the same answer with the first. It does not belong to the issue we are discussing. For that issue does not propose a case in which a government is to be overturned, but only one in which a law of a government, intended to be continued, may or may not be resisted. Nobody denies the right of revolution from one system of government to another. If, however, a change of this kind occur, and a new system be substituted for the old one, the point we are discussing would be just as certain to arise under the new, as it has arisen under the old; for the same philosophy of government would belong as exactly to the one case as to the other.

What then is the result of this discussion, as to the true duty of a citizen in relation to an existing law, however odious to his feelings or wrong to his judgment? It is, unquestionably, to sustain the law while it [39] exists; and if needful to assist in carrying it out. He may condemn it, but not resist it, directly or indirectly. He may speak against it, and write against it, with all the freedom that belongs to the amplest discussion of a nation's policy of administration. But while the law remains upon the Statute books, it must be sacred as a principle of duty. Until it be repealed as unwise, or set aside as invalid, by competent authority, in a case properly made, no individual judgment can gainsay its authority, without disloyalty - no individual conscience can resist it, without violating a superior duty to the State. In certain things the rule of necessity is as indispensable to political government, as it is to the economy of individual life - and one form of that rule is illustrated in what I have said.

My proper hour for this discourse is passed; and I would not abuse a patience which has borne with me so kindly, and honored me so much. I have taken topics mainly from suggestions of our own history: and I trust that no apology is necessary for my having done so. My purpose, in part, has been, to discuss, in a plain way, some matters of moment that seem in our very midst; and I have studiously labored to present these upon their own merits, without any extraneous aids, to give them an effect beyond the fair claim of argument. The times are quite too grave for a mere entertainment of the taste, on an occasion which admits of something that should be more profitable to them, in the discussion of high matters for the judgment. If, in what I have uttered, I shall have done nothing to relieve the doubts, which in certain [40] matters now agitate the

country, I think the spirit in which I have spoken will bear me witness, that I have not been forgetful of the country's interest and honor; and that in asserting what I believe to be the truth, in connection with these doubts, however delicate the problems in which they have had their birth, while I have not failed to suggest the honest thoughts of one American citizen, I have testified a true appreciation of the deference and respect due to those of every other.